370 N.C.—No. 1 Pages 1-234

DISCIPLINE AND DISABILITY OF ATTORNEYS; CERTIFICATION OF PARALEGALS; IOLTA PROGRAM; CLIENT SECURITY FUND; LEGAL SPECIALIZATION; PROFESSIONAL CONDUCT

# ADVANCE SHEETS

OF

# CASES

ARGUED AND DETERMINED IN THE

# SUPREME COURT

OF

## NORTH CAROLINA

*APRIL 25, 2018*

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

# THE SUPREME COURT
# OF
# NORTH CAROLINA

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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 18 AUGUST 2017 AND 29 SEPTEMBER 2017



ORDERS



PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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**TERMINATION OF PARENTAL RIGHTS**

**Termination of Parental Rights—neglect—sufficiency of findings—**The trial court did not err by terminating respondent's parental rights on the basis of neglect where the findings in the trial court's order were sufficient. Respondent had been incarcerated, and the initial allegations of neglect were based on the mother's actions, but the evidence of prior neglect did not stand alone. Respondent had a long history of criminal activity and substance abuse, and he initially indicated his desire to be involved in the child's life, but he failed to follow through consistently after his release. **In re M.A.W., 149.**

## SCHEDULE FOR HEARING APPEALS DURING 2018

## NORTH CAROLINA SUPREME COURT

Appeals will be called for hearing on the following dates, which are subject to change.

January 8, 9, 10
February 5, 6, 7
March 12, 13, 14, 15
April 16, 17, 18
May 14, 15, 16, 17
August 27, 28, 29, 30
October 1, 2, 3, 4
November 6, 7, 8
December 3, 4, 5, 6

CASES

ARGUED AND DETERMINED IN THE

# SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

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CHRISTENBURY EYE CENTER, P.A.
v.
MEDFLOW, INC. AND DOMINIC JAMES RIGGI

No. 141PA16

Filed 18 August 2017

**Statutes of Limitation and Repose—breach of contract—unified consideration—not an installment contract**

An action involving an unfulfilled business agreement was properly dismissed for violating the statute of limitations where the claim was filed 14 years after plaintiff had notice of the breach of the agreement but plaintiff argued that the agreement was an installment contract, with royalty payments being due within three years of the filing of the complaint. The agreement was not an installment contract because its terms demonstrated a mutual dependency between the promised performance by plaintiff and the promised performances by defendants. The consideration supporting the agreement was unified and incapable of apportionment.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered on 23 June 2015 by Judge James L. Gale, Chief Special Superior Court Judge for Complex Business Cases appointed by the Chief Justice under N.C.G.S. § 7A-45.4, in Superior Court, Mecklenburg County, dismissing plaintiff's complaint. Heard in the Supreme Court on 21 March 2017.

*Shumaker, Loop & Kendrick, LLP, by Frederick M. Thurman, Jr., for plaintiff-appellant.*

*Robinson, Bradshaw & Hinson, P.A., by Douglas M. Jarrell and Fitz E. Barringer, for defendant-appellee Medflow. Inc.*

*Moore & Van Allen PLLC, by Benjamin P. Fryer and Nader S. Raja, for defendant-appellee Dominic James Riggi.*

NEWBY, Justice.

North Carolina law has long recognized the principle that a party must timely bring an action upon discovery of an injury to avoid dismissal of the claim. Statutes of limitations require the pursuit of claims to occur within a certain period after discovery, thereby striking the balance between one's right to assert a claim and another's right to be free from a stale claim. Here plaintiff's action arises from an unfulfilled business agreement. Plaintiff's complaint reveals, however, that plaintiff had notice of the breach of the agreement and its resulting injuries fourteen years before commencing the current action. Because plaintiff failed to pursue its claims within the statute of limitations period, plaintiff's claims are time barred. Accordingly, we affirm the trial court's order dismissing plaintiff's claims.

Jonathan D. Christenbury, M.D. founded plaintiff Christenbury Eye Center, P.A., a professional association that offers ophthalmology services. In 1998 or 1999, Dr. Christenbury approached defendant Dominic James Riggi, a consultant, about developing a software management package for plaintiff. Upon Riggi's recommendation, plaintiff purchased a generalized software platform, with the idea that Riggi and plaintiff would later customize and enhance the platform for plaintiff's practice needs and for possible sale to other physician practices and customers. Around the same time, Riggi formed defendant Medflow, Inc., a medical record software development company.

In October 1999, plaintiff and defendants entered into an "Agreement Regarding Enhancements" to the original software platform (the Agreement). The Enhancements are improvements to the software platform such as "customized screens, interfaces, forms, [and] procedures." Under the Agreement, plaintiff assigned its rights in the Enhancements to defendants. "As consideration for the assignment of rights . . . [defendants] agree[d] to pay [plaintiff] a royalty of ten percent (10%) of the gross amount of all fees . . . received" from any sales of the Enhancements made "on or after October 1, 1999" and to "provide [plaintiff] with a written report on a monthly basis . . . includ[ing] a detailed description of the fees received from [defendants'] Customers

during the prior month, along with payment to [plaintiff] of all corresponding fees due with respect to such charges for that prior month." The Agreement also required defendants to pay plaintiff "a minimum royalty in the amount of Five Hundred Dollars ($500.00) each year for the first five years after [20 October 1999]" and restricted defendants from selling the Enhancements to customers within North Carolina and South Carolina without first obtaining plaintiff's written consent.

Defendants never performed any of their obligations under the Agreement. Defendants never provided plaintiff with a single monthly report detailing the fees received from defendants' customers nor paid any corresponding fees. Defendants failed to make the first $500 minimum royalty payment, which became due on 20 October 2000, and never paid any royalties thereafter. Defendants also allegedly sold the Enhancements to other practice groups and customers in the restricted areas of North Carolina and South Carolina without plaintiff's express consent as early as 1999.

For the next ten years, defendants allegedly continued to be in breach of the Agreement, never providing plaintiff a written sales report, never making any royalty payments, and never obtaining plaintiff's consent for restricted sales. Plaintiff, however, continued to use the software platform and received periodic software updates from Medflow affiliated service providers. During this time, plaintiff did not raise any question or concern regarding its rights to receive written reports and royalty payments, nor did it inquire about restricted sales.

Despite having never received the benefit of its bargain, plaintiff waited fourteen years before filing this action on 22 September 2014. Plaintiff's complaint asserts four claims against defendants: breach of contract, fraud, unfair and deceptive trade practices, and unjust enrichment.[1] Plaintiff alleges that "since October 1999, [defendants have] . . . sold the Enhancements, and derivatives thereof, to other ophthalmologic practices, both inside and outside the restricted territory of North Carolina and South Carolina, without paying royalties to [plaintiff]," and that "[a]t no time did [defendants] . . . inform [plaintiff] that [defendants] had sold further developments or modifications to the Enhancements . . . . [or] paid to [plaintiff] or accounted for any royalties due under the Agreement."

1. On 27 October 2014, the Chief Justice designated this case as a mandatory complex business case.

Defendants moved to dismiss all claims under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, asserting that North Carolina's statutes of limitations barred plaintiff's action. N.C.G.S. §§ 1-52, 75-16.2 (2015). In response, plaintiff essentially argued that the Agreement should be treated as an installment contract for limitations purposes, with a new limitations period beginning upon the failure to make each payment, thus enabling plaintiff to seek recovery on royalty payments due within the three years before the filing of its complaint. *See Martin v. Ray Lackey Enters.*, 100 N.C. App. 349, 357, 396 S.E.2d 327, 332 (1990) ("[W]here obligations are payable in installments, the statute of limitations runs against each installment independently as it becomes due."). Defendants asserted that under North Carolina law the Agreement should not be considered an installment contract.

Following a hearing, the trial court granted defendants' motions to dismiss. *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, No. 14 CVS 17400, 2015 WL 3823817, at *8 (N.C. Super. Ct. Mecklenburg County (Bus. Ct.) June 19, 2015). The trial court determined that the allegations of plaintiff's complaint "reveal that [defendants] did not perform [their] reporting and payment obligations at least as early as October 20, 2000, when the first minimum royalty payment was due and substantially more than three years prior to when the Verified Complaint was filed." *Christenbury Eye Ctr.*, 2015 WL 3823817, at *4. Regardless of whether the Agreement was an installment contract, the trial court found that plaintiff's complaint revealed that "[d]efendants clearly repudiated the contract by their consistent and repeated failure to perform, placing [p]laintiff on notice that future reports and payments would not be made." *Id.* at *5. As a result, the trial court concluded that North Carolina's statutes of limitations barred all of plaintiff's claims. *Id.* at *5-8; *see Teachey v. Gurley*, 214 N.C. 288, 293, 199 S.E. 83, 87 (1938) (noting that the statute of limitations begins to run when a party repudiates "in such manner that [the adverse party] is called upon to assert his rights").[2]

Plaintiff thereafter improperly noticed appeal to the Court of Appeals, which dismissed the case for lack of jurisdiction. *See* N.C.G.S. § 7A-27(a)(2) (2015) (providing a direct right of appeal to the Supreme Court from a final judgment of the Business Court). We allowed plaintiff's petition for writ of certiorari to review the trial court's dismissal order.

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2. Alternatively, the trial court concluded that, "by declining to take action in regard to [d]efendants' failure to submit reports or make royalty payments, [plaintiff] waived any right to future payments to the extent that the Agreement could appropriately be considered an installment contract." *Christenbury Eye Ctr.*, 2015 WL 3823817, at *5.

We review a dismissal under Rule 12(b)(6) de novo, "view[ing] the allegations as true and . . . in the light most favorable to the non-moving party." *Kirby v. N.C. DOT*, 368 N.C. 847, 852, 786 S.E.2d 919, 923 (2016) (quoting *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008)). Dismissal is proper when the complaint "fail[s] to state a claim upon which relief can be granted." *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 7 (2015) (alteration in original) (quoting N.C.G.S. § 1A-1, Rule 12(b)(6) (2013)). "When the complaint on its face reveals that no law supports the claim . . . or discloses facts that necessarily defeat the claim, dismissal is proper." *Id.* at 448, 781 S.E.2d at 8 (citing *Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)).

Plaintiff premises each of its claims on allegations that defendants breached the Agreement by failing to provide written sales reports or pay royalties and by conducting unauthorized sales.[3] We conclude that plaintiff's own allegations, taken as true, establish that its claims accrued at the earliest on 20 November 1999 and at the latest by 20 October 2000. Because plaintiff had notice of its injury but did not initiate its current action for almost fourteen years, all of its claims are time barred.

We have long recognized that a party must initiate an action within a certain statutorily prescribed period after discovering its injury to avoid dismissal of a claim. *See Shearin v. Lloyd*, 246 N.C. 363, 370, 98 S.E.2d 508, 514 (1957) ("Statutes of limitations . . . require that litigation be initiated within the prescribed time or not at all."), *superseded by statute*, N.C.G.S. § 1-15(b) (1971), *on other grounds as recognized in Black v. Littlejohn*, 312 N.C. 626, 630-31, 325 S.E.2d 469, 473 (1985). "The purpose of a statute of limitations is to afford security against stale

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3. Specifically, the verified complaint alleges various claims that are all based on defendants' nonperformance:

(1) Plaintiff's breach of contract claim relies on defendants' "fail[ure] to pay royalties under the Agreement and perform other obligations required by the Agreement."

(2) Plaintiff's fraudulent concealment claim relies on defendants' "contractual duty under the Agreement to [report] to the Practice any fees received by Medflow related to the Enhancement."

(3) Plaintiff's unfair and deceptive trade practices claim relies on defendants' failure to report and pay royalties under the Agreement.

(4) Plaintiff's unjust enrichment claim relies on defendants' failing to pay royalties and conducting unauthorized sales, alleging that defendants "retained certain royalties due to [plaintiff] and received certain disallowed fees related to impermissible sales in the restricted territories."

demands, not to deprive anyone of his just rights by lapse of time." *Id.* at 371, 98 S.E.2d at 514. This security must be jealously guarded, for "[w]ith the passage of time, memories fade or fail altogether, witnesses die or move away, [and] evidence is lost or destroyed." *Estrada v. Burnham*, 316 N.C. 318, 327, 341 S.E.2d 538, 544 (1986), *superseded by statute*, N.C.G.S. § 1A-1, Rule 11(a) (Cum. Supp. 1988), *on other grounds as stated in Turner v. Duke Univ.*, 325 N.C. 152, 163-64, 381 S.E.2d 706, 712-13 (1989). "[I]t is for these reasons, and others, that statutes of limitations are inflexible and unyielding and operate without regard to the merits of a cause of action." *Id.* at 327, 341 S.E.2d at 544 (citing *Shearin*, 246 N.C. at 370, 98 S.E.2d at 514).

It is well settled that "where the right of a party is once violated the injury immediately ensues and the cause of action arises." *Sloan v. Hart*, 150 N.C. 269, 274, 63 S.E. 1037, 1039 (1909). A cause of action is complete and the statute of limitations begins to run upon the inception of the loss from the contract, generally the date the promise is broken. *See Jewell v. Price*, 264 N.C. 459, 461, 142 S.E.2d 1, 3 (1965) ("Where there is . . . a breach of an agreement . . . the statute of limitations immediately begins to run against the party aggrieved . . . ." (citing, *inter alia*, *Shearin*, 246 N.C. 363, 98 S.E.2d 508)).

Here plaintiff's complaint reveals that it had notice of its injury as early as 20 November 1999, when defendants failed to provide the first monthly report, and certainly by 20 October 2000, when defendants failed to pay the first $500 minimum royalty payment. *See Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 493, 329 S.E.2d 350, 354 (1985) (concluding that the statutes of limitations at issue in that case began to run "as soon as the injury [became] apparent to the claimant or should reasonably [have] become apparent"). The complaint further alleges that, despite such payments being due, defendants persisted in their breach and "*[a]t no time* . . . paid . . . or accounted for any royalties due under the Agreement." (Emphasis added.) For fourteen years, however, plaintiff did not raise any question or concern regarding its rights to receive written reports and minimum annual royalty payments, nor did it inquire about restricted sales. Any increase in plaintiff's injury therefore represents the "continual ill effects from an original violation," *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 179, 581 S.E.2d 415, 423 (2003) (quoting *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981)), and "aggravation of the original [breach]," *Pembee Mfg.*, 313 N.C. at 493, 329 S.E.2d at 354 (citing *Matthieu v. Piedmont Nat. Gas Co.*, 269 N.C. 212, 215, 152 S.E.2d 336, 339-40 (1967)). Because plaintiff had

notice of its injury yet failed to assert its rights, all of plaintiff's claims are time barred.[4]

Plaintiff contends, however, that the Agreement should be treated as an installment contract for limitations purposes and that each overdue sales report, unauthorized sale, and delinquent royalty payment is a separate breach of contract claim, thus allowing plaintiff to pursue any claims arising within three years before filing suit. Because the terms of the Agreement demonstrate a mutual dependency between the promised performance by plaintiff and the promised performances by defendants, the consideration supporting the Agreement is unified and incapable of apportionment. As such, the Agreement is not an installment contract.

"In interpreting contracts, we construe them as a whole." *Ussery v. Branch Banking & Tr.*, 368 N.C. 325, 335, 777 S.E.2d 272, 279 (2015) (citing *Singleton v. Haywood Elec. Membership Corp.*, 357 N.C. 623, 629, 588 S.E.2d 871, 875 (2003)). "Each clause and word is considered with reference to each other and is given effect by reasonable construction." *Id.* at 336, 777 S.E.2d at 279 (citing *Sec. Nat'l Bank of Greensboro v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 93, 143 S.E.2d 270, 275 (1965)). We determine the intent of the parties and the nature of an agreement "by the plain meaning of the written terms." *RL REGI N.C., LLC v. Lighthouse Cove, LLC*, 367 N.C. 425, 428, 762 S.E.2d 188, 190 (2014) (citing *Powers v. Travelers Ins. Co.*, 186 N.C. 336, 338, 119 S.E. 481, 482 (1923)).

"An 'installment contract' is one which requires or authorizes the delivery of goods in separate lots to be separately accepted." N.C.G.S. § 25-2-612(1) (2015). In such cases the statute of limitations runs against each installment as it becomes due, *see Shoenterprise Corp. v. Willingham*, 258 N.C. 36, 39, 127 S.E.2d 767, 770 (1962), thus permitting actions falling within the limitations period while precluding those that fall outside of it. Though the term "installment contract" technically applies to contracts for the sale of goods, for limitations purposes this principle has been extended to some agreements falling outside the technical definition. *See, e.g.*, *Martin*, 100 N.C. App. at 357, 396 S.E.2d at 332 (lessee's obligation to pay all real estate taxes levied on the leased premises).

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4. Plaintiff's claims for breach of contract, fraudulent concealment, and unjust enrichment are subject to a three-year statute of limitations. N.C.G.S. § 1-52(1), (9). Plaintiff's unfair and deceptive trade practices claim is subject to a four-year statute of limitations. *Id.* § 75-16.2. Based upon the purported claims having arisen at the latest by October 2000, the three-year statute of limitations would have run in October 2003, and the four-year statute of limitations would have run in October 2004.

Whether an agreement should be treated as an installment contract "depends not on the number of promises [on either or both sides] . . . but on whether there has been a single expression of mutual assent to all the promises as a unit." 15 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 45:3, at 320 (4th ed. 2014) [hereinafter *Williston on Contracts*]. "A contract is entire, and not severable, when by its terms, nature and purpose it contemplates . . . that each and all of its parts, material provisions, and the consideration, are common each to the other and interdependent." *Wooten v. Walters*, 110 N.C. 251, 254, 14 S.E. 734, 735 (1892). Conversely, the hallmark of an installment contract is that its terms contain "two or more distinct items, both in the agreement to perform and in the promise of compensation, capable of 'apportionment' or separate allocation the one to the other, as indicated in the contract itself." *Neal v. Wachovia Bank & Tr.*, 224 N.C. 103, 107, 29 S.E.2d 206, 208 (1944).

Here a fair construction of the terms of the Agreement compels the conclusion that the Agreement is not an installment contract. The Agreement sets out that, in a one-time assignment, plaintiff conveyed its rights in the Enhancements in exchange for defendants' various promises to provide monthly sales reports, refrain from selling the Enhancements in North Carolina and South Carolina absent plaintiff's express consent, and pay royalties. The terms of the Agreement, therefore, demonstrate a mutual dependency between the promises provided by the parties as consideration to support the Agreement, inextricably tying plaintiff's assignment of rights in the Enhancements to defendants' promised performance. Moreover, the Agreement lacks any indication that the parties intended their promises to be divisible, severable, or otherwise capable of apportionment. *See Williston on Contracts* § 45:4, at 321 ("There is a presumption against finding a contract divisible unless divisibility is expressly stated in the contract itself, or the intent of the parties to treat the contract as divisible is otherwise clearly manifested." (footnotes omitted)). Accordingly, the consideration supporting the Agreement is unified and incapable of apportionment. As such, the Agreement is not an installment contract.[5]

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5. Moreover, as the trial court correctly concluded, defendants' immediate and repeated failure to perform effected a clear repudiation of the entire Agreement. *See Edwards v. Proctor*, 173 N.C. 41, 44, 91 S.E. 584, 585 (1917) (noting that a party's refusal to perform results in a breach of contract when "the refusal to perform [is] of the whole contract or of a covenant going to the whole consideration"). Because plaintiff was on notice by at least 20 October 2000 that future reports and payments would not be made, the statute of limitations began to run on plaintiff's claims regardless of whether the Agreement was an installment contract. *See Teachey*, 214 N.C. at 293, 199 S.E. at 87 (stating, *inter alia*, that the statute of limitations begins to run from the time the non-breaching party learned of the repudiation).

Furthermore, unlike an installment contract, in which specified installment payments are due at scheduled times, the terms of the Agreement contain no fixed time or schedule for any payments beyond the first five years. *See*, *e.g.*, *Vreede v. Koch*, 94 N.C. App. 524, 380 S.E.2d 615 (1989) (interpreting installment contract that required, *inter alia*, payments in *monthly* installments until all principal and interest were paid in full). The payments on which plaintiff seeks recovery are well beyond that five-year period. Instead, the decision to sell the Enhancements and thus trigger the royalty provision rested entirely in defendants' hands. Plaintiff's installment contract argument therefore fails.

While a party is duty bound to honor its contractual obligations, statutes of limitation operate inexorably without reference to the merits of a cause of action, thereby "preventing surprises through the revival of claims that have been allowed to slumber." *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49, 64 S. Ct. 582, 586, 88 L. Ed. 788, 792 (1944). Plaintiff's complaint reveals that plaintiff had notice of its injury over fourteen years ago, well before commencing its current action. Whatever rights existed, plaintiff's fourteen-year slumber resulted in their becoming stale. Because plaintiff failed to timely pursue its claims within the statute of limitations periods, plaintiff's claims are time barred. Accordingly, we affirm the trial court's decision to dismiss plaintiff's complaint.

AFFIRMED.

THE FIDELITY BANK, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF REVENUE, RESPONDENT

Nos. 392A16 and 393PA16

Filed 18 August 2017

**1. Rules of Civil Procedure—Rule 12(b)(6) dismissal on remand—underlying decision void**

In a case concerning the N.C. tax deduction from corporate income for the purchase of discounted U.S. obligations (Market Discount Income), the Business Court erred by dismissing petitioner's second petition for judicial review pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). The Department of Revenue did not have the authority to revisit the issue on remand. The Department's findings and conclusions with respect to that issue were therefore void, and the Business Court should have vacated the challenged order.

**2. Taxation—N.C. corporate income tax—deductions—market discount income—definition of interest**

In a case concerning the N.C. tax deduction from corporate income for the purchase of discounted U.S. obligations (Market Discount Income), the Business Court correctly concluded that the Market Discount Income that Fidelity Bank received on the discounted bonds was not deductible for North Carolina corporate income tax purposes. There was no statutory definition of the word "interest" as used in the applicable statue, N.C.G.S. § 105-130.5(b)(1). The term "interest," not defined in the statute, was unambiguous and should have been understood in accordance with its plain meaning as involving "periodic payments received by the holder of a bond." The General Assembly had not adopted the definitions set out in the Internal Revenue Code into the North Carolina Revenue Act on any sort of wholesale basis.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of an opinion and order dated 3 May 2013 entered by Judge John R. Jolly, Jr., Chief Special Superior Court Judge for Complex Business Cases, in the Superior Court, Wake County, and appeal pursuant to N.C.G.S. § 7A-27(a) from a final judgment and order entered on 23 June 2016 entered by Judge Louis A. Bledsoe, III, Special Superior Court Judge for Complex Business Cases, in the Superior Court, Wake County. Heard in the Supreme Court on 13 June 2017.

*Ward and Smith, P.A., by Alexander C. Dale, Donalt J. Eglinton, and Amy P. Wang, for petitioner-appellant.*

*Joshua H. Stein, Attorney General, by Matthew W. Sawchak, Solicitor General, and Perry J. Pelaez, Assistant Attorney General, for respondent-appellee North Carolina Department of Revenue.*

ERVIN, Justice.

The principal issue before this Court in these consolidated appeals is whether the North Carolina Business Court correctly interpreted N.C.G.S. § 105-130.5(b)(1) so as to preclude The Fidelity Bank from deducting "Market Discount Income" relating to discounted United States obligations for North Carolina corporate income taxation purposes. In view of the fact that the relevant portions of N.C.G.S. § 105-130.5(b)(1) clearly and unambiguously preclude the proposed deduction, we affirm the Business Court's substantive decision with respect to this issue while reversing the Business Court's decision to dismiss the second of the two judicial review petitions that Fidelity Bank filed in these cases and remanding that matter to the Business Court for further remand to the North Carolina Department of Revenue with instructions to vacate that portion of the Department's Second Amended Final Agency Decision relating to the deductibility issue for lack of subject matter jurisdiction.

Fidelity Bank, a C corporation, is a wholly owned subsidiary of Fidelity Bancshares, Inc. Fidelity Bank acquired United States government bonds at a discount to face value and held those discounted bonds until maturity, thereby earning income, generally referred to as Market Discount Income, consisting of the difference between the amount that Fidelity Bank initially paid for the bonds and the amount that it received relating to those discounted bonds at maturity. As a result of the fact that five of these discounted bonds matured during the 2001 tax year, Fidelity earned $724,098.00 in Market Discount Income related to the securities in question during that period. On its 2001 North Carolina corporate income tax return, Fidelity treated this Market Discount Income as taxable income and then deducted this Market Discount Income as interest earned on United States government obligations for the purposes of determining its net taxable income.

On 8 July 2002, the Department issued a Notice of Corporate Income Tax Assessment to Fidelity Bank assessing additional North Carolina income taxes of $49,963.00 and associated interest in the amount of $1132.63 against Fidelity Bank based upon a determination that Fidelity

Bank was not entitled to deduct this Market Discount Income for the 2001 tax year. On 31 July 2002, Fidelity Bank sent a protest letter to the Department objecting to the Notice of Assessment. On 17 May 2006, the Department sent a letter to Fidelity Bank imposing additional income taxes and associated interest based upon the rejection of Fidelity Bank's assertion that it was entitled to deduct the Market Discount Income that Fidelity Bank had earned on the bonds. On 12 September 2008, following further negotiations between the parties, the Department issued a Notice of Final Determination reiterating its decision to reject Fidelity Bank's attempt to deduct the Market Discount Income for state corporate income taxation purposes and seeking the payment of additional taxes plus associated interest.

On 11 November 2008, Fidelity Bank filed a Petition for a Contested Case Hearing challenging the Department's decision with respect to the deductibility of the Market Discount Income that Fidelity Bank had earned on the discounted bonds and requesting relief from the Department's claim for interest on the additional income tax amount that had been assessed against Fidelity Bank. On 30 June 2009, the Administrative Law Judge entered an order granting partial summary judgment in favor of the Department on the grounds that the Market Discount Income relating to the discounted bonds was not deductible for North Carolina corporate income tax purposes.[1] On 16 November 2009, the Administrative Law Judge granted partial summary judgment in Fidelity Bank's favor with respect to the Department's attempt to collect interest on the amount of unpaid taxes that the Department claimed that Fidelity Bank owed. On 25 November 2009, the Administrative Law Judge's decision was submitted to the Department for the purpose of allowing the Department to make a final decision.[2] On 22 January 2010, the Department issued a Final Agency Decision in which it adopted the Administrative Law Judge's decision with respect to the deductibility issue and remanded the case to the Administrative Law Judge for the making of further findings of fact relating to the interest abatement issue.[3]

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1. The parties agreed that there were no disputed issues of material fact, so that this case could be appropriately resolved at the summary judgment stage of this contested case proceeding.

2. According to the statutory provisions governing administrative proceedings in effect at the time, the Administrative Law Judge submitted a recommended decision to the Department, which made the final decision. *See* N.C.G.S. § 150B-34 (2009), amended by Act of June 18, 2011, ch. 398, sec. 18, 2011 N.C. Sess. Laws 1678, 1686.

3. No proceedings on remand appear to have been conducted before the Administrative Law Judge as a result of the Department's initial final agency decision.

On 24 February 2010, Fidelity Bank filed a petition for judicial review in the Superior Court, Wake County, for the purpose of challenging the Department's initial final agency decision. The case stemming from the filing of Fidelity Bank's first judicial review petition was designated a mandatory complex business case and submitted to the Business Court for decision. On 3 May 2013, the Business Court entered an order in which it affirmed the Department's final decision with respect to the deductibility issue and remanded the case to the Department for the making of additional findings of fact with respect to the interest abatement issue.[4]

On 10 December 2013, the Department issued an Amended Final Agency Decision in which it adopted the Administrative Law Judge's decision with respect to the deductibility decision as its own and remanded Fidelity Bank's request for abatement of the interest assessment to the Administrative Law Judge for further proceedings. On 23 April 2015, the Administrative Law Judge entered an Amended Decision concluding that Fidelity Bank should be required to pay interest on the amount of any unpaid 2001 taxes. On 24 July 2015, the Department entered a Second Amended Final Agency Decision determining that Fidelity Bank was not entitled to deduct the Market Discount Income for purposes of its 2001 corporate income tax return and requiring Fidelity Bank to pay additional taxes and related interest in light of the Department's rejection of Fidelity Bank's assertion that the Market Discount Income that it earned during the 2001 tax year was deductible for North Carolina corporate income taxation purposes.

On 19 August 2015, Fidelity filed a petition seeking judicial review of the Department's second amended final agency decision in the Superior Court, Wake County. In its petition, Fidelity Bank requested that the Department's decision with respect to the deductibility issue in the second amended final agency decision be overturned without advancing any challenge to the Department's decision with respect to the interest abatement issue. On 20 August 2015, the proceeding resulting from the filing of Fidelity Bank's second judicial review petition was designated a mandatory complex business case and referred to the Business Court for decision. On 15 January 2016, the Department filed motions seeking the entry of orders dismissing Fidelity Bank's second judicial review petition for failure to state a claim upon which relief could be granted

4. Although Fidelity Bank sought appellate review of the Business Court's initial decision, the Court of Appeals dismissed Fidelity Bank's appeal as having been taken from an unappealable interlocutory order.

pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), and entering final judgment with respect to the deductibility issue in accordance with the decision made in response to Fidelity Bank's first judicial review petition. On 23 June 2016, the Business Court entered a final judgment and order granting the Department's motions to dismiss the second judicial review petition and entering final judgment with respect to the deductibility issue consistent with the court's determination in the proceeding stemming from the first judicial review petition. *Fidelity Bank v. N.C. Dep't of Revenue*, Nos. 10 CVS 3405, 15 CVS 11311, 2016 WL 3917735 (N.C. Super. Ct. Wake County (Bus. Ct.) June 20, 2016).

On 14 July 2016, Fidelity Bank noted an appeal to the Court of Appeals from the Business Court's decision with respect to the deductibility issue in the proceeding stemming from the first judicial review proceeding and an appeal to this Court from the Business Court's decision to dismiss the second judicial review petition for failure to state a claim upon which relief could be granted. On 20 October 2016, Fidelity Bank filed a petition with this Court seeking discretionary review of the deductibility decision prior to a determination by the Court of Appeals in the case stemming from the first judicial review proceeding. This Court allowed Fidelity Bank's discretionary review petition on 8 December 2016, heard consolidated oral argument in both cases on 13 June 2017, and now consolidates these cases for purposes of decision.

**[1]** As an initial matter, we must address the correctness of the Business Court's decision to dismiss Fidelity Bank's second judicial review petition pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). In making this determination, the Business Court noted that, "although [the Business Court] did not remand the Deductibility Issue to the Department, the Department elected to include findings and conclusions on that issue in its Second Amended Final Agency decision." *Fidelity Bank*, 2016 WL 3917735, at *4. As the Business Court also noted,

> North Carolina law is clear, however, that when an appellate court (i.e., [the Business Court's] capacity here) remands a case to the trial court (i.e., the Department's capacity here), any judgments of the trial court "which were inconsistent and at variance with, contrary to, and modified, corrected, altered or reversed prior mandates of the [appellate court]" are "unauthorized and void."

*Id.* (second alteration in original) (quoting *Lea Co. v. N.C. Bd. of Transp.*, 323 N.C. 697, 699, 374 S.E.2d 866, 868 (1989) (emphasis omitted) (quoting *Collins v. Simms*, 257 N.C. 1, 8, 125 S.E.2d 298, 303 (1962))). For that

reason, the Business Court concluded that "the Department did not have authority to make any findings of fact or conclusions of law concerning the Deductibility Issue in its Second Amended Final Agency Decision," rendering "the findings and conclusions in the Second Amended Final Agency Decision concerning the Deductibility Issue void and without legal effect," so as to preclude the Department's decision with respect to the deductibility issue as set out in the second amended final agency decision from being "the proper subject of judicial review." *Id.* at *5. As a result, the Business Court granted the Department's dismissal motion. *Id.* at *5, 6.

On appeal, Fidelity Bank contends that the Business Court erred by dismissing the second judicial review petition on the grounds that, given the Business Court's determination that the Department's decision with respect to the deductibility issue on remand had been made "without authority and [was] void," the Business Court should have invalidated, rather than ignored, the Department's decision to reiterate its earlier decision concerning the deductibility issue in the second amended final agency decision. On the other hand, the Department asserts that, "[b]ecause the [second judicial review proceeding] raised the same deductibility issue that the [Business Court's order in the first judicial review proceeding] had already decided, [the Business Court] was right to hold that Fidelity's petition in the [second judicial review proceeding] failed to state a claim." We agree with Fidelity Bank that the Business Court erred by dismissing that portion of its second petition for judicial review challenging that portion of the Department's second amended final agency decision addressing the deductibility issue for failing to state a claim upon which relief can be granted.

As the Business Court concluded, the Department lacked the authority to revisit the deductibility issue on remand from the Business Court's decision in the first judicial review proceeding, making its findings and conclusions with respect to that issue void. "A void judgment . . . binds no one." *E. Carolina Lumber Co. v. West*, 247 N.C. 699, 701, 102 S.E.2d 248, 249 (1958). The "invalidity" of a void order "may be asserted at any time and in any action where some benefit or right is asserted thereunder," *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 677, 360 S.E.2d 772, 777 (1987) (quoting *E. Carolina Lumber Co.*, 247 N.C. at 701, 102 S.E.2d at 249), rendering any failure on Fidelity Bank's part to raise this issue before the Business Court and the fact that the order entered by the Business Court in the first judicial review proceeding was binding upon the Business Court in the second judicial review proceeding insufficient to justify dismissal of the second judicial review petition.

Moreover, the fact that the Business Court did, in fact, determine that the relevant portion of the Department's second final agency decision was "void" and the absence of any specific showing of prejudice in addition to the risk of confusion arising from the existence of multiple orders addressing the same issue on the same facts do not support a decision to refrain from vacating a void administrative decision either. In view of the fact that "an appeal from a void order cannot be frivolous," this Court reversed an "order . . . dismissing the appeal." *In re Foreclosure of Sharpe*, 230 N.C. 412, 418, 53 S.E.2d 302, 306 (1949). For similar reasons, we have no hesitancy in determining that a litigant is entitled to assert, in a proceeding seeking judicial review of an administrative decision, that the decision in question is void. In the event that this assertion is well founded, the reviewing court should vacate the challenged order rather than dismiss the request for judicial review for failure to state a claim. As a result, since the Department lacked the authority to address the deductibility decision on remand, the Business Court's order relating to the deductibility decision in the proceeding stemming from the second judicial review proceeding should be reversed and this case should be remanded to the Business Court for further remand to the Department with instructions to vacate that portion of the second amended final agency decision addressing the deductibility issue.

**[2]** The principal substantive issue before us in this case, which is properly before this Court in connection with Fidelity Bank's appeal from the Business Court's decision to enter a final judgment upholding the Department's deductibility decision in connection with the first judicial review proceeding, is whether the Business Court erred by affirming that portion of the Department's final agency decision in which the Department determined that Fidelity Bank was not entitled to deduct the Market Discount Income that it earned during the 2001 tax year as interest on United States obligations for North Carolina corporate income taxation purposes pursuant to N.C.G.S. § 105-130.5(b)(1). In seeking relief from the Business Court's decision, Fidelity Bank asserts that the plain and unambiguous language contained in N.C.G.S. § 105-130.5(b)(1) and 26 U.S.C. § 1276(a)(4) renders Market Discount Income deductible interest upon United States obligations for North Carolina corporate income taxation purposes. According to Fidelity Bank, the General Assembly intended to adopt the definition of "interest" contained in 26 U.S.C. § 1276(a)(4) given that the taxpayer's federal taxable income is the "baseline starting point" for determining a taxpayer's state net taxable income, *see* N.C.G.S. § 105-130.2 (2015), and that Market Discount Income is treated as interest for purposes of determining

federal taxable income. More specifically, given that 26 U.S.C. § 1276(a)(4) states that Market Discount Income "shall be treated as interest for purposes of [the Code]," 26 U.S.C. § 1276(a)(4) (2012), and given that the General Assembly has adopted the Code for the purpose of determining a taxpayer's state income tax liability, *see* N.C.G.S. § 105-130.2(15), Fidelity Bank contends that the General Assembly intended that Market Discount Income should be treated as deductible interest upon United States obligations for state corporate income taxation purposes. As a result, given that the Business Court ignored the plain language of the relevant provisions of state law in upholding the Department's decision with respect to the deductibility issue, Fidelity Bank contends that the Business Court's decision with respect to that issue should be reversed.

The Department, on the other hand, contends that the Business Court properly determined that Market Discount Income does not constitute deductible "interest" for North Carolina income taxation purposes. According to the Department, the term "interest" as used in N.C.G.S. § 105-130.5 should be understood, in accordance with its plain meaning, as "periodic payments received by the holder of a bond," citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998), *cert. denied*, 526 U.S. 1090 (1999), *abrogated on other grounds by Lenox, Inc. v. Tolson*, 353 N.C. 659, 663, 548 S.E.2d 513, 517 (2001). Even though N.C.G.S. § 105-130.2(15) provides that a taxpayer's income for state taxation purposes is determined on the basis of the taxpayer's federal taxable income, the statutory provisions governing North Carolina income taxation do not adopt the definitions contained in the Internal Revenue Code on a wholesale basis. Instead, the Department asserts that the General Assembly has adopted Internal Revenue Code provisions for use in determining a taxpayer's obligation to pay North Carolina income taxes on a selective basis, so that, for example, N.C.G.S. § 105-130.5(b) incorporates Internal Revenue Code provisions in only twelve of its twenty-one subsections. "[W]hen no such reference appears—as here—words used in the Revenue Act do not take on any specialized meaning they might have under the Code." The Department claims that, had the General Assembly intended to incorporate the Internal Revenue Code's definitions into N.C.G.S. § 105-130.5(b)(1), it would have done so expressly. In addition, the Department contends that 26 U.S.C. § 1276 of the Code has no application outside the context of federal tax law given its statement that Market Discount Income "shall be treated as interest for purposes of [the Code]," quoting 26 U.S.C. § 1276(a)(4). As a result, the Department contends that the Business Court's decision with respect to the deductibility issue should be affirmed.

According to N.C.G.S. § 105-130.2(15), a taxpayer's "State net income" is "[t]he taxpayer's federal taxable income as determined under the Code,[5] adjusted as provided in G.S. 105-130.5." N.C.G.S. § 105-130.2(15). N.C.G.S. § 105-130.5(b) allows a taxpayer to take certain "deductions from federal taxable income" "in determining State net income." *Id.* § 105-130.5(b) (2015). Among the deductions allowed in N.C.G.S. § 105-130.5(b) is one for "[i]nterest upon the obligations of the United States or its possessions, to the extent included in federal taxable income," provided that "interest upon the obligations of the United States shall not be an allowable deduction unless interest upon obligations of the State of North Carolina or any of its political subdivisions is exempt from income taxes imposed by the United States."[6] *Id.* § 105-130.5(b)(1). As a result, as both parties appear to agree, the proper resolution of the substantive issue that is before us in this case hinges upon the meaning of the term "interest" as used in N.C.G.S. § 105-130.5(b)(1).

"In resolving issues of statutory construction, we look first to the language of the statute itself." *Walker v. Bd. of Trs. of the N.C. Local Gov'tal Emps. Ret. Sys.*, 348 N.C. 63, 65, 499 S.E.2d 429, 430 (1998) (quoting *Hieb v. Lowery*, 344 N.C. 403, 409, 474 S.E.2d 323, 327 (1996)).

> When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. *See Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). 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. *See Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 620, 629, 265 S.E.2d 379,

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5. According to N.C.G.S. § 105-130.2(2), which incorporates a definitions set out in N.C.G.S. § 105-228.90, "Code" is defined as "[t]he Internal Revenue Code as enacted as of January 1, 2017, including any provisions enacted as of that date that become effective either before or after that date," N.C.G.S. § 105-228.90(b)(1b).

6. In addition to its decision that the Department had correctly determined that Market Discount Income on the discounted bonds that matured in 2001 was not 'interest," the Business Court also concluded that the deduction that Fidelity Bank had attempted to take was barred by the reciprocity provision contained in N.C.G.S. § 105-130.5(b)(1). In view of our decision that Market Discount Income is not "interest" for purposes of N.C.G.S. § 105-130.5(b)(1), we need not address the issue of whether the deduction in question was barred by the reciprocity provision contained in N.C.G.S. § 105-130.5(b)(1) and express no opinion as to the correctness of the interpretation of that statutory provision adopted by the Department and the Business Court.

> 385 (1980) ("The best indicia of that intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish.").

*Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006). Thus, the initial issue that must be addressed in construing the relevant statutory language requires a determination of whether the language in question is ambiguous or unambiguous.

An unambiguous word has a "definite and well known sense in the law." *C.T.H. Corp. v. Maxwell*, 212 N.C. 803, 810, 195 S.E. 36, 40 (1938); *see also State Highway Comm'n v. Hemphill*, 269 N.C. 535, 539, 153 S.E.2d 22, 26 (1967) (stating that language in a statute is unambiguous when it "express[es] a single, definite and sensible meaning") (quoting *State ex rel. Long v. Smitherman*, 251 N.C. 682, 684, 111 S.E.2d 834, 836 (1960))). In the event that the General Assembly uses an unambiguous word without providing an explicit statutory definition, that word will be accorded its plain meaning. *See Walker*, 348 N.C. at 66, 499 S.E.2d at 431 (stating that, although "[t]he word 'terminate' is undefined in chapter 128 of the North Carolina General Statutes," "[a]s this word is unambiguous, . . . we accord it its plain meaning"); *see also Poole v. Miller*, 342 N.C. 349, 352, 464 S.E.2d 409, 411 (1995) (stating that, although "[t]he word 'judgment' is undefined in Rule 68," "[a]s this word is unambiguous, we shall accord it its plain meaning"); *In re Appeal of Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202-03 (1974) (stating that, "[i]n the construction of any statute, including a tax statute, words must be given their common and ordinary meaning, nothing else appearing," and "[w]here, however, the statute, itself, contains a definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be" (citations omitted)). On the other hand, in the event that the relevant statutory provision is ambiguous, its meaning must be determined utilizing the ordinary rules of statutory construction.

"The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Burgess*, 326 N.C. at 209, 388 S.E.2d at 137 (citation omitted). As we have already noted, "[t]he best indicia of that intent are the language of the statute . . . , the spirit of the act and what the act seeks to accomplish." *Coastal Ready-Mix Concrete*, 299 N.C. at 629, 265 S.E.2d at 385 (citations omitted). As a general proposition, when the General Assembly intends to adopt provisions or definitions from other sources of law into a statute, it does so "by clear and specific reference." *See Lutz Indus. v. Dixie Home Stores*, 242 N.C. 332, 340, 88 S.E.2d 333, 339 (1955) (stating that "[t]he 1941 Act ratified and adopted the North

Carolina Building Code published in 1936 by clear and specific reference"). "Special canons of statutory construction apply when the term under consideration is one concerning taxation." *In re Estate of Kapoor*, 303 N.C. 102, 106, 277 S.E.2d 403, 407 (1981). "[W]hen the statute provides for an *exemption* from taxation . . . any ambiguities are resolved in favor of taxation." *Id.* at 106, 277 S.E.2d at 407 (citing *In re Clayton-Marcus*, 286 N.C. 215, 210 S.E.2d 199 (1974)).

As both parties have observed, there is no statutory definition of the word "interest" as used in N.C.G.S. § 105-130.5(b)(1). The Business Court, however, defined the term in question in the context of bonds as "periodic payments received by the holder of a bond."[7] *Fidelity Bank v. N.C. Dep't of Revenue*, No. 10 CVS 3405, 2013 WL 1896987, at *5 (N.C. Super. Ct. Wake County (Bus. Ct.) May 3, 2013). In view of the fact that the term "interest" has a "definite and well-known sense in the law," *C.T.H. Corp.*, 212 N.C. at 810, 195 S.E. at 40, and that this "plain meaning" definition is consistent with the manner in which "interest" is used in other statutory provisions and judicial decisions, *see e.g.*, N.C.G.S. § 143-134.1(a) (2015) (stating that "the prime contractor shall be paid interest . . . at the rate of one percent (1%) per month"); *Knight v. Braswell*, 70 N.C. 708, 711-12 (1874) (enforcing a contract requiring that interest owed on a bond be paid annually), we conclude, as did the Business Court, that the undefined term "interest" as used in N.C.G.S. § 105-130.5(b)(1) is unambiguous and should be understood in accordance with its plain meaning as involving "periodic payments received by the holder of a bond," *Fidelity Bank*, 2013 WL 1896987, at *5, and that, had the General Assembly intended for the term "interest" as used in N.C.G.S. § 105-130.5(b)(1) to be defined in accordance with 26 U.S.C. § 1276(a)(4), it would have incorporated that definition into N.C.G.S. § 105-130.5(b)(1) "by clear and specific reference," *see Lutz Indus.*, 242 N.C. at 340, 88 S.E.2d at 339. Since the validity of Fidelity Bank's challenge to the Business Court's decision hinges upon the extent to which the Business Court correctly interpreted the meaning of the term "interest" as that term is used in N.C.G.S. § 105-130.5(b)(1) and since the Business Court did not err by defining the term "interest" for purposes of N.C.G.S. § 105-130.5(b)(1) as "periodic payments received by the holder of a bond," we hold that the Business Court correctly concluded that the Market Discount Income that Fidelity Bank received on the discounted bonds that matured during 2001 was not deductible for North Carolina corporate income tax purposes.

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7. Fidelity Bank does not appear to dispute that this is a proper "plain meaning" definition of "interest," assuming that the use of such a definition is appropriate.

Although Fidelity Bank has vigorously asserted that the plain language of the relevant provisions of Chapter 105 of the General Statutes unambiguously indicates that the General Assembly intended that the term "interest" as used in N.C.G.S. § 105-130.5(b)(1) be understood to include Market Discount Income given that Market Discount Income is treated as "interest" for purposes of federal corporate income taxation, we do not find this argument persuasive. To be sure, 26 U.S.C. § 1276(a)(1) states that, "[e]xcept as otherwise provided in this section, gain on the disposition of any market discount bond shall be treated as ordinary income to the extent it does not exceed the accrued market discount on such bond" and 26 U.S.C. § 1276(a)(4) provides that "any amount treated as ordinary income under [26 U.S.C. § 1276(a)(1)] shall be treated as interest for purposes of this title." 26 U.S.C. § 1276(a)(1), (a)(4) (2012). For that reason, Market Discount Income is certainly treated as interest income for the purpose of determining the taxpayer's federal taxable income. *See* 26 U.S.C. § 860C(b)(1)(B) (2012). However, the fact that Market Discount Income is treated as interest for purposes of determining federal taxable income does not, Fidelity Bank's argument to the contrary notwithstanding, mean that Market Discount Income should be treated as "interest" for all purposes under the North Carolina Revenue Act.

As a general proposition, there is nothing illogical about including Market Discount Income, along with all other revenue derived from a discounted bond, as interest for the purpose of calculating federal taxable income while refusing to treat Market Discount Income as interest for purposes of the deduction for interest upon United States obligations allowed by N.C.G.S. § 105-130.5(b)(1). Instead, any decision to require that Market Discount Income be treated as interest for the purpose of both calculating federal taxable income and the deduction from federal taxable income authorized by N.C.G.S. § 105-130.5(b)(1) requires specific support in the relevant statutory language. We are unable to read the relevant provisions of the North Carolina Revenue Act to require the consistency of treatment for which Fidelity Bank contends.

A careful review of the provisions of Chapter 105 of the General Statutes demonstrates, as the Department notes, that the General Assembly has not adopted the definitions set out in the Internal Revenue Code into the North Carolina Revenue Act on any sort of wholesale basis. Instead, the General Assembly has selectively incorporated certain of the definitions contained in the Internal Revenue Code into the North Carolina Revenue Act. Although a number of the deductions from federal taxable income for purposes of calculating North Carolina net taxable income incorporate various provisions of the Internal Revenue

Code, no such reference to any provision of the Code appears in N.C.G.S. § 105-130.5(b)(1). In the event that the provisions of the Internal Revenue Code were binding throughout the North Carolina Revenue Act, these references to the Code in other portions of N.C.G.S. § 105-130.5(b) would be superfluous. *State v. Buckner*, 351 N.C. 401, 408, 527 S.E.2d 307, 311 (2000) (stating that, "[i]f possible, a statute must be interpreted so as to give meaning to all of its provisions"); *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981) (stating that "a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant"). As a result, the essential argument advanced in order to justify the construction of N.C.G.S. § 105-130.5(b)(1) advocated for by Fidelity Bank lacks support in the overall structure and literal language of the North Carolina Revenue Act.

Although Fidelity Bank has directed our attention to the provision in N.C.G.S. § 105-130.5(b)(1) making "[i]nterest upon the obligations of the United States or its possessions" deductible "to the extent included in federal taxable income," we are unable to read this language as requiring that Market Discount Income be treated as "interest" for purposes of the deduction authorized by N.C.G.S. § 105-130.5(b)(1). Instead of shedding light on the definition of "interest," the language in question, when read literally, simply indicates that anything that qualifies as "interest" for purposes of N.C.G.S. § 105-130.5(b)(1) is only deductible to the extent that it is "included in federal taxable income." Thus, we are unable to construe N.C.G.S. § 105-130,5(b)(1) in the manner contended for by Fidelity Bank.

As a result, for all of these reasons, we conclude that the Business Court's decision concerning the deductibility issue in its order resolving the issues raised in the first judicial review petition and rendered final in the orders addressing the second judicial review petition should be affirmed. However, we further conclude that the Business Court's decision to dismiss the portions of the second judicial review petition challenging the Department's decision concerning the deductibility issue in the second amended final agency decision was erroneous. For that reason, we conclude that the Business Court's dismissal decision should be reversed and that the case arising from Fidelity Bank's second judicial review proceeding should be remanded to the Business Court for further remand to the Department for the sole purpose of entering an order vacating its remand decision with respect to the deductibility issue.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

KORNEGAY FAMILY FARMS LLC
v.
CROSS CREEK SEED, INC.

No. 187PA16

Filed 18 August 2017

**Agriculture—mislabeled seed—remedies**

Defendant's limitation of remedies clauses were unenforceable against plaintiffs in a case involving mislabeled seed on appeal from the denial of partial summary judgment by the Business Court. Plaintiffs fell squarely within the protection afforded by the Seed Law policy recognized in *Gore v. George J. Ball, Inc.*, 279 N.C. 192 (1971). It is the policy of the State to protect farmers from the potentially devastating consequences of planting mislabeled seed.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order and opinion dated 20 April 2016 entered by Judge James L. Gale, Chief Special Superior Court Judge for Complex Business Cases appointed by the Chief Justice pursuant to N.C.G.S. § 7A-45.4, in Superior Court, Johnston County, denying defendant's motions for partial summary judgment. Heard in the Supreme Court on 10 April 2017.

*Ellis & Parker PLLC, by L. Neal Ellis, Jr.; and Jolly Williamson & Williamson, by John P. Williamson, Jr., for plaintiff-appellees.*

*Poyner Spruill LLP, by Steven B. Epstein, Andrew H. Erteschik, and Saad Gul, for defendant-appellant.*

*Pinto Coates Kyre & Bowers, PLLC, by Jon Ward; and Michael W. Patrick for North Carolina Advocates for Justice, amicus curiae.*

*Smith Moore Leatherwood LLP, by Matthew Nis Leerberg and Kip D. Nelson, for North Carolina Association of Defense Attorneys, amicus curiae.*

*H. Julian Philpott, Jr. and Phillip J. Parker, Jr. for North Carolina Farm Bureau Federation, Inc., Tobacco Growers Association of North Carolina, Inc., North Carolina Soybean Producers Association, North Carolina Peanut Growers Association, and Carolinas Cotton Growers Cooperative, Inc., amici curiae.*

JACKSON, Justice.

In this case we consider whether defendant Cross Creek Seed, Inc. may enforce several limitation of remedies clauses pursuant to Article 2 of the Uniform Commercial Code (UCC) as codified in N.C.G.S. § 25-2-719(1)(a) against Kornegay Family Farms, LLC and a number of other commercial farmers (plaintiffs) in defense of lawsuits premised on defendant's distribution of allegedly mislabeled tobacco seed. Because it is the policy of this State, as expressed by the General Assembly in the North Carolina Seed Law of 1963 (Seed Law), *see* N.C.G.S. §§ 106-277 to -277.34 (2015), to protect farmers from the potentially devastating consequences of planting mislabeled seed, we conclude that defendant's limitation of remedies clauses are unenforceable against plaintiffs. Accordingly, we affirm the North Carolina Business Court's 20 April 2016 order and opinion denying defendant's motions for partial summary judgment.

Defendant is headquartered in Raeford, North Carolina, and is in the business of breeding, developing, and producing tobacco seeds. The eight plaintiffs in this case all are commercial farmers in North Carolina who had purchased one or more of four varieties of defendant's tobacco seed between January and February 2014. Between June and August 2015, each plaintiff filed a separate suit against defendant alleging that defendant had sold them mislabeled, certified tobacco seed for planting. The complaints were filed in the superior courts of six different counties across North Carolina. Plaintiffs complained that "[c]ontrary to the order and the labeling on the containers delivered to [them], a substantial portion of the seed was of an unknown variety" and not the type or types of certified seed each plaintiff contracted to receive from defendant. Plaintiffs learned that they had not received the correct types of seed after the seeds had been planted and consequently produced "plants which were defective, disease prone, inferior, and unmarketable." Several plaintiffs subsequently filed complaints with the North Carolina Seed Board pursuant to relevant provisions of the Seed Law. *See* N.C.G.S. §§ 106-277.30, -277.34. The Seed Board investigated these complaints and determined that the yields of what it described as "off-type" plants were "consistent with the presence of genetic abnormalities" in the seed. The Seed Board also determined that the yields of "off-type" plants were not "consistent with nutritional deficiencies" nor were they responses to "environmental or agronomic factors" such as chemical injury. Defendant denied selling unknown varieties of tobacco seed to plaintiffs—and most relevant to our review of this case—argued that in accord with the limitation of remedies clause on each container

of seed, plaintiffs' alleged damages were "limited to repayment of the purchase price of the seed."

On 7 July 2015, the Chief Justice of the Supreme Court of North Carolina designated the suit by Kornegay Family Farms—the named plaintiff—as a mandatory complex business case, and the matter was subsequently assigned to Chief Special Superior Court Judge for Complex Business Cases James L. Gale. By a consent order signed by Judge Gale on 15 October 2015, the other seven cases were consolidated in a "Master File" established in conjunction with the case filed by the named plaintiff.

In October and November 2015, defendant filed motions for partial summary judgment against all eight plaintiffs seeking to bar recovery of any damages exceeding the purchase price of the seed. The Business Court heard the motions on 4 February 2016. At the hearing, defendant reiterated its argument that any damages sustained by plaintiffs were limited to the purchase price of the seeds as stated in the limitation of remedies clause printed on the labels affixed to each container of seed. Defendant argued that these limitation of remedies clauses governed the transactions with plaintiffs pursuant to the provision of UCC Article 2 codified at N.C.G.S. § 25-2-719.[1]

On 20 April 2016, the Business Court issued an order and opinion denying all of defendant's motions for partial summary judgment on the grounds that limitation of remedies clauses appearing on the labels of mislabeled seed must fail by virtue of the public policy central to the Seed Law as interpreted and applied by this Court. The Business Court observed that, faced with a set of facts similar to those presented in the instant case, this Court held that a limitation of remedies clause was unenforceable after determining that the Seed Law "has declared the policy of North Carolina to be one of protecting the farmer from the disastrous consequences of planting seed of one kind, believing he is planting another." *Kornegay Family Farms, LLC v. Cross Creek Seed, Inc.*, No. 15 CVS 1646, 2016 WL 1618272, at *4 (N.C. Super. Ct. Johnston Cty. (Bus. Ct.) Apr. 20, 2016) (quoting *Gore v. George J. Ball, Inc.*, 279 N.C. 192, 208, 182 S.E.2d 389, 398 (1971)). In *Gore* we also referred to a packaging disclaimer similar to the one at issue in this case as a "skeleton warranty." 279 N.C. at 208, 182 S.E. 2d at 398. Finding no definitive renunciation of *Gore* by either this Court or the General Assembly,

1. Section 25-2-719 states that "[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable." N.C.G.S. § 25-2-719(3) (2015).

the Business Court "decline[d] to infer a legislative intent for the UCC to supersede the public policy of the Seed Law in cases involving the sale of mislabeled seed." *Kornegay Family Farms*, 2016 WL 1618272, at *8. Consequently, the Business Court ruled that this Court's decision in *Gore* did not allow defendant to enforce its limitation of remedies clauses against plaintiffs. *Id.* at *9. At the same time, the Business Court recognized that this Court "has not squarely confronted whether a limitation of remedies in a mislabeled-seed case governed by the UCC is enforceable," *id.* at *7, and agreed with all parties that guidance from this Court is needed, *id.* at *8.

On interlocutory appeal from the order of the Business Court denying defendant's motions for partial summary judgment, defendant argues that its limitation of remedies clauses are enforceable pursuant to the UCC and that this Court's prior analysis of the public policy underlying the Seed Law does not apply in this case. We disagree.

The stated purpose of the Seed Law, codified in Chapter 106, Article 31 of the General Statutes, is "to regulate the labeling, possessing for sale, sale and offering or exposing for sale or otherwise providing for planting purposes of agricultural seeds and vegetable seeds; to prevent misrepresentation thereof; and for other purposes." N.C.G.S. § 106-277. Accordingly, the Seed Law makes it unlawful "[t]o transport, to offer for transportation, to sell, distribute, offer for sale or expose for sale within this State agricultural or vegetable seeds for seeding purposes" if those seeds, *inter alia*, are "[n]ot labeled in accordance with the provisions of this Article," present a "false or misleading labeling or claim," or have "affixed names or terms that create a misleading impression as to the kind, kind and variety, history, productivity, quality or origin of the seeds." *Id.* § 106-277.9(1).

In 1971 we first were confronted with determining whether and how the Seed Law affects private, civil litigation premised on allegations of mislabeled seed. *See generally Gore*, 279 N.C. 192, 182 S.E.2d 389. In *Gore* the plaintiff ordered a particular type of tomato seed from the defendant. *Id.* at 195, 182 S.E.2d at 390. The seed was delivered to the plaintiff in several packets that each bore the following limitation of remedies clause:

> LIMITATION OF WARRANTY: Geo. J. Ball, Inc. warrants, to the extent of the purchase price, that seeds, plants, bulbs, growers supplies and other materials sold are as described on the container, within recognized tolerances. We give no other or further warranty, express or implied.

*Id.* at 195, 182 S.E.2d at 390. The plaintiff planted the seed and the seed produced tomato plants. *Id.* at 195, 182 S.E.2d at 390. It was not until the young tomatoes first appeared, however, that the plaintiff realized that they were not of the type that he had ordered. *See id.* at 195, 182 S.E.2d at 390. Instead of producing tomatoes that were "slightly flattened, uniform and free of cracks" and of "excellent size," the plants produced tomatoes of an "unusual shape" that "were a variety of tomato wholly unsuited for sale for table use." *Id.* at 194-95, 182 S.E.2d at 390. On the basis of these facts, the plaintiff sued the defendant for negligence in mislabeling the seed and for what this Court construed as "a breach of [ ] contract by failure to deliver the seed ordered, a breach of warranty of fitness of the seed for the purpose for which the plaintiff intended to use them and a failure of consideration." *Id.* at 198-99, 182 S.E.2d at 392. The plaintiff sought consequential damages totaling $9966.00, although he had paid only $5.00 for the seed. *Id.* at 195, 199, 182 S.E.2d at 390, 392. The trial court granted the defendant's motion for a directed verdict and dismissed the action. *Id.* at 197, 182 S.E.2d at 391.

On appeal from the trial court, the Court of Appeals held the trial court had erred in part in granting a directed verdict for the defendant and remanded the case to the trial court on the breach of contract claim on the grounds that a jury could award nominal damages on the plaintiff's contract claim. *Id.* at 197, 182 S.E.2d at 391-92. On appeal to this Court, we held the judgment of the Court of Appeals to be correct except as to its statement concerning the damages recoverable by the plaintiff. *Id.* at 211, 182 S.E.2d at 400. We began our analysis of recoverable damages by observing:

> Even though the jury should find that the provision entitled 'Limitation of Warranty' was so located and printed in the catalogue and other documents relied upon by the defendant as to bring it to the plaintiff's attention and so make it a part of the contract, it will not avail the defendant if it is contrary to the public policy of this State. A provision in a contract which is against public policy will not be enforced.

*Id.* at 203, 182 S.E.2d at 395 (citing *In re Receivership of Port Publ'g Co.*, 231 N.C. 395, 397, 57 S.E.2d 366, 367 (1950); *Glover v. Rowan Mut. Fire Ins. Co.*, 228 N.C. 195, 198, 45 S.E.2d 45, 47 (1947); *Cauble v. Trexler*, 227 N.C. 307, 311, 42 S.E.2d 77, 80 (1947); *Seminole Phosphate Co. v. Johnson*, 188 N.C. 419, 428, 124 S.E. 859, 862 (1924); *Miller v. Howell*, 184 N.C. 119, 122, 113 S.E. 621, 622-23 (1922); and *Standard Fashion Co. v. Grant*, 165 N.C. 453, 456, 81 S.E. 606, 607-08 (1914)). Given the

underlying facts of *Gore*, this Court looked to the Seed Law for guidance. After considering the stated purpose of the Seed Law and the provisions regulating labeling of seed, we concluded:

> [T]he statute has declared the policy of North Carolina to be one of protecting the farmer from the disastrous consequences of planting seed of one kind, believing he is planting another. To permit the supplier of seed to escape all real responsibility for its breach of contract by inserting therein a skeleton warranty, such as was here used, would be to leave the farmer without any substantial recourse for his loss.

*Id.* at 208, 182 S.E.2d at 398. According to this Court, such a result is necessary because "the breach of the contract of sale of seed . . . . *always* causes disaster. Loss of the intended crop is inevitable. The extent of the disaster is measured only by the size of the farmer's planting." *Id.* at 208, 182 S.E.2d at 398. Accordingly, the Court concluded that "the phrase, 'to the extent of the purchase price,' as used in the 'Limitation of Warranty' relied upon by the defendant, is contrary to the public policy of this State as declared in the North Carolina Seed Law . . . and is invalid." *Id.* at 208, 182 S.E.2d at 398 (citation omitted).

In the present case we consider facts that are nearly identical to those in *Gore*: plaintiffs purchased particular types of seed, received packages of the wrong seed mislabeled as the type or types ordered, and only discovered the mistake after the planted seeds yielded crops different from those anticipated. Furthermore, both cases involve contract clauses that purport to limit recoverable damages to the purchase price of the seed in any action potentially arising from the seed purchase transaction. Despite these nearly identical facts, defendant contends that our reasoning in *Gore* should not be applied in the present case because the transaction at issue in *Gore* predated the effective date of the UCC in North Carolina. Defendant contends that although the Court in *Gore* may have accurately described and applied the law in seed mislabeling cases in a pre-UCC world, the reasoning in *Gore* no longer remains correct in view of current North Carolina law on the subject. We do not agree with this argument.

Article 2 of the UCC, which was enacted in North Carolina in 1965, states that a seller's warranty "may limit or alter the measure of damages recoverable under this article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts." N.C.G.S. § 25-2-719(1)

(a). If a limited remedy "is expressly agreed to be exclusive," then "it is the sole remedy," *id.* § 25-2-719(1)(b), and "[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable," *id.* § 25-2-719(3); however, Article 2 also provides for exceptions to these general rules. Critical to this case, Article 2 does not "impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers." *Id.* § 25-2-102 (2015). The Seed Law expressly regulates sale of seed to farmers and therefore, falls squarely within the section 25-2-102 exception. As such, the labeling provisions of the Seed Law considered by this Court in *Gore* were not "impair[ed] or repeal[ed]" by enactment of the UCC. *Id.* Consequently, we conclude that this Court's reasoning in *Gore* regarding the public policy underlying the mislabeling provisions was not limited solely to the facts of that case, and the analysis employed in *Gore* remains intact.

In addition, since our decision in *Gore* the General Assembly has taken no steps to repudiate our construction and application of the Seed Law. "[T]he legislature is always presumed to act with full knowledge of prior and existing law and [ ] where it chooses not to amend a statutory provision that has been interpreted in a specific way, we may assume that it is satisfied with that interpretation." *Polaroid Corp. v. Offerman*, 349 N.C. 290, 303, 507 S.E.2d 284, 294 (1998) (citation omitted), *cert. denied*, 526 U.S. 1098 (1999), *abrogated on other grounds by Lenox, Inc. v. Tolson*, 353 N.C. 659, 663, 548 S.E.2d 513, 517 (2001); *see also Hewett v. Garrett*, 274 N.C. 356, 361, 163 S.E.2d 372, 375 (1968) (determining that when the General Assembly had convened in seventeen regular sessions and several special sessions without changing a particular statute, this Court could "assume [that] the law-making body [was] satisfied with the interpretation this Court has placed upon [it]"). We also have found the law on a particular point settled when the General Assembly chose not to change a statute following a decision rendered by this Court only a year before. *City of Raleigh v. Mechs. & Farmers Bank*, 223 N.C. 286, 292, 26 S.E.2d 573, 576 (1943). Relevant to this case, since their enactment in 1965, the General Assembly has not altered section 25-2-102 or section 25-2-719 to provide expressly for enforcement of limitation of remedies clauses in mislabeled seed cases. *See* N.C.G.S. §§ 25-2-102, -719. Neither has the General Assembly made any change to the Seed Law that repudiates our understanding in *Gore* of the Seed Law's underlying policy and purpose. Such "[l]ong acquiescence in the practical interpretation of a statute is entitled to great weight in arriving at its meaning." *Polaroid Corp.*, 349 N.C. at 303, 507 S.E.2d at 294 (quoting *State v. Emery*, 224 N.C. 581, 587, 31 S.E.2d 858, 862 (1944)).

Defendant next argues that, in accord with the opinion of the Court of Appeals in *Billings v. Joseph Harris Co.*, which was affirmed by this Court, limitation of remedies clauses such as the one at issue here are enforceable pursuant to Article 2 of the UCC. The plaintiff in *Billings* purchased cabbage seed that was infected with a seed borne disease that caused the plants to rot in the field. In *Billings* the plaintiff argued before the Court of Appeals that its case was not governed by Article 2 of the UCC but by the Seed Law and this Court's decision in *Gore*. *Billings*, 27 N.C. App. 689, 696, 220 S.E.2d 361, 367 (1975), *aff'd*, 290 N.C. 502, 226 S.E.2d 321 (1976). As defendant notes in support of its position here, the Court of Appeals rejected the plaintiff's argument in *Billings* and held that the disclaimers of warranties used by the defendant were "beyond the parameters of the Seed Law." *Id.* at 696, 220 S.E.2d at 367. The Court of Appeals distinguished *Gore* on several grounds, including that the defendant in *Billings* "shipped the precise seed ordered by [the] plaintiff." *Id.* at 697, 220 S.E.2d at 367.

We do not agree that the decision of the Court of Appeals in *Billings* is determinative in the present case. When this Court considered *Billings* on appeal, we distinguished it from our preceding decision in *Gore*. *Billings*, 290 N.C. at 507, 226 S.E.2d at 324. We noted that in *Gore* "the defendant delivered the wrong kind of seed, whereas, in [*Billings*], the plaintiff admit[ted] that he received the exact kind of seed he ordered." *Id.* at 507, 226 S.E.2d at 324. Therefore, we concluded that in *Billings* "there was no violation of the North Carolina Seed Law through false labeling" or mislabeling of seed. *Id.* at 507, 226 S.E.2d at 324. Because the present case clearly involves mislabeled seed, it is clear that the reasoning of this Court in *Gore*, not *Billings*, is controlling. Since there was no mislabeling issue in *Billings*, the Court expressed "no opinion as to whether, where there has been such a breach, a limitation of the buyer to the recovery of the purchase price is 'reasonable in the light of the anticipated or actual harm caused by the breach.' " *Id.* at 510, 226 S.E.2d at 325 (quoting N.C.G.S. § 25-2-718). In contrast to the actual question in *Billings*, the hypothetical issue referenced by the Court is the one we address in this case.

Defendant also argues that the legislature "did not intend for the Seed Law to prevent a seller from enforcing its limitation of remedies in private litigation." In support of this position, defendant contends that the Seed Law is a regulatory statute that does not create a private right of action by which an injured party may seek damages for a violation. Defendant further contends that the Seed Law explicitly affects private, civil litigation in only two ways: first, factual evidence and scientific

opinions contained in a report of the Seed Board may be introduced in court proceedings pursuant to subsection 106-277.34(a), and second, subsection 106-277.34(b) limits damages in private actions in which the buyer did not make a sworn complaint against the dealer pursuant to the Seed Law to the "expenses incurred in connection with the cultivation of the seed alleged to be defective." N.C.G.S. § 106-277.34. Applying the doctrine of *expressio unius est exclusio alterius*—"[w]here a statute . . . sets forth the instances of its application or coverage, other methods or coverage are necessarily excluded," *State ex rel. Hunt v. N.C. Reinsurance Facil.*, 302 N.C. 274, 290, 275 S.E.2d 399, 407 (1981) (quoting 12 Strong's North Carolina Index 3d: *Statutes* § 5.10 (1978))—to these provisions, defendant argues that the Seed Law cannot be construed to otherwise affect private, civil actions. Specifically, defendant maintains that the underlying policy of the Seed Law as expressed in *Gore* cannot be applied to prevent enforcement of a limitation of remedies clause in a private, civil action.

Although the Seed Law is regulatory in nature, it does not bar aggrieved parties from pursuing private, civil litigation for damages resulting from mislabeled seed. In fact, certain provisions of the Seed Law clearly demonstrate that the General Assembly contemplated such recourse. As defendant observes, the 1998 amendments to the Seed Law provide for certain evidentiary constraints in "any court action involving a complaint that has been the subject of an investigation under G.S. 106-277.32," quoting N.C.G.S. § 106-277.34(a), and outline recovery limitations in "any court action where a buyer alleges that he or she suffered damages due to the failure of agricultural or vegetable seed to produce or perform as labeled . . . and the buyer failed to make a sworn complaint against the dealer as set forth in G.S. 106-277.30," quoting *id.* § 106-277.34(b). At the same time, although these two provisions do explicitly regulate private actions involving mislabeled seeds, their existence does not abrogate our reasoning in *Gore*. Again, because "the legislature is always presumed to act with full knowledge of prior and existing law" and it has taken no action over the last forty years to invalidate our interpretation in *Gore* of the policy of the Seed Law regarding limitation of remedies, "we may assume that [the General Assembly] is satisfied with that interpretation." *Polaroid Corp.*, 349 N.C. at 303, 507 S.E.2d at 294. Defendant's reliance on the doctrine of *expressio unius est exclusio alterius* is inapposite.

In *Gore* we interpreted the Seed Law to invalidate enforcement of limitation of remedies clauses in private, civil actions based on mislabeled seed. 279 N.C. at 208, 182 S.E.2d at 398. For the reasons stated

above, we apply our decision in *Gore* to the present case and reaffirm our previous conclusion that it is the public policy of North Carolina, as expressed by the General Assembly in the Seed Law, to protect farmers from "the disastrous consequences of planting seed of one kind, believing [they are] planting another." *Id.* at 208, 182 S.E.2d at 398. For the purpose of resolving the issue before us, we accept plaintiffs' contentions that they were sold mislabeled tobacco seed and could only recognize the mistake after planting the seeds and witnessing yields of "off-type" plants that were "defective, disease prone, inferior, and unmarketable." In light of these facts, plaintiffs here fall squarely within the protection afforded by the policy we recognized in *Gore*. Enforcing defendant's limitation of remedies clauses pursuant to Article 2 of the UCC in this case would foreclose the possibility of plaintiffs' recovering consequential damages for the mislabeled seed and would, therefore, violate that policy. Accordingly, we hold that defendant's limitation of remedies clauses are unenforceable against plaintiffs, and we affirm the opinion and order of the North Carolina Business Court denying defendant's motions for partial summary judgment against all plaintiffs.

AFFIRMED.

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STATE OF NORTH CAROLINA
v.
JAMES L. JOHNSON

No. 151PA16

Filed 18 August 2017

**Search and Seizure—traffic stops—reasonable suspicion—too fast for conditions**

An officer had reasonable suspicion to initiate a traffic stop, so that the stop was constitutional and the superior court correctly denied defendant's motion to suppress evidence of driving while impaired. The evidence supported the findings that the officer saw defendant make a sharp left turn and fishtail in snowy conditions and he then stopped defendant for driving too fast for conditions. The reasonable suspicion standard, which is less demanding than probable cause, applies to all traffic stops. Just because defendant did not leave the lane in which he was traveling or hit the curb did not mean that he was driving safely.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 784 S.E.2d 633 (2016), reversing a judgment entered on 3 March 2015 by Judge Mark E. Powell in Superior Court, Henderson County, and remanding for further proceedings. Heard in the Supreme Court on 21 March 2017.

*Joshua H. Stein, Attorney General, by J. Joy Strickland and J. Rick Brown, Assistant Attorneys General, for the State-appellant.*

*Jeffrey William Gillette for defendant-appellee.*

MARTIN, Chief Justice.

Defendant was stopped at a red light on a snowy evening. When the light turned green, defendant's truck abruptly accelerated, turned sharply left, and fishtailed, all in front of a police officer in his patrol car. The officer pulled defendant over for driving at an unsafe speed given the road conditions. Defendant argues that this stop was unconstitutional and seeks to suppress all of the evidence arising from it. Because we find that the officer had reasonable suspicion to stop defendant's truck, we hold that the stop was constitutional and reverse the decision of the Court of Appeals.

Defendant was cited for driving while impaired. In district court, defendant filed a motion to suppress the evidence of his impairment, and the district court granted the motion. The State appealed the district court's order to superior court for de novo review. The superior court denied the motion and remanded the case to the district court for further proceedings.

After the case was remanded, defendant pleaded guilty to driving while impaired. Defendant appealed the district court's judgment to the superior court, where he refiled his motion to suppress. The motion came before the same superior court judge who previously heard the motion. After finding that there was "no reason to hear [the motion] again," the superior court judge indicated that, to the extent that the motion needed to be denied a second time, he was denying it. Defendant then pleaded guilty to driving while impaired in superior court while preserving his right to appeal the superior court's denial of his motion to suppress.

Defendant appealed to the Court of Appeals, which determined that the traffic stop was unconstitutional. *State v. Johnson*, ___ N.C. App. ___, ___, 784 S.E.2d 633, 636 (2016). The Court of Appeals stated that

"there was nothing illegal about Defendant's left-hand turn" and held that the police officer who pulled defendant over therefore did not have reasonable suspicion to do so. *Id.* at ___, 784 S.E.2d at 636. We allowed the State's petition for discretionary review.

The Fourth Amendment to the United States Constitution states that "[t]he right of the people to be secure . . . , against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Although "Article I, Section 20 of the North Carolina Constitution contains different language [than the Fourth Amendment], it provides the same protection against unreasonable searches and seizures." *State v. Elder*, 368 N.C. 70, 73, 773 S.E.2d 51, 53 (2015). "A traffic stop is a seizure 'even though the purpose of the stop is limited and the resulting detention quite brief.' " *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (quoting *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)).

"Traffic stops have 'been historically reviewed under the investigatory detention framework first articulated in *Terry v. Ohio*.' " *Id.* at 414, 665 S.E.2d at 439 (citation omitted) (quoting *United States v. Delfin–Colina*, 464 F.3d 392, 396 (3d Cir. 2006)). In *Terry*, the Supreme Court of the United States held that an officer may make a brief investigatory stop of suspects walking on the street if the officer has a reasonable, articulable suspicion that "criminal activity may be afoot." 392 U.S. 1, 21, 30 (1968). Soon after, the Supreme Court applied the reasonable suspicion standard established in *Terry* to investigatory stops of vehicles near the international border. *See United States v. Brignoni–Ponce*, 422 U.S. 873, 881-82 (1975). Several years later, the Court extended the application of the reasonable suspicion standard to traffic stops more generally. *Prouse*, 440 U.S. at 663. In *State v. Styles*, we held that the reasonable suspicion standard applies to all traffic stops for traffic violations, "whether the traffic violation was readily observed or merely suspected." 362 N.C. at 415, 665 S.E.2d at 440.

The reasonable suspicion standard is "less demanding . . . than probable cause and requires a showing considerably less than preponderance of the evidence." *Id.* at 414, 665 S.E.2d at 439 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000)). Police officers must simply be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion." *Terry*, 392 U.S. at 21. The reasonable suspicion standard is therefore satisfied if an officer has "some minimal level of objective justification" for making the stop. *Styles*, 362 N.C. at 414, 665 S.E.2d at 439 (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)). To determine whether reasonable suspicion exists, courts must look at "the totality of

the circumstances," *United States v. Cortez*, 449 U.S. 411, 417 (1981), as "viewed from the standpoint of an objectively reasonable police officer," *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

When reviewing a ruling on a motion to suppress, we analyze whether the trial court's "underlying findings of fact are supported by competent evidence . . . and whether those factual findings in turn support the [trial court's] ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). We address only the superior court's ruling, as we do not need to address the district court's prior proceedings. *Cf. State v. Sparrow*, 276 N.C. 499, 507, 173 S.E.2d 897, 902 (1970) ("When an appeal of right is taken to the Superior Court, in contemplation of law it is as if the case had been brought there originally and there had been no previous trial. The judgment appealed from is completely annulled and is not thereafter available for any purpose.").

We first review the superior court's findings of fact to determine if they are supported by competent evidence.[1] In summary, the superior court found the following facts. Snow had started falling on the night in question, and slush had begun to accumulate on the roads. Defendant was stopped at a red light. Officer Garrett Gardin of the Hendersonville Police Department was stopped in the lane next to defendant's truck. When the light turned green, defendant "abruptly accelerated" his truck and turned left. The truck fishtailed, but defendant regained control of the truck and stayed in his lane. Officer Gardin pulled defendant over because, in Officer Gardin's opinion, defendant was driving unsafely for the road conditions.

Officer Gardin's testimony at the suppression hearing in superior court supports these findings of fact. The officer testified that "snowfall was going to the ground," that snow was "starting to hold on to the ground," and that he had to switch to an "older model" marked police car that "had snow tires on it." Defendant's truck "approached [the] left-hand side of [his] car," Officer Gardin testified, and, "right when the light turned green[,] [defendant] immediately took a left turn . . . , screeching

1. In November 2014, when this case was first before the superior court, that court issued an Order on Motion to Suppress, which contained its findings of fact and conclusions of law. As we have already noted, after defendant pleaded guilty in district court, appealed the judgment to superior court, and renewed his motion to suppress in superior court, the motion came before the same superior court judge who had issued the November 2014 Order. Because the superior court judge found that there was "no reason to hear [the motion] again" and did not issue new findings of fact or conclusions of law, we review the findings of fact and conclusions of law that the superior court made in its November 2014 Order.

[his] tires." In response to a question at the suppression hearing, Officer Gardin agreed that defendant's truck had "jackknifed." According to Officer Gardin, "the tail end" of the truck "was headed toward the . . . corner w[h]ere there was a sidewalk next to [some] tennis courts . . . but [the truck] never actually ma[d]e it on to the sidewalk." Officer Gardin testified that, in his opinion, defendant was driving "too fast for what was going on at the time as far as [the] weather was concerned."

We next review whether the superior court's findings of fact support its ultimate conclusion of law that the stop was constitutional.[2] As we have said, the reasonable suspicion standard applies to traffic stops "whether the traffic violation was readily observed or merely suspected." *Styles*, 362 N.C. at 415, 665 S.E.2d at 440. In making this determination, our opinion in *Styles* cited—among other opinions from federal circuit courts—both *United States v. Delfin–Colina*, 464 F.3d at 396-97, and *United States v. Chanthasouxat*, 342 F.3d 1271, 1275-76 (11th Cir. 2003). *See Styles*, 362 N.C. at 415-16, 665 S.E.2d at 440-41. While these opinions are, of course, not binding on this Court, they can help us understand how the reasonable suspicion standard applies when a police officer allegedly observes a traffic violation instead of just suspecting one. In *Delfin–Colina*, the Third Circuit stated that "an officer need not be factually accurate in her belief that a traffic law had been violated but, instead, need only produce facts establishing that she reasonably believed that a violation had taken place." 464 F.3d at 398. And in *Chanthasouxat*, the Eleventh Circuit explained that the important question when determining the constitutionality of a traffic stop after an allegedly observed violation is not "whether [the defendant is] actually guilty of committing a traffic offense," but "whether it was reasonable for [the officer] to *believe* that [a traffic offense had been committed]." 342 F.3d at 1277 (alterations in original) (quoting *United States v. Cashman*, 216 F.3d 582, 587 (7th Cir. 2000)).[3]

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2. In its analysis, the superior court incorrectly used probable cause, not reasonable suspicion, as the standard to determine the constitutionality of this stop. As we have already explained, however, reasonable suspicion is the proper standard here. *See Styles*, 362 N.C. at 415, 665 S.E.2d at 440.

3. Although *Chanthasouxat* itself took no position on whether the reasonable suspicion standard or the probable cause standard applied in this context, *see* 342 F.3d at 1275 & n.2, 1280, the language from *Chanthasouxat* that we have quoted comes from *United States v. Cashman*, which used a probable cause standard, *see* 216 F.3d at 587. The common thread among all of these cases, however, is best summed up in *Cashman*, which states that "the Fourth Amendment requires only a reasonable assessment of the facts, not a perfectly accurate one." *Id.* at 587, *quoted in Chanthasouxat*, 342 F.3d. at 1277. It may be that the facts necessary to make a belief reasonable can be fewer or less significant when the reasonable suspicion standard, rather than the probable cause standard, applies. But

Here, Officer Gardin thought that defendant was driving at an unsafe speed given the weather and the conditions of the road. Under N.C.G.S. § 20-141(a), "[n]o person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing." N.C.G.S. § 20-141(a) (2015). As long as Officer Gardin reasonably believed, and had some "minimal level of objective justification" to believe, *Styles*, 362 N.C. at 414, 665 S.E.2d at 439 (quoting *Sokolow*, 490 U.S. at 7), that defendant had just driven at a speed that was greater than was reasonable and prudent for the snowy and slushy conditions that Officer Gardin was observing, then the reasonable suspicion standard was met.

As the trial court's findings of fact show, Officer Gardin was stopped at the same intersection as defendant before defendant took his sharp left turn. Officer Gardin was there when defendant's truck abruptly accelerated, turned, and fishtailed. The trial court, moreover, found that defendant "regained control" of his truck after it fishtailed, which indicates that defendant *lost* control of his truck when it fishtailed. All of these facts show that it was reasonable for Officer Gardin to believe that defendant's truck had fishtailed, and that defendant had lost control of his truck, because of defendant's abrupt acceleration while turning in the snow. It is common knowledge that drivers must drive more slowly when it is snowing, because it is easier to lose control of a vehicle on snowy roads than on clear ones. And any time that a driver loses control of his vehicle, he is in danger of damaging that vehicle or other vehicles, and of injuring himself or others. So, under the totality of these circumstances, it was reasonable for Officer Gardin to believe that defendant had violated N.C.G.S. § 20-141(a) by driving too quickly given the conditions of the road.

The Court of Appeals' decision suggests that an officer can initiate a traffic stop based on the officer's belief that he or she has just observed a traffic violation only if the officer *actually* observed a traffic violation. *See Johnson*, ___ N.C. App. at ___, 784 S.E.2d at 636. The Court of Appeals reasoned, among others things, that defendant did not commit any violation because his truck did not leave its lane or hit the curb when it fishtailed. *Id.* at ___, 784 S.E.2d at 636.

But again, in order to have reasonable suspicion to conduct a traffic stop based on a violation that an officer allegedly observed, the officer

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whichever standard applies, the underlying point—that an officer need not observe an actual offense as long as the officer can point to facts that give him or her a reasonable belief that an offense has been committed—is the same.

does not need to observe an actual traffic violation. To be sure, when a defendant does in fact commit a traffic violation, it is constitutional for the police to pull the defendant over. *See, e.g.*, *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). But while an actual violation is sufficient, it is not necessary. To meet the reasonable suspicion standard, it is enough for the officer to *reasonably believe* that a driver has violated the law. *See Styles*, 362 N.C. at 415-16, 665 S.E.2d at 440-41; *accord Delfin–Colina*, 464 F.3d at 398; *Chanthasouxat*, 342 F.3d at 1277 (quoting *Cashman*, 216 F.3d at 587). In other words, even if defendant could show—had he been charged with violating subsection 20-141(a)—that he had not in fact violated that subsection, the traffic stop in this case was still constitutional as long as it was reasonable for Officer Gardin to believe that he saw defendant violate that subsection. Reasonable belief is a less stringent standard than legal certainty.

The fact that defendant stayed in his lane and did not hit the curb, moreover, does not necessarily mean that he was driving at a safe speed given the road conditions. After all, a driver may be traveling at an unsafe speed but be able to avoid accident or injury through sheer good fortune—as indeed may have happened here when defendant lost control of his truck in a snowy intersection and fishtailed toward a sidewalk before managing to regain control. By the same token, just because defendant did not leave the lane that he was traveling in or hit the curb does not mean that he was driving safely.

Officer Gardin had reasonable suspicion to initiate the traffic stop here, so the stop was constitutional. As a result, the superior court correctly denied defendant's motion to suppress. We therefore reverse the decision of the Court of Appeals.

REVERSED.

STATE OF NORTH CAROLINA
v.
CALVIN SHERWOOD WATTS

No. 132A16

Filed 18 August 2017

**Criminal Law—request for limiting instruction—sufficiently clear**

In a prosecution arising from defendant's alleged sexual assault on an eleven-year-old girl, defendant's convictions were reversed where the trial court did not give defendant's requested limiting instruction about the testimony of a witness who testified about an alleged prior rape. Contrary to the State's contention, defense counsel's motion, viewed in context, was plainly a request for a Rule 404(b) limiting instruction, although not as explicitly worded as would be the better practice.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 783 S.E.2d 266 (2016), reversing judgments entered on 31 October 2014 by Judge James Gregory Bell in Superior Court, Columbus County, and granting defendant a new trial. After hearing oral argument on 15 February 2017, the Court ordered the parties on 3 March 2017 to submit supplemental briefs. Additional issues raised in the supplemental briefs were determined without oral argument pursuant to N.C. R. App. P. 30(f)(1).

*Joshua H. Stein, Attorney General, by Laura E. Crumpler, Special Deputy Attorney General, for the State-appellant.*

*John Keating Wiles for defendant-appellee.*

PER CURIAM.

In October 2014, defendant Calvin Sherwood Watts was tried in the Superior Court in Columbus County on one count of first-degree rape, three counts of first-degree sexual offense with a child, and one count of kidnapping. The charges arose from defendant's alleged sexual assault on an eleven-year-old girl to whom defendant was like a "grandpa." Before presenting the case to the jury, the State filed a notice of its intent to offer evidence pursuant to Rule of Evidence 404(b). *See* N.C.G.S. § 8C-1, Rule 404(b) (2015) ("Evidence of other crimes, wrongs,

or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident."). A proposed State's witness planned to testify that defendant had forced his way into her apartment and raped her in 2003. Those alleged events resulted in the return of indictments for rape and for breaking or entering against defendant, but those charges were dismissed in 2005. Defendant filed a pretrial motion *in limine* seeking to prevent the admission of Rule 404(b) evidence in the present case.

Following arguments on the Rule 404(b) motions and a voir dire hearing, the trial court ruled that the challenged evidence was admissible under Rule 404(b) to show opportunity and plan, thereby permitting the witness to testify before the jury over defense counsel's repeated objections. At the conclusion of the witness's testimony, defense counsel "move[d] to strike the testimony . . . and ask[ed] for an instruction and in the alternative ask[ed] for a mistrial." The trial court denied defendant's motions and did not give the requested instruction to the jury. At the conclusion of the State's case-in-chief, the trial court dismissed the charge of first-degree rape and allowed the case to go forward on the lesser included offense of attempted first-degree rape. The jury ultimately returned guilty verdicts on all four charges against defendant that were submitted to the jury.

Defendant asserts that his motion "for an instruction" was clearly a request for a limiting instruction regarding the Rule 404(b) evidence that had just been presented by the State's witness. The State, in contrast, contends that defendant's request was unclear and that he has thus waived the issue on appeal. We conclude that, viewed in context,[1] defense counsel's motion, while not as explicitly worded as would be the better practice, nonetheless was plainly a request for a Rule 404(b) limiting instruction. *See* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make *if the specific grounds were not apparent from the context*." (emphasis added)).

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1. Specifically, the motion followed the State's notice of intent to introduce Rule 404(b) evidence from its witness, defendant's motion *in limine* to exclude that evidence, the arguments of counsel and the voir dire hearing on the issue, and defense counsel's repeated objections to the witness's testimony.

Our General Statutes provide that "[w]hen evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, *shall* restrict the evidence to its proper scope and instruct the jury accordingly." N.C.G.S. § 8C-1, Rule 105 (2015) (emphasis added). "Failure to give the requested instruction must be held prejudicial error for which [a] defendant is entitled to a new trial." *State v. Norkett*, 269 N.C. 679, 681, 153 S.E.2d 362, 363 (1967); *cf. State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991) (failure to give a limiting instruction not requested by a defendant is not reviewable on appeal); *State v. Jones*, 322 N.C. 406, 368 S.E.2d 844 (1988) (same). Accordingly, because defendant was prejudiced by the trial court's failure to give the requested limiting instruction, we affirm, as modified herein, the opinion of the Court of Appeals that reversed defendant's convictions and remanded the matter to the trial court for a new trial.

MODIFIED IN PART AND AFFIRMED.

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DAVID WRAY
v.
CITY OF GREENSBORO

No. 255A16

Filed 18 August 2017

**Immunity—sovereign—contract actions**

The averments in plaintiff's first amended complaint were sufficient to allege a waiver of governmental immunity due to a city's failure to honor contractual obligations to plaintiff as an employee. In contract actions, the doctrine of sovereign immunity will not be a defense; a waiver of governmental immunity is implied and effectively alleged when the plaintiff pleads a contract claim. In the context of a contract action, rather than a tort action, N.C.G.S. § 160A-485 has no application and does not limit how governmental immunity may be waived.

Justice ERVIN dissenting.

Justice BEASLEY joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 787 S.E.2d 433 (2016), reversing an order entered on 13 May 2015 by Judge James C. Spencer, Jr. in Superior Court, Guilford County, and remanding the case for further proceedings. Heard in the Supreme Court on 9 May 2017 in session in the Old Chowan County Courthouse (1767) in the Town of Edenton pursuant to N.C.G.S. § 7A-10(a).

*Carruthers & Roth, P.A., by Kenneth R. Keller and Mark K. York, for plaintiff-appellee.*

*Mullins Duncan Harrell & Russell PLLC, by Alan W. Duncan and Stephen M. Russell, Jr.; and Smith Moore Leatherwood LLP, by Patrick M. Kane, for defendant-appellant.*

*Wilson & Helms LLP, by Lorin J. Lapidus; and Kimberly S. Hibbard, General Counsel, and Gregory F. Schwitzgebel, III, Associate General Counsel, for North Carolina League of Municipalities, amicus curiae.*

HUDSON, Justice.

This case involves attempts by plaintiff, David Wray, a former Chief of Police for defendant, the City of Greensboro, to obtain reimbursement from the City for costs incurred by plaintiff in defending lawsuits brought against him for events that occurred during his tenure as Chief of Police. Because we conclude that plaintiff has sufficiently pleaded waiver of governmental immunity by alleging the essence of a contract claim, we affirm the decision of the Court of Appeals reversing the trial court's order of dismissal and remanding the matter for further proceedings.

On 2 January 2009, plaintiff filed a complaint in the Superior Court in Guilford County, seeking, *inter alia*, a judgment declaring that he is entitled to indemnification and reimbursement from the City for all legal expenses incurred by him in connection with two lawsuits naming him as a defendant. In his complaint plaintiff stated that he began employment with defendant as a police officer in March 1981 and rose through the ranks to be named Chief of Police in July 2003. According to plaintiff, he was told that he "would need to take appropriate steps to restore the integrity and high standards" of the police department that had deteriorated under his predecessor. Plaintiff instituted measures that were unpopular with some officers, and he was ultimately forced to resign from his position in January 2006.

In 2007 and 2008, respectively, two police officers sued plaintiff and other individuals, as well as the City, seeking damages for various wrongs alleged to have been inflicted on them during plaintiff's tenure. In his complaint plaintiff states that he requested that the City provide him with a defense in both suits, which "contain[ed] allegations that David Wray was acting within the course and scope of his employment with the City"; however, the City refused to do so.

Plaintiff asserted that in November 1980, long before either suit was filed, "the City passed a Resolution which provided that if a City officer or an employee were sued in either their individual or official capacities, the City would provide for the defense of said employee or individual and pay any judgment resulting from said suit against the employee or official." Plaintiff stated that "[t]he Resolution provided for defense and indemnification if the employee or official were acting in the scope and course of their employment or duty, unless the employee or official: 1) acted with fraud, corruption or actual malice, or 2) acted or failed to act in a wanton or oppressive manner." The 1980 Resolution reads that, as authorized by the General Assembly in 1977 in section 160A-167 of the North Carolina General Statutes,[1] "it is . . . the policy of the City of Greensboro to provide for the defense of its officers and employees against civil claims and judgments and to satisfy the same, either through insurance or otherwise, when resulting from any act done . . . in the scope and course of their employment," with the exceptions stated above. The policy authorizes the City Manager to determine whether a claim filed against an officer meets the standards set forth in the policy and states that the City Council "shall determine . . . whether" to provide

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1. Section 160A-167 of the North Carolina General Statutes, titled "Defense of employees and officers; payment of judgments," reads in pertinent part:

> Upon request made by . . . any . . . former employee or officer, . . . any city . . . may provide for the defense of any civil or criminal action or proceeding brought against him either in his official or in his individual capacity, or both, on account of any act done or omission made, or any act allegedly done or omission allegedly made, in the scope and course of his employment or duty as an employee or officer of the city . . . . The defense may be provided by the city . . . by its own counsel, or by employing other counsel, or by purchasing insurance which requires that the insurer provide the defense. Providing for a defense pursuant to this section is hereby declared to be for a public purpose, and the expenditure of funds therefor is hereby declared to be a necessary expense. Nothing in this section shall be deemed to require any city . . . to provide for the defense of any action or proceeding of any nature.

N.C.G.S. § 160A-167(a) (2015).

for payment of any such claim made or judgment entered against an officer.

Plaintiff asked the court to "enter a declaratory judgment requiring the City to defend and indemnify him in connection with [both lawsuits]" and to pay his costs for defending those suits.

The case was removed to federal court to address a companion federal claim asserted by plaintiff. That claim was dismissed, and in August 2013, the state-law claim was remanded to the Superior Court in Guilford County.

On 20 October 2014, plaintiff filed an amended complaint reflecting dismissal of the federal claim and adding details to his remaining claim seeking indemnification and reimbursement from the City. Specifically, plaintiff stated that a third lawsuit was filed against him, the City, and other individuals in January 2009, and that he also had to pay his own defense costs for that action. Plaintiff reiterated that "[a]s an employee of the City acting within the course and scope of his employment, and pursuant to the provisions of the City Policy, [he] is entitled to indemnification and reimbursement for the expenses he has incurred as a result of the allegations by and position taken by the City, as well as costs he has incurred in connection with his defense" in all three lawsuits "in the amount of $220,593.71."

On 24 November 2014, the City filed a motion to dismiss under Civil Procedure Rules 12(b)(1), 12(b)(2), and 12(b)(6). Defendant asserted that the complaint should be dismissed for "lack of a justiciable controversy, lack of personal and subject matter jurisdiction, and for failure to state a claim." Defendant argued, *inter alia*, that the claims asserted by plaintiff in his first amended complaint, including his "newly-added claims for reimbursement of legal expenses," "are barred by the doctrine of governmental immunity, and accordingly Plaintiff has failed to state a claim on which relief can be granted."

On 13 May 2015, Judge James C. Spencer, Jr. entered an order dismissing plaintiff's first amended complaint with prejudice. The trial court ruled that defendant is "shielded by the doctrine of governmental immunity, which immunity has not been waived." The court added, "Neither the institution of a plan adopted pursuant to N.C.G.S. § 160A-167, under which a city may pay all or part of some claims against employees of the city, nor action taken by the city under N.C.G.S. § 160A-167, waives governmental immunity." Plaintiff appealed to the Court of Appeals.

On 7 June 2016, a divided panel of the Court of Appeals reversed the trial court's order dismissing plaintiff's claim and remanded the matter

for further proceedings. *Wray v. City of Greensboro*, ___ N.C. App. ___, 787 S.E.2d 433 (2016). The majority held that plaintiff "has, in fact, set forth allegations that the City has waived governmental immunity . . . based on the City's act of entering into an employment agreement with Plaintiff." *Id.* at ___, 787 S.E.2d at 435.

The majority explained, "Specifically, Plaintiff has made a breach of contract claim, essentially alleging that he had a contract with the City to work for the City and that pursuant to the City's contractual obligations, the City is required to pay for his litigation expenses." *Id.* at ___, 787 S.E.2d at 435 (emphasis omitted). The majority added, "Importantly, the City is authorized to enter into employment contracts with its police officers, and the City is authorized by N.C.[G.S.] § 160A-167 to enact a policy by which it may contractually obligate itself to pay for certain legal expenses incurred by these officers." *Id.* at ___, 787 S.E.2d at 435-36.

The majority reiterated throughout its opinion that this appeal is not about the merits of plaintiff's contract claim. *Id.* at ___, 787 S.E.2d at 436-37. Rather, the issue to be resolved is whether the trial court erred in dismissing the complaint "based on the doctrine of governmental immunity, the only basis of its order." *Id.* at ___, 787 S.E.2d at 436 (emphasis omitted). The majority reviewed plaintiff's amended complaint and determined that plaintiff sufficiently alleged waiver. *Id.* at ___, 787 S.E.2d at 437. Specifically, the majority determined that plaintiff alleged "that he was employed by the City's Police Department as the Chief of Police, that he was acting within the 'course and scope of his employment' at all times material to his claim, that pursuant to the provisions of the City Policy he is entitled to reimbursement for his legal expenses and fees, and that the City failed to honor the City Policy." *Id.* at ___, 787 S.E.2d at 437. Therefore, the majority held that plaintiff "establish[ed] waiver through a breach of Plaintiff's contractual relationship as an employee of the City." *Id.* at ___, 787 S.E.2d at 437. The majority further held that "the City is not shielded by the doctrine of governmental immunity to the extent that Plaintiff's action is based in contract." *Id.* at ___, 787 S.E.2d at 438. Accordingly, the majority reversed the trial court's order and remanded the case for further proceedings. *Id.* at ___, 787 S.E.2d at 438.

The dissent would conclude that the trial court properly granted defendant's motion to dismiss. *Id.* at ___, 787 S.E.2d at 438 (Bryant, J., dissenting). The dissent would characterize the City's policy, as declared in the 1980 Resolution, as "prescrib[ing] an intent to provide for the defense of officers and employees," which, according to the dissent, does not equate to "provid[ing] substantive rights or procedural steps."

*Id.* at ___, 787 S.E.2d at 439 (citations and emphasis omitted). The dissent "would hold that the Resolution is not a contractual provision upon which plaintiff can compel defendant's performance." *Id.* at ___, 787 S.E.2d at 439.

While acknowledging that "there is plenary support for the proposition that an employer-employee relationship is essentially contractual and such a relationship often waives immunity from suit on the contract," the dissent would nonetheless affirm the trial court. *Id.* at ___, 787 S.E.2d at 439 (citations omitted). The dissent would conclude "that the record before the trial court was sufficient to determine that plaintiff could not establish a valid contractual agreement with defendant City of Greensboro on the issue central to this action, the provision of a legal defense as a condition of employment." *Id.* at ___, 787 S.E.2d at 439-40. Accordingly, the dissent would "hold the trial court was correct in concluding that defendant . . . did not waive its governmental immunity to plaintiff's suit." *Id.* at ___, 787 S.E.2d at 440. Therefore, the dissent would affirm the trial court's order dismissing plaintiff's complaint. *Id.* at ___, 787 S.E.2d at 440. Defendant filed its appeal based on the dissenting opinion.

Because we agree that plaintiff has sufficiently pleaded waiver of governmental immunity by alleging a contract claim, we affirm the decision of the Court of Appeals reversing the trial court's order of dismissal and remanding the matter for further proceedings.

"Dismissal of an action under Rule 12(b)(6) is appropriate when the complaint 'fail[s] to state a claim upon which relief can be granted.' " *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 7 (2015) (alteration in original) (quoting N.C. R. Civ. P. 12(b)(6)). "[T]he well-pleaded material allegations of the complaint are taken as [admitted]; but conclusions of law or unwarranted deductions of fact are not admitted." *Id.* at 448, 781 S.E.2d at 7 (first alteration in original) (quoting *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970)). "The system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss." *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 334 S.E.2d 751, 755 (1985). "A complaint should not be dismissed under Rule 12(b)(6) '. . . unless it affirmatively appears that plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim.' " *Id.* at 481, 334 S.E.2d at 755 (quoting *Presnell v. Pell*, 298 N.C. 715, 719, 260 S.E.2d 611, 613 (1979)). "We review appeals from dismissals under Rule 12(b)(6) de novo." *Arnesen*, 368 N.C. at 448, 781 S.E.2d at 8 (citing *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013)).

Additionally, "[q]uestions of law regarding the applicability of sovereign or governmental immunity are reviewed de novo." *Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611, 781 S.E.2d 282, 284 (2016) (citations omitted).

As a general rule, "[u]nder the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity." *Evans ex rel. Horton v. Hous. Auth.*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004) (quoting *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997)); *see also Smith v. State*, 289 N.C. 303, 309, 222 S.E.2d 412, 417 (1976). Specifically, "[t]he doctrine has proscribed both contract and tort actions against the [S]tate and its administrative agencies, as well as suits to prevent a State officer or Commission from performing official duties or to control the exercise of judgment on the part of State officers or agencies." *Smith*, 289 N.C. at 309-10, 222 S.E.2d at 417 (citations omitted). Governmental immunity is that portion of the State's sovereign immunity which extends to local governments. *See, e.g.*, *Evans*, 359 N.C. at 53, 602 S.E.2d at 670; *Meyer*, 347 N.C. at 104, 489 S.E.2d at 884.

A State or local government, however, waives that immunity when it enters into a valid contract, to the extent of that contract. *Whitfield v. Gilchrist*, 348 N.C. 39, 42-43, 497 S.E.2d 412, 414 (1998); *Smith*, 289 N.C. at 320, 222 S.E.2d at 423-24. Specifically, this Court has held "that whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." *Smith*, 289 N.C. at 320, 222 S.E.2d at 423-24. Thus, "in causes of action on contract . . . , the doctrine of sovereign immunity will not be a defense to the State. The State will occupy the same position as any other litigant." *Id.* at 320, 222 S.E.2d at 424 (citation omitted). "Likewise, a city or county waives immunity when it 'enters into a valid contract.' " *Wray*, ___ N.C. App. at ___, 787 S.E.2d at 436 (majority opinion) (emphasis omitted) (quoting *M Series Rebuild, LLC v. Town of Mount Pleasant*, 222 N.C. App. 59, 65, 730 S.E.2d 254, 259, *disc. rev. denied*, 366 N.C. 413, 735 S.E.2d 190 (2012)).

"In order to overcome a defense of governmental immunity, the complaint must specifically allege a waiver of governmental immunity. Absent such an allegation, the complaint fails to state a cause of action." *Fabrikant v. Currituck County*, 174 N.C. App. 30, 38, 621 S.E.2d 19, 25 (2005) (quoting *Paquette v. County of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002) (citations omitted), *disc. rev. denied*, 357 N.C. 165, 580 S.E.2d 695 (2003)); *accord Hinson v. City of Greensboro*, 232

N.C. App. 204, 210, 753 S.E.2d 822, 827 (2014). "This requirement does not, however, mandate that a complaint use any particular language. Instead, consistent with the concept of notice pleading, a complaint need only allege facts that, if taken as true, are *sufficient to establish* a waiver . . . [of] immunity." *Fabrikant*, 174 N.C. App. at 38, 621 S.E.2d at 25 (emphasis added) (citation omitted). Because in contract actions "the doctrine of sovereign immunity will not be a defense," a waiver of governmental immunity is implied, and effectively alleged, when the plaintiff pleads a contract claim. *See Smith*, 289 N.C. at 320, 222 S.E.2d at 423-24 ("[W]henever the State of North Carolina . . . enters into a valid contract, *the State implicitly consents to be sued* for damages on the contract in the event it breaches the contract." (emphasis added)). Thus, an allegation of a valid contract is an allegation of waiver of governmental immunity.

Here plaintiff adequately pleaded a contract action: that he had an employment relationship with the City that included the obligation on the part of the City to pay for his defense and that the City failed to do so. Specifically, in his first amended complaint plaintiff alleged, in pertinent part, as follows:

> 2. The plaintiff . . . was formerly Chief of Police of the Greensboro Police Department.
>
> . . . .
>
> 4. David Wray began employment with the Police Department of the City of Greensboro as a police officer in March of 1981.
>
> 5[.] Through the years, David Wray was promoted to Sergeant, Lieutenant, Assistant Chief, and ultimately was promoted . . . to the position of Chief of Police in July of 2003.
>
> . . . .
>
> 25. Mitchell Johnson's actions in locking David Wray from his office effectively ended David Wray's ability to serve as Chief and as a practical matter terminated David Wray's employment with the City.
>
> 26. David Wray submitted his resignation as Chief on January 9, 2006.
>
> . . . .

35[.] At all times material hereto . . . David Wray acted in the scope and course of his employment with the City, and not because of actual fraud, corruption, actual malice, or in a wanton or oppressive manner.

. . . .

38[.] By letter dated June 5, 2007, counsel for David Wray wrote to counsel representing the City, pointing out that the Fulmore complaint pertained to "official capacity" conduct on the part of David Wray and requested that the City indemnify David Wray and provide him with a defense in the action. . . .

39. By letter dated July 3, 2007, counsel for the City responded to the request that the City provide David Wray with representation by providing a copy of the City Policy dated 13 November 1980 and 18 November 1980 ("City Policy") and denied the request for representation, based "on current information." . . .

40. Upon information and belief, the City paid for representation of Randy Gerringer, Brian Bissett and Craig McMinn in the Fulmore Suit.

. . . .

46. David Wray also requested that the City provide him with a defense in connection with the Hinson Suits.

47. The City did not defend David Wray or provide David Wray with a defense in the Hinson Suits.

. . . .

51. David Wray requested that the City provide him with a defense and indemnification in the Alexander Suit.

52. The City did not defend David Wray or provide David Wray with a defense in the Alexander Suit.

. . . .

62. At all times material hereto, David Wray was acting within the course and scope of his employment with the City of Greensboro, in the good faith discharge of his duties.

. . . .

> 64. At all times material to the allegations contained in the Fulmore Suit, the Hinson Suits, and the Alexander Suit, David Wray acted within the course and scope of his employment as the Chief of the Greensboro Police Department and is entitled to reimbursement for costs he incurred to defend himself in connection with the statements made by the City, as well as costs incurred in connection with his defense in the Fulmore Suit, the Hinson Suits, and the Alexander Suit.
>
> 65[.] The City has refused and continues to refuse to reimburse David Wray for his legal expenses.
>
> 66. As an employee of the City acting within the course and scope of his employment, and pursuant to the provisions of the City Policy, David Wray is entitled to indemnification and reimbursement for the expenses he has incurred as a result of the allegations by and position taken by the City, as well as costs he has incurred in connection with his defense in the Fulmore Suit, the Hinson Suits, and the Alexander Suit in the amount of $220,593.71.

In sum, plaintiff alleged that he was an "employee of" defendant, that he "acted within the course and scope of his employment as the Chief of the Greensboro Police Department," that "pursuant to the provisions of the City Policy, [he] is entitled to indemnification and reimbursement for the . . . costs he has incurred in connection with his defense" in various lawsuits, and that defendant "has refused and continues to refuse to reimburse" him.

In light of the low bar for notice pleading under Rule 12(b)(6), as well as the waiver of governmental immunity that is inferred from the pleading of a contract claim, we conclude that the averments in plaintiff's first amended complaint are sufficient to allege a waiver of governmental immunity due to the City's failure to honor contractual obligations to plaintiff as an employee. Although we hold that dismissal of the complaint was not warranted, like the Court of Appeals, we express no opinion on the merits of plaintiff's contract action. We simply conclude, as we did in *Smith*, that "plaintiff is not to be denied his day in court because his contract was with" the City. *Smith*, 289 N.C. at 322, 222 S.E.2d at 424.

Moreover, the trial court erroneously concluded that the City was "shielded by the doctrine of governmental immunity" based on this Court's decision in *Blackwelder v. City of Winston-Salem*, 332 N.C. 319,

420 S.E.2d 432 (1992). Citing *Blackwelder*, the trial court stated: "Neither the institution of a plan adopted pursuant to N.C.G.S. § 160A-167, under which a city may pay all or part of some claims against employees of the city, nor action taken by the city under N.C.G.S. § 160A-167, waives governmental immunity." *Blackwelder*, however, does not control here. In *Blackwelder* this Court stated that "[a]ction by the City under N.C.G.S. § 160A-167 does not waive immunity" in the context of a tort action, noting that "N.C.G.S. § 160A-485 provides that the *only way* a city may waive its governmental immunity is by the purchase of liability insurance." 332 N.C. at 324, 420 S.E.2d at 436 (emphasis added). Section 160A-485 of the North Carolina General Statutes specifically addresses waiver of immunity from civil liability in tort. N.C.G.S. § 160A-485(a) (2015) ("Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance."). Here, in the context of a contract action, rather than a tort action, section 160A-485 has no application and does not limit how governmental immunity may be waived. Because there is no analogous statute limiting mechanisms for waiver of governmental immunity in the context of contract actions, the reasoning in *Blackwelder* does not control here.

We conclude that plaintiff's first amended complaint sufficiently presents allegations of a claim sounding in contract. As such, we further conclude that the complaint sufficiently alleges that the City has consented to be sued to the extent of any such contract. These allegations are adequate to raise a waiver of governmental immunity, and thus, to survive the City's motion to dismiss. For these reasons, we affirm the decision of the Court of Appeals reversing the trial court's order of dismissal and remanding the matter for further proceedings.

AFFIRMED.

Justice ERVIN dissenting.

As a result of its reliance upon what I believe to be an excessively "low bar for notice pleading under [N.C.G.S. § 1A-1,] Rule 12(b)(6)," the Court has determined that plaintiff "adequately pleaded a contract action: that he had an employment relationship with the City that included the obligation on the part of the City to pay for his defense and that the City failed to do so." In view of my belief that plaintiff did not sufficiently allege the existence of a contractual relationship between himself and the City that encompassed a right to obtain reimbursement for the costs of defending the civil actions brought against him in the Alexander, Fulmore, and Hinson suits, I am unable to agree with

the Court's conclusion that plaintiff's amended complaint adequately alleged the necessary waiver of governmental immunity. As a result, I respectfully dissent from the Court's decision to affirm the Court of Appeals' opinion in this case.

The trial court dismissed plaintiff's first amended complaint on the grounds that the City had not waived its right to assert governmental immunity in this case, with "[n]either the institution of a plan adopted pursuant to N.C.G.S. § 160A-167, under which a city may pay all or part of some claims against employees of the city, nor action taken by the city under N.C.G.S. § 160A-167" sufficing to work such a waiver. In reversing the trial court's order, the Court of Appeals determined that plaintiff "has essentially pleaded that he had an employment relationship with the City and that the City has contractually obligated itself to pay for his defense as a benefit of his contract," with the issue of "[w]hether the City is, in fact, obligated to *pay contractually* by virtue of its passage of the City Policy [going] to the merits" rather than being "the subject of this appeal." *Wray v. City of Greensboro*, ___ N.C. App. ___, ____, 787 S.E.2d 433, 437 (2016). In upholding this determination, this Court has held that "plaintiff's first amended complaint sufficiently presents allegations of a claim sounding in contract" and "sufficiently alleges that the City consents to be sued to the extent of any such contract." As a result, the ultimate issue before the Court in this case is the extent, if any, to which plaintiff's first amended complaint adequately alleges that the City breached a contract with plaintiff under which plaintiff was entitled to obtain reimbursement for the cost of defending civil actions brought against him in connection with actions that he had taken in the course and scope of his employment by the City.

According to Rule 12(b)(6) of our Rules of Civil Procedure, a complaint is subject to dismissal in the event that it fails "to state a claim upon which relief can be granted." N.C.G.S. § 1A-1, Rule 12(b)(6) (2015). "When the complaint on its face reveals that no law supports the claim, reveals an absence of facts sufficient to make a valid claim, or discloses facts that necessarily defeat the claim, dismissal is proper." *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 8 (2015) (citing *Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)). In determining whether a motion to dismiss for failure to state a claim for relief should be allowed or denied, "the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not." *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (quoting 2A James Wm. Moore et al., *Moore's Federal Practice* ¶ 12.08 (2d ed. 1968)).

Rule 8(a)(1) of our Rules of Civil Procedure requires civil complaints to include "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief." N.C.G.S. § 1A-1, Rule 8(a)(1) (2015). Thus, pursuant to Rule 8(a)(1), a complaint is sufficient to state a claim upon which relief can be granted in the event that

> "it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and by using the rules provided for obtaining pretrial discovery to get any additional information he may need to prepare for trial." Nevertheless, the plaintiff's complaint must allege enough "to give the substantive elements of his claim."

*RGK, Inc. v. U.S. Fid. & Guar. Co.*, 292 N.C. 668, 674, 235 S.E.2d 234, 238 (1977) (quoting *Sutton*, 277 N.C. at 104-05, 176 S.E.2d at 167); *see also United Leasing Corp. v. Miller*, 45 N.C. App. 400, 405, 263 S.E.2d 313, 317 (stating that "[a] claim for relief must still satisfy the requirements of the substantive law which gave rise to the pleadings, and no amount of liberalization should seduce the pleader into failing to state enough to give the substantive elements of his claim"), *disc. rev. denied*, 300 N.C. 374, 267 S.E.2d 685 (1980). As this Court stated shortly after the enactment of the North Carolina Rules of Civil Procedure, "the additional requirements in our Rule 8(a)(1) manifest the legislative intent to require a more specific statement, or notice in more detail, than Federal Rule 8(a)(2) requires." *Sutton*, 277 N.C. at 100, 176 S.E.2d at 164.

Governmental immunity[1] "shields a defendant entirely from having to answer for its conduct at all in a civil suit for damages." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citation omitted). "Under the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity." *Evans ex rel. Horton v. Hous. Auth.*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004) (quoting *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997)). A

1. Although "[t]he State's sovereign immunity applies to both its governmental and proprietary functions, while the more limited governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions," *Evans ex rel. Horton v. Hous. Auth.*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004) (citations omitted), "[i]n application here, the distinction is immaterial," *Craig*, 363 N.C. at 335 n.3, 678 S.E.2d at 353 n.3, given the obviously governmental nature of the law enforcement function.

"complaint [against a local governmental entity] does not state a cause of action" unless it alleges a waiver of governmental immunity. *Fields v. Durham City Bd. of Educ.*, 251 N.C. 699, 701, 111 S.E.2d 910, 912 (1960).

As the Court acknowledges, a municipality can waive governmental immunity by entering into a valid express contract. *See Whitfield v. Gilchrist*, 348 N.C. 39, 42-43, 497 S.E.2d 412, 414 (1998) (citing *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976) (holding that, "whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract")). For that reason, the Court correctly notes that "a waiver of governmental immunity is implied, and effectively alleged, when the plaintiff pleads a contract claim," so that, in other words, "an allegation of a valid contract is an allegation of waiver of governmental immunity." On the other hand, in the absence of allegations that the parties entered into "both an express contract and a valid contract, the State has not waived its sovereign immunity." *Eastway Wrecker Serv., Inc. v. City of Charlotte*, 165 N.C. App. 639, 644, 599 S.E.2d 410, 413 (2004), *aff'd per curium*, 360 N.C. 167, 622 S.E.2d 495 (2005); *see also Whitfield*, 348 N.C. at 42-43, 497 S.E.2d at 415 (stating that, "[c]onsistent with the reasoning of *Smith*, we will not first imply a contract in law where none exists in fact, then use that implication to support the further implication that the [governmental entity] has intentionally waived its [governmental immunity] and consented to be sued for damages for breach of the contract it never entered in fact").

In order to state a valid express contract claim, the plaintiff "must allege the existence of a contract between plaintiff and defendant, the specific provisions breached, the facts constituting the breach, and the amount of damages resulting to plaintiff from such breach." *RGK*, 292 N.C. at 675, 235 S.E.2d at 238 (emphasis omitted) (quoting *Cantrell v. Woodhill Enters., Inc.* 273 N.C. 490, 497, 160 S.E.2d 476, 481 (1968)). Admittedly, "[t]here is no rule which requires a plaintiff to set forth in his complaint the full contents of the contract which is the subject matter of his action or to incorporate the same in the complaint by reference to a copy thereof attached as an exhibit" as long as the complaint "allege[s] in a plain and concise manner the material, ultimate facts which constitute his cause of action." *Id.* at 675, 235 S.E.2d at 238 (quoting *City of Wilmington v. Schutt*, 228 N.C. 285, 286, 45 S.E.2d 364, 366 (1947)). At a minimum, however, a complaint must "allege such a state of facts as would put defendants . . . on legal notice of the existence of the contract." *Eller v. Arnold*, 230 N.C. 418, 422, 53 S.E.2d 266, 269 (1949).

In his amended complaint, plaintiff alleged that he "began employment with the Police Department of the City of Greensboro as a police officer in March of 1981" and was, "[t]hrough the years, . . . promoted to Sergeant, Lieutenant, Assistant Chief, and[,] ultimately[,] . . . to the position of Chief of Police in July of 2003." According to a City Policy adopted on 13 and 17 November 1980,[2] a copy of which is attached to plaintiff's amended complaint and incorporated in plaintiff's complaint by reference:

> 1. [I]t is hereby declared to be the policy of the City of Greensboro to provide for the defense of its officers and employees against civil claims and judgments and to satisfy the same, either through insurance or otherwise,, when resulting from any act done or omission made, or any act allegedly done or omission allegedly made, in the scope and course of their employment or duty as employees or officers of the City, except and unless it is determined that an officer or employee (1) acted or failed to act because of actual fraud, corruption or actual malice or (2) acted or failed to act in a wanton or oppressive manner.
>
> 2. The City Manager or his designee shall determine whether or not a claim or suit filed against an officer or employee, either in his official or his individual capacity, or both, meets the standards set forth herein and the standards set forth in the aforementioned statute as specified herein for providing a defense for such officer or employee.
>
> . . . .

2. The City's Policy, upon which plaintiff's claim rests, was founded, in turn, upon N.C.G.S. § 160A-167(a), which currently provides, in pertinent part, that, "[u]pon request made by . . . any . . . employee or officer, or former employee or officer, . . . any city . . . may provide for the defense of any civil or criminal action or proceeding brought against him either in his official or in his individual capacity, or both, on account of any act done or omission made, or any act allegedly done or omission allegedly made, in the scope and course of his employment or duty as an employee or officer of the city," with "[n]othing in this section [to] be deemed to require any city . . . to provide for the defense of any action or proceeding of any nature." N.C.G.S. § 160A-167(a) (2015). The payment of any judgments entered against such municipal employees or officers, which is a subject beyond the scope of the present action given that plaintiff was not held to be liable in the Alexander, Fulmore, or Hinson suits, is governed by the provisions of N.C.G.S. § 160A-167(b) and (c).

4. The terms "officer" and "employee" as used herein shall mean present or past officers or employees who might hereafter have claims or judgments entered against them.

5. This resolution shall not be interpreted in any way to relieve any insurance company of its obligation under any insurance policy to protect the interest of any insured under said policy, or to reduce or eliminate the rights of any officer or any employee of the City against any other party. Further, except as expressly stated herein, this resolution is not to be interpreted as an [sic] waiver of any rights the City has against any party.

6. The terms of this resolution shall include all pending claims and litigation, as well as any future claims and litigation which may arise from the date of adoption of this resolution. Further, this resolution shall constitute the uniform standards under which claims made or civil judgments entered against officers or employees or former officers or employees of the City shall be paid, and a copy of this resolution shall be maintained in the office of the City Clerk for public inspection.

According to plaintiff, the actions of City Manager Mitchell Johnson in changing the locks on plaintiff's office on 6 January 2006 "effectively ended [plaintiff's] ability to serve as Chief and[,] as a practical matter[,] terminated [plaintiff's] employment with the City." Although plaintiff requested the City to pay for his defense in the Alexander, Fulmore, and Hinson suits, the City declined to do so. As a result, plaintiff claimed to be entitled to recover "indemnity and reimbursement of fees incurred by [him] as a result of failure by the [City] to honor the provisions of the" City's legal fee and judgment payment reimbursement policy given that, "[a]t all times material to the allegations contained in the Fulmore Suit, the Hinson Suits, and the Alexander Suit, [plaintiff] acted within the course and scope of his employment as the Chief of the Greensboro Police Department"; "[t]he City has refused and continues to refuse to reimburse [plaintiff] for his legal expenses"; and "[a]s an employee of the City acting within the course and scope of his employment, and pursuant to the provisions of the City Policy, [plaintiff] is entitled to indemnification and reimbursement for the expenses he has incurred as a result of the allegations by and position taken by the City, as well as costs he

has incurred in connection with his defense in the Fulmore Suit, the Hinson Suits, and the Alexander Suit in the amount of $220,593.71."

A careful review of the allegations contained in the amended complaint discloses that plaintiff never alleged that the City had a contractual obligation to provide, or reimburse him for the cost of, his defense in the Alexander, Fulmore, and Hinson suits. Aside from the fact that the word "contract" is nowhere to be found in the amended complaint, plaintiff simply never alleged that the protections available under the City's defense cost reimbursement and judgment payment policy constituted any part of the consideration that plaintiff received in return for his service as a City employee. Although there is no "mandate that a complaint use any particular language" and although a complaint "need only allege facts that, if taken as true, are sufficient to establish a waiver . . . of . . . immunity," *Fabrikant v. Currituck County*, 174 N.C. App. 30, 38, 621 S.E.2d 19, 25 (2005), plaintiff has completely failed to allege any basis for a finding that the provisions of the City's defense cost reimbursement and judgment payment policy have been incorporated into plaintiff's employment contract with the City, such as, for instance, by alleging that the Policy was a component of his contract of employment with the City or that he had a vested contractual right to be reimbursed for the cost of defending the Alexander, Fulmore, and Hinson suits in accordance with the Policy. On the contrary, plaintiff has simply alleged that he was a City employee and that the Policy exists, without making an effort to establish any nexus between these two facts. I simply do not believe that these allegations suffice to work a waiver of governmental immunity on the basis of a valid, express contract.

The ordinary sense of the language utilized in plaintiff's amended complaint indicates that, instead of attempting to allege an action for breach of his contract of employment with the City, plaintiff is attempting to bring a direct action to enforce a freestanding City policy separate and apart from his contract of employment. Such a reading of plaintiff's complaint is bolstered by plaintiff's repeated references to having "requested" the City to provide him with a defense or to reimburse him for the cost of his defense in the Alexander, Fulmore, and Hinson suits without making any reference to his employment contract with the City. Assuming that I have correctly interpreted plaintiff's complaint as asserting a direct claim against the City under the Policy rather than as asserting a claim for breach of plaintiff's contract of employment with the City, it is clear that plaintiff has failed to adequately allege any basis for a waiver of the City's governmental immunity defense.

Finally, even if plaintiff has alleged that the Policy was a portion of his contract of employment with the City, or even if plaintiff is entitled to bring a direct claim against the City on the basis of the Policy, he still cannot properly plead the requisite waiver of governmental immunity. As the Policy clearly states, "this resolution is not to be interpreted as [a] waiver of any rights the City has against any party."[3] When read in accordance with its plain meaning, the Policy itself clearly states that it should not be understood as creating any sort of enforceable contractual right or operating to work a waiver of any claim of governmental immunity that the City might otherwise be entitled to make. As a result, for all of these reasons, I respectfully dissent from my colleagues' decision and would reverse, rather than affirm, the Court of Appeals' decision to overturn the trial court's order dismissing plaintiff's complaint.[4]

Justice BEASLEY joins in this dissenting opinion.

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3. The Policy provision quoted in the text is fully consistent with, and possibly mandated by, the provision in N.C.G.S. § 160A-167(a) that states that "[n]othing in this section shall be deemed to require any city . . . to provide for the defense of any action or proceeding of any nature." In light of this provision, one could argue that a municipality lacks the necessary statutory authority to contractually obligate itself to reimburse an officer's or employee's defense costs. However, we need not decide that issue given the fact that plaintiff has, for the reasons discussed in the text, failed to adequately allege the waiver of governmental immunity necessary to support the claim that he has attempted to assert against the City in the amended complaint.

4. Although I am not certain that the proper interpretation of our prior decision in *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 420 S.E.2d 432 (1992), is directly relevant given the manner in which the Court has resolved this case, I disagree with the manner in which my colleagues have read our statement in *Blackwelder* to the effect that "[a]ction by the City under N.C.G.S. § 160A-167 does not waive immunity." *Id.*, at 324, 420 S.E.2d at 436. Although *Blackwelder* was, in fact, decided in the context of a tort action, I see no reason to believe that the statement quoted earlier in this footnote has no bearing on claims other than those sounding in tort, such as contract actions, and do not wish to be understood as having agreed with the Court's contrary view.

**COOPER v. BERGER**

[370 N.C. 59 (2017)]

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|---|---|---|
| ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA | ) | |
| v. | ) | From Wake County |
| PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; AND THE STATE OF NORTH CAROLINA | ) | |

No. 52PA17-2

ORDER

Plaintiff-Petitioner Governor Roy A. Cooper, III's Motion for Temporary Stay is dismissed as moot. Plaintiff-Petitioner Governor Roy A. Cooper, III's Petition for Writ of Supersedeas is decided as follows:

Under the authority granted to this Court pursuant to Article IV, Sections 1 and 12 of the North Carolina Constitution, and for the purpose of preserving the status quo during the expedited consideration of this case by the Court, the Court orders that:

1. The status quo as of the date of this order is to be maintained. Therefore, until further order of this Court, the parties are prohibited from taking further action regarding the unimplemented portions of the act that establishes a new "Bipartisan State Board of Elections and Ethics Enforcement." Act of Apr. 11, 2017, ch. 6, 2017 N.C. Sess. Laws ___, ___ (the Act). Likewise, the parties should not seek further enforcement of the order entered on 1 June 2017 by the three judge panel convened pursuant to N.C.G.S. § 1-267.1.

2. During the consideration of this case by this Court, the parties have no duty to take action to implement further the provisions of the Act providing for the establishment, qualification, or organization of the Bipartisan State Board of Elections and Ethics Enforcement and, furthermore, may not proceed in any manner to make any appointments to, or to provide for, the reestablishment, re-qualification, re-organization, or re-constitution of the former North Carolina State Board of Elections or the North Carolina State Ethics Commission.

3. The parties may petition the Court for the purpose of obtaining any modifications to this order that they deem necessary to preserve the status quo and to ensure the orderly and lawful conducting of local and other elections during the consideration of this case by this Court.

By order of the Court, this the 20th day of July, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 20th day of July, 2017.

s/ J. Bryan Boyd

J. BRYAN BOYD
Clerk of the Supreme Court

**COOPER v. BERGER**

[370 N.C. 61 (2017)]

| | | |
|---|---|---|
| ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA | ) | |
| v. | ) | From Wake County |
| PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; AND THE STATE OF NORTH CAROLINA | ) | |

No. 52PA17-2

SPECIAL ORDER

The Court, on its own motion, orders the State to make a filing no later than 2:00 p.m. on Monday, 21 August 2017 containing the following information:

1) the identity of each county board of elections which currently lacks a quorum;

2) the extent, if any, to which any affected county board of elections would be unable to act even if the consent order which has been proposed by the parties is entered;

3) the nature and extent of any pending, unresolved complaints which affect the manner in which any election to be held on or before 12 September 2017 in any of those counties is to be conducted;

4) the date or dates upon which the ballots associated with any election affected by those complaints have to be made available for absentee or early voting purposes;

5) the date or dates upon which absentee or early voting must begin in any election affected by those complaints;

6) and any other relevant information that the State believes would be helpful to the Court.

The other parties are ordered to advise the Court of the extent, if any, to which they wish to supplement or comment upon any of the information provided by the State in response to this order no later than 5:00 p.m. on Monday, 21 August 2017 and the date and time at which

any such supplemental information or comments can be filed with the Court. In the event that the parties cannot, with reasonable effort, make the filings required by this order, they should notify the Court of the time and date upon which they reasonably believe that the required filing can be made.

By order of the Court in Conference, this the 17th day of August, 2017.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of August, 2017.

s/ J. Bryan Boyd

J. BRYAN BOYD
Clerk of the Supreme Court

**PEOPLES v. TUCK**

[370 N.C. 63 (2017)]

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| CECELIA W. PEOPLES AND ERNEST A. ROBINSON, JR. | ) | |
| v. | ) | From Vance County |
| THOMAS H. TUCK | ) | |

No. 423PA16

ORDER

Defendant's petition for discretionary review is allowed for the limited purpose of remanding to the Court of Appeals to reconsider its holding in light of *United Community Bank (G.A.) v. Wolfe*, ___ N.C. ___, 799 S.E.2d 269 (2017). *See United Cmty. Bank*, ___ N.C. at ___, 799 S.E.2d at 272 (recognizing that, under N.C.G.S. § 1A-1, Rule 56(e), a party may not rest upon an affidavit containing merely "conclusory statement[s] without any supporting facts" to create a genuine issue of material fact).

By Order of the Court in Conference, this 17th day of August, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of August, 2017.

J. BRYAN BOYD
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

17 AUGUST 2017

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| 001PA17 | Doss, et al.<br>v. Adams, et al. | Joint Motion to Dismiss Petition and Appeal | Allowed<br>**07/21/2017** |
| 002P17 | State v. Juan Antonia Miller | 1. State's Motion for Temporary Stay (COA16-424)<br>2. State's Petition for *Writ of Supersedeas*<br>3. State's PDR Under N.C.G.S. § 7A-31 | 1. Allowed<br>**01/04/2017**<br>2. Allowed<br>3. Allowed |
| 007PA17 | In the Matter of J.A.M. | Guardian ad Litem's Motion to Withdraw and Substitute Counsel | Allowed<br>**07/07/2017** |
| 012PA17 | Eli Global, LLC, et al. v. Heavner | Plts' Motion to Dismiss Appeal | Denied<br>**06/14/2017** |
| 026P17 | David Wichnoski, O.D., P.A. d/b/a Spectrum Eye Care and Wichnoski RE, LLC v. Piedmont Fire Protection Systems, LLC and Shipp's Fire Extinguisher Sales and Services, Inc.<br>———————<br>Shipp's Fire Extinguisher Sales and Services, Inc., Third-Party Plaintiff v. Andujar Construction, Inc., Colony Investors, LLC, Custom Security, Inc., and Electrical Contracting Services, Inc., Third-Party Defendants | Plts' PDR Under N.C.G.S. § 7A-31 (COA16-759) | Allowed |
| 045A17 | North Carolina Farm Bureau Mutual Insurance Company v. Lillian Dianne Hull and Annitta B. Crook | 1. Plt's Notice of Appeal Based Upon a Dissent (COA16-522)<br>2. Plt's PDR Under N.C.G.S. § 7A-31 | 1. ---<br>2. Denied |

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

17 AUGUST 2017

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| 046P17 | Peter Buffa and Wife, Stacy Buffa v. Cygnature Construction and Development, Inc.; Granite Hardwoods, Inc.; The Hardwood Company; Windsor Window Company d/b/a Windsor Windows and Doors; Christopher Wotell; and Gary Sovel | 1. Plts' PDR Under N.C.G.S. § 7A-31 (COA16-237)<br>2. Plts' Motion to Amend Petition to Add Additional Authority | 1. Denied<br>2. Dismissed |
| 052P17-2 | Roy A. Cooper, III, in his official capacity as Governor of the State of North Carolina v. Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives | 1. Plt's Motion for Temporary Stay (COAP17-412, 17-694)<br>2. Plt's Petition for *Writ of Supersedeas*<br>3. Plt's PDR Prior to a Decision of the COA | 1. Dismissed as moot **07/20/2017**<br>2. Allowed 0**7/20/2017**<br>3. Special Order **07/19/2017** |
| 052PA17-2 | Cooper v. Berger, et al. | 1. The Honorable James B. Hunt, Jr. and the Honorable Burley B. Mitchell, Jr.'s Motion for Leave to File Amicus Brief<br>2. Defs' Motion for Extension of Time to File Brief | 1. Allowed **08/14/2017**<br>2. Allowed **08/14/2017** |
| 052PA17-2 | Cooper v. Berger, et al. | Honorable James B. Hunt, Jr. and Honorable Burley B. Mitchell's Motion for Extension of Time to File Amicus Brief | Allowed **08/02/2017** |
| 052PA17-2 | Cooper v. Berger, et al. | 1. Brennan Center for Justice at N.Y.U. School of Law and Democracy North Carolina's Motion for Leave to File Amicus Brief<br>2. County Board Members Ms. Stella Anderson and Mr. Courtney Patterson's Motion for Leave to File Amicus Brief | 1. Allowed **08/08/2017**<br>2. Denied **08/08/2017** |

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

17 AUGUST 2017

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| 070P17 | Francisco Fagundes and Desiree Fagundes v. Ammons Development Group, Inc.; East Coast Drilling & Blasting, Inc.; Scott Carle; and Juan Albino | Plt's (Francisco Fagundes) PDR Under N.C.G.S. § 7A-31 (COA16-776) | Denied |
| 072P17-2 | State v. Lequan Fox | Def's *Pro Se* Motion for Petition for Prohibition | Dismissed **06/26/2017** |
| 075P17-2 | Ocwen Loan Servicing v. Margaret Ann Reaves | 1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Wake County<br>2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Wake County<br>3. Def's *Pro Se* Motion for Temporary Stay<br>4. Def's *Pro Se* Petition for *Writ of Supersedeas* | 1. Dismissed **08/14/2017**<br>2. Dismissed **08/14/2017**<br>3. Denied **08/14/2017**<br>4. Denied **08/14/2017** |
| 077P17 | Bassem Sam Abdin d/b/a The Car Company of Boone and Ramsey William Abdin, Plaintiffs v. CCC-Boone, LLC and Blythe Development Co., Defendants<br>———————<br>Blythe Development Co., Third-Party Plaintiff v. Brooks Engineering Associates, P.A., Third-Party Defendant | Plts' PDR Under N.C.G.S. § 7A-31 (COA16-17) | Denied |
| 097P17 | Town of Belville v. Urban Smart Growth, LLC and Michael White | Plt's PDR Under N.C.G.S. § 7A-31 (COA16-817) | Denied |

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

17 AUGUST 2017

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| 102P17 | State v. Teddy Jabar Hargett | 1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-452)<br>2. Def's PDR Under N.C.G.S. § 7A-31<br>3. State's Motion to Dismiss Appeal<br>4. Def's Motion to Amend PDR and Notice of Appeal<br>5. Def's Motion to Supplement Motion to Amend PDR and Notice of Appeal | 1. ---<br>2. Denied<br>3. Allowed<br>4. Allowed<br>5. Allowed |
| 122P17 | State v. Talib Ali Muhammad | 1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-306)<br>2. Def's PDR Under N.C.G.S. § 7A-31<br>3. State's Motion to Dismiss Appeal | 1. ---<br>2. Denied<br>3. Allowed |
| 123P17 | State v. Michael Lee Williams | Def's PDR Under N.C.G.S. § 7A-31 (COA16-855) | Denied |
| 129P17 | Cynthia Ann Strickland v. Stephen Glenn Hood | Plt's Petition for *Writ of Certiorari* to Review Order of COA (COA16-1041) | Dismissed |
| 130A03-2 | State v. Quintel Martinez Augustine (DEATH) | State's Motion for Extension of Time to File Response to Petition for *Writ of Certiorari* | Allowed **06/30/2017**<br>**Ervin, J., recused** |
| 131P01-14 | Anthony Dove v. Faye E. Daniels, Superintendent of Pamlico Corrections | Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* | Denied **07/25/2017** |
| 135P17 | Celia A. Bell, Employee v. Goodyear Tire and Rubber Company, Employer, Liberty Mutual Insurance Company, Carrier | 1. Defs' Motion for Temporary Stay (COA15-1299)<br>2. Defs' Petition for *Writ of Supersedeas*<br>3. Defs' PDR Under N.C.G.S. § 7A-31<br>4. Defs' Motion to Amend PDR | 1. Allowed **04/26/2017** Dissolved **08/17/2017**<br>2. Denied<br>3. Denied<br>4. Dismissed as moot |
| 136P17 | Jennifer Rittelmeyer v. University of North Carolina at Chapel Hill | Petitioner's PDR Under N.C.G.S. § 7A-31 (COA15-1228) | Denied |

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

17 AUGUST 2017

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| 137P17 | Jennifer Anne Wolski v. North Carolina Division of Motor Vehicles and the Commissioner of Motor Vehicles | Respondents' PDR Under N.C.G.S. § 7A-31 (COA16-702) | Denied |
| 139P17-2 | Mohammed Nasser Jilani v. Donnie Harrison, Sheriff Wake County Detention Center | Petitioner's *Pro Se* Motion for Application for Enforcement of Writ § 17-16 Attachment for Failure to Obey | Denied **07/06/2017** |
| 139P17-3 | Jilani v. Harrison | Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* | Denied **07/11/2017** |
| 147P17-2 | State v. Salim A. Gould | Def's *Pro Se* Motion for Appeal of Order Motion for Appropriate Relief | Dismissed |
| 148P17 | State v. Montier Lopez Jackson | Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP17-260) | Dismissed<br>**Jackson, J., recused** |
| 148P17-2 | Montier Lopez Jackson v. John Herring, Superintendent, Lanesboro Correctional Institution | Petitioner's *Pro Se* Petition for **Writ of Habeas Corpus** | Denied **08/16/2017**<br>**Jackson, J., recuse**d |
| 151P17 | State v. Donald Burchett | Def's *Pro Se* Motion for Review | Dismissed |
| 154P17-2 | State v. Jermaine D. Carson, Jr. | Def's *Pro Se* Motion for *Writ En Banc* | Denied **06/09/2017**<br>**Ervin, J., recused** |
| 155P17 | State v. Joe Roberts Reynolds | 1. Def's Motion for Temporary Stay (COA16-149)<br>2. Def's Petition for *Writ of Supersedeas*<br>3. Def's PDR Under N.C.G.S. § 7A-31<br>4. Def's Motion to Withdraw PDR and Petition for *Writ of Supersedeas* and to Dissolve Temporary Stay | 1. Allowed **05/19/2017**<br>2. ---<br>3. ---<br>4. Allowed |

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

17 AUGUST 2017

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| 156P10-2 | Stacey McCoy Brooks v. Erik A. Hooks, Secretary of NCDPS; Katy Poole, Superintendent of Scotland Correctional Institution | Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* | Denied **06/16/2017** **Ervin, J., recused** |
| 158P06-14 | State v. Derrick D. Boger | 1. Def's *Pro Se* Petition for *Writ of Mandamus*<br>2. Def's *Pro Se* Motion for Civil Tort Claim | 1. Denied<br>2. Dismissed |
| 158P17 | State v. Henry Calvin Jones | 1. Def's Notice of Appeal Based Upon a Constitutional Question Pursuant to N.C.G.S. § 7A-30 (COA16-842)<br>2. Def's PDR Under N.C.G.S. § 7A-31<br>3. State's Motion to Dismiss Appeal | 1. ---<br>2. Denied<br>3. Allowed |
| 160P17 | State v. Derrick A. Rogers | 1. Def's *Pro Se* Motion for PDR (COAP17-200)<br>2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA<br>3. Def's *Pro Se* Motion for Preparation of Stenographic Transcript<br>4. Def's *Pro Se* Motion to Amend Petition | 1. Dismissed<br>2. Dismissed<br>3. Dismissed as moot<br>4. Allowed |
| 161P17 | David Felton v. Paul G. Butler; James L. Forte; Willis J. Fowler; Danny G. Moody; Pat McCrory; and Roy Cooper | 1. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP17-219)<br>2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis*<br>3. Plt's *Pro Se* Motion to Appoint Counsel | 1. Denied<br>2. Allowed<br>3. Dismissed as moot |
| 163P17 | James Arnold and Leah Metcalf individually, and on behalf of all others similarly situated v. The University of North Carolina at Chapel Hill | Plts' PDR Under N.C.G.S. § 7A-31 (COA16-573) | Denied **Ervin, J., recused** |
| 165P17 | State v. Daniel Mylett | Def's PDR Under N.C.G.S. § 7A-31 (COA16-816) | Denied |
| 166P17 | State v. John Allen Hill, IV | Def's PDR Under N.C.G.S. § 7A-31 (COA16-744) | Denied |

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

17 AUGUST 2017

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| 167P17 | State v. Tekenya Boyd | 1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-715)<br>2. Def's PDR Under N.C.G.S. § 7A-31 | 1. Dismissed *ex mero motu*<br>2. Denied |
| 169P17 | Jeffrey Blake St. John v. Kelly J. Thomas, Commissioner, North Carolina Division of Motor Vehicles, Department of Transportation | 1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA16-847)<br>2. Petitioner's Motion to Withdraw PDR | 1. ---<br>2. Allowed **07/13/2017** |
| 170P15-2 | State v. Patrick Shane Williams | Def's *Pro Se* Motion for Notice of Appeal (COAP17-384) | Dismissed<br>**Ervin, J., recused** |
| 171A17 | State v. Daryl Williams | 1. State's Motion for Temporary Stay (COA16-684)<br>2. State's Petition for *Writ of Supersedeas*<br>3. State's Notice of Appeal Based Upon a Dissent<br>4. State's PDR as to Additional Issues | 1. Allowed **06/01/2017**<br>2. Allowed<br>3. ---<br>4. Allowed |
| 172P17 | Dwain Cornelius Ferrell v. State of North Carolina, et al. | Plt's *Pro Se* Motion for Complaint Civil Action (COAP17-254) | Dismissed |
| 174P17 | State v. Jerome Harris | Def's PDR Under N.C.G.S. § 7A-31 (COA16-874) | Denied<br>**Morgan, J., recused** |
| 179P17 | Kevin Bray and The Kernersville Professional Fire Fighters Association v. Curtis L. Swisher, in his capacity as Town Manager of the Town of Kernersville | 1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-928)<br>2. Def's Conditional Motion to Amend the Record on Appeal | 1. Denied<br>2. Dismissed as moot |
| 180A17 | Kim and Barry Lippard v. Larry Holleman and Alan Hix | Defs' Notice of Appeal Based Upon a Constitutional Question (COA16-886) | Dismissed *ex mero motu* |

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

17 AUGUST 2017

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| 181P17 | Edward J. Austin v. State of North Carolina | Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Stanly County | Denied **07/07/2017** |
| 182P17 | Randall Cole v. N.C. Department of Public Safety | Petitioner's PDR Under N.C.G.S. § 7A-31 (COA16-340 | Denied |
| 183P17 | William Barry Freedman and Freedman Farms, Inc. v. Wayne James Payne and Michael R. Ramos | Plt's (William Barry Freedman) PDR Under N.C.G.S. § 7A-31 (COA16-969) | Denied |
| 184P17 | State v. Eric Jonathan Cox | Def's PDR Under N.C.G.S. § 7A-31 (COA16-1068) | Denied |
| 185P17 | State v. John Arthur Stroud | 1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-989)<br>2. Def's PDR Under N.C.G.S. § 7A-31<br>3. State's Motion to Dismiss Appeal | 1. ----<br>2. Denied<br>3. Allowed |
| 186P17 | State v. Lenwood Lee Paige | 1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COA06-3)<br>2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* | 1. Dismissed<br>2. Allowed<br>**Hudson, J., recused** |
| 187P17 | State v. Devrie Leran Burris | Def's PDR Under N.C.G.S. § 7A-31 (COA16-238) | Denied |
| 189P17 | State v. Robert A.D. Waldrup | 1. Def's *Pro Se* Motion for Notice of Appeal<br>2. Def's *Pro Se* Motion for Trial Transcript to be Used as an Exhibit | 1. Dismissed<br>2. Dismissed |
| 190P17 | Brandon Lee v. James Freeman, Assistant Public Defender | Plt's *Pro Se* Motion for Appeal of Decision of The North Carolina State Bar | Dismissed |
| 191P17 | Department of Transportation v. Joseph P. Riddle, III, and wife, Trina T. Riddle | Def's PDR Under N.C.G.S. § 7A-31 (COA16-445) | Denied |

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

17 AUGUST 2017

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| 192P17 | In the Matter of the Foreclosure of a Deed of Trust Executed by Holly B. Rankin and Darrin L. Rankin (Present Record Owners(s): Mozijah Bailey and Wendy Carolina Lopez) and (Darrin L. Rankin, as to Life Estate Only) in the Original Amount of $307,920.00 Dated October 4, 2006, Recorded in Book 21173, Page 276, Mecklenburg County Registry Substitute Trustee Services, Inc., Substitute Trustee | 1. Respondent's (Mozijah Bailey) Motion for Temporary Stay (COA16-771)<br>2. Respondent's (Mozijah Bailey) Petition for *Writ of Supersedeas* | 1. Allowed **6/16/2017**<br>2. |
| 193P17 | State v. David Charles Lane | 1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-764)<br>2. Def's PDR Under N.C.G.S. § 7A-31<br>3. State's Motion to Dismiss Appeal | 1. ---<br>2. Denied<br>3. Allowed |
| 194P17 | State v. Taylor Pruitt Roberson | Def's PDR Under N.C.G.S. § 7A-31 (COA16-939) | Denied |
| 195P17 | Chelsea Doolittle v. Robert M. George, in his Individual Capacity as an Officer of the Hickory Police Department; Vidal A. Sipe, in his Individual Capacity as an Officer of the Hickory Police Department; Frank C. Pain, in his Individual Capacity as an Officer of the Hickory Police Department; and The City of Hickory, a North Carolina Municipality | 1. Def's (Robert M. George) Motion for Temporary Stay<br>2. Def's (Robert M. George) Petition for *Writ of Supersedeas*<br>3. Def's (Robert M. George) Petition for *Writ of Certiorari* to Review Order of COA<br>4. Def's (Robert M. George) Motion to Amend or Supplement Petition for *Writ of Certiorari*, Petition for *Writ of Supersedeas*, and Motion for Temporary Stay<br>5. Def's (Robert M. George) Motion for Leave to File Reply to Response to Petition for *Writ of Certiorari*, Petition for *Writ of Supersedeas*, and Motion for Temporary Stay | 1. Allowed **06/16/2017**<br>2.<br>3.<br>4.<br>5. Allowed **07/13/2017** |

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

17 AUGUST 2017

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| 196P17 | Maeghan Richmond v. Robert M. George, in his Individual Capacity as an Officer of the Hickory Police Department; Vidal A. Sipe, in his Individual Capacity as an Officer of the Hickory Police Department; Frank C. Pain, in his Individual Capacity as an Officer of the Hickory Police Department; and The City of Hickory, a North Carolina Municipality | 1. Def's (Robert M. George) Motion for Temporary Stay (COAP17-350)<br>2. Def's (Robert M. George) Petition for *Writ of Supersedeas*<br>3. Def's (Robert M. George) Petition for *Writ of Certiorari* to Review Order of COA<br>4. Def's (Robert M. George) Motion for Leave to Amend or Supplement Petition for *Writ of Certiorari*, Petition for *Writ of Supersedeas*, and Motion for Temporary Stay<br>5. Def's (Robert M. George) Motion for Leave to File Reply to Response to Petition for *Writ of Certiorari*, Petition for *Writ of Supersedeas*, and Motion for Temporary Stay | 1. Allowed **06/19/2017**<br>2.<br>3.<br>4.<br>5. Allowed **07/28/17** |
| 197P17 | State v. Brian Keith Blackwell | 1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COA16-737)<br>2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*<br>3. Def's *Pro Se* Motion to Amend Petition for *Writ of Certiorari*<br>4. Def's *Pro Se* Motion to Dismiss | 1. Dismissed<br>2. Allowed<br>3. Allowed<br>4. Dismissed<br>**Ervin, J., recused** |
| 198P17 | State v. Susan Marie Maloney | Def's PDR Under N.C.G.S. § 7A-31 (COA16-851) | Denied |
| 199A17 | State of NC v. Seid Michael Mostafavi | 1. State's Motion for Temporary Stay (COA16-1233)<br>2. State's Petition for *Writ of Supersedeas*<br>3. State's Notice of Appeal Based Upon a Dissent | 1. Allowed **06/20/2017**<br>2. Allowed **07/13/2017**<br>3. --- |
| 200P07-6 | State v. Kenneth Earl Robinson | 1. Def's *Pro Se* Motion for Notice of Appeal (COAP17-283)<br>2. Def's *Pro Se* Motion for PDR | 1. Dismissed<br>2. Dismissed |

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

17 AUGUST 2017

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| 200P17 | Barry D. Edwards, XMC Films, Incorporated, Aegis Films, Inc., and David E. Anthony v. Clyde M. Foley, Ronald M. Foley, Lavonda S. Foley, Samuel L. Scott, CRS Trading Co. LLC, Brown Burton, Ronald Jed Meadows, and American Solar Kontrol, LLC | 1. Defs' Motion for Temporary Stay (COA16-1060)<br>2. Defs' Petition for *Writ of Supersedeas*<br>3. Defs' PDR Under N.C.G.S. § 7A-31<br>4. Motion to Admit Bryan M. Knight *Pro Hac Vice* | 1. Allowed **06/20/2017** |
| 201P17 | In re Matter of Foreclosure of a Deed of Trust Executed by Sheila McLean Dated June 2, 2005, and Recorded in Book 1477, Page 417 *et seq.*, of Franklin County, Registrar of Deeds | Respondent's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-1173) | Denied |
| 202A17 | Locklear v. Cummings, et al. | Defs' Attorney Bingham Hinch's Motion to Withdraw as Counsel | Allowed **06/30/2017** |
| 204P17 | State v. Elias Antwan Collins | 1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-901)<br>2. Def's Motion to Deem Petition Timely Filed | 1. Denied<br>2. Denied |
| 205P17 | Antwone Archie v. Johnney Hawkins/ Jose Stein | 1. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Forsyth County<br>2. Defs' *Pro Se* Motion for Notice of Appeal | 1. Dismissed<br>2. Dismissed *ex mero motu*<br>**Hudson, J., recused** |

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

17 AUGUST 2017

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| 206P17 | Norman Alan Kerr v. Clerk of Superior Court of Forsyth County | 1. Petitioner's *Pro Se* Petition for *Writ of Mandamus*<br>2. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis* | 1. Denied<br>2. Allowed |
| 207P08-2 | State v. Ernest Drayton, Jr. | Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, New Hanover County | Dismissed |
| 207P17 | State v. Michael Anthony Scaturro, Jr. | 1. State's Motion for Temporary Stay (COA16-1026)<br>2. State's Petition for *Writ of Supersedeas*<br>3. State's PDR Under N.C.G.S. § 7A-31 | 1. Allowed **06/23/2017**<br>2. Allowed<br>3. Allowed |
| 208A17 | State v. Justin Deandre Bass | 1. State's Motion for Temporary Stay (COA16-421)<br>2. State's Petition for *Writ of Supersedeas*<br>3. State's Notice of Appeal Based Upon a Dissent | 1. Allowed **06/23/2017**<br>2. Allowed **06/23/2017**<br>3. --- |
| 211P17 | Christopher Buckner, Employee v. United Parcel Service, Employer, Liberty Mutual Insurance Company, Carrier | 1. Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA16-1110)<br>2. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 | 1. Dismissed *ex mero motu*<br>2. Denied |
| 212P17 | State v. Calvin Steven Brooks | 1. Def's *Pro Se* Motion for Notice of PDR (COA17-38)<br>2. Def's *Pro Se* Motion to Appoint Counsel | 1. Dismissed<br>2. Dismissed as moot |
| 215P17 | State v. Khaliq Adeeb Ishrat | Def's *Pro Se* Petition for *Writ of Mandamus* (COAP17-338) | Dismissed |
| 216P17 | State v. Tyrone D. Sanders | Petitioner's *Pro Se* Motion for Immediate Release | Dismissed |
| 217P17 | State v. Marvin Everette Miller, Jr. | 1. State's Motion for Temporary Stay (COA16-1206)<br>2. State's Petition for *Writ of Supersedeas*<br>3. State's PDR Under N.C.G.S. § 7A-31<br>4. Def's Conditional PDR Under N.C.G.S. § 7A-31 | 1. Allowed **07/03/2017**<br>2. Allowed<br>3. Allowed<br>4. Allowed |

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

17 AUGUST 2017

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| 219P17 | Courtney NC, LLC DBA Oakwood Raleigh at Brier Creek v. Monette Baldwin AKA Nell Monette Baldwin | 1. Def's *Pro Se* Motion for Temporary Stay (COAP17-459)<br>2. Def's *Pro Se* Petition for *Writ of Supersedeas*<br>3. Def's *Pro Se* Motion for Notice of Appeal | 1. Denied **07/07/2017**<br>2.<br>3. |
| 221P17 | State v. Willie James Langley | 1. State's Motion for Temporary Stay (COA16-1107)<br>2. State's Petition for *Writ of Supersedeas* | 1. Allowed **07/06/2017**<br>2. |
| 222A17 | State v. Sam Babb Clonts, III | 1. State's Motion for Temporary Stay (COA16-566)<br>2. State's Petition for *Writ of Supersedeas* | 1. Allowed **07/07/2017**<br>2. |
| 223P17 | Darryl Ray Smith, Employee v. Michael W. Young d/b/a Camaro Specialty Co., Employer, Noninsured, and Michael W. Young, Individually | Plt's *Pro Se* Motion for Review | Dismissed |
| 224A17 | Kevin Posey v. Wayne Memorial Hospital, Inc. and Wayne Health Corporation | 1. Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA16-1218)<br>2. Plt's *Pro Se* Amended Notice of Appeal Based Upon a Constitutional Question | 1. Dismissed as moot<br>2. Dismissed e*x mero motu* |
| 225P17 | Adam L. Perry v. William Earl Britt | 1. Plt's *Pro Se* Motion for Application for Preliminary and/or Permanent Injunction<br>2. Plt's *Pro Se* Motion to Strike and Dismiss Defendant's Insufficient Defense Claim | 1. Dismissed<br>2. Dismissed |
| 229P17 | State v. Samuel Sylvester Simmons | 1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-975)<br>2. Def's PDR Under N.C.G.S. § 7A-31<br>3. State's Motion to Dismiss Appeal | 1. —<br>2. Denied<br>3. Allowed |

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

17 AUGUST 2017

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| 230P17 | State v. Anthony Lee McNair | 1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COA16-707)<br>2. Def's *Pro Se* Motion for PDR<br>3. Def's *Pro Se* Motion to Amend PDR | 1. Denied<br>2. Dismissed<br>3. Allowed |
| 231P17 | State v. Antwone Archie | Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Forsyth County | Dismissed |
| 232P17 | State v. Anthony Bernard Bowden | Def's PDR Under N.C.G.S. § 7A-31 (COA16-1074) | Denied |
| 235P17 | Peter Jaeger Dillon v. Mecklenburg County Family Court, the Honorable Regan A. Miller (Chief Judge), the Honorable Rickye McKoy-Mitchell, the Honorable Christy T. Mann, et al. | Petitioner's *Pro Se* Petition for *Writ of Mandamus* | Denied |
| 236P17 | State v. Delgen Foye | Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-675) | Denied |
| 237P17 | State v. Victor Olandus Moultry | Def's *Pro Se* Motion for PDR (COAP17-211) | Dismissed |
| 240P17 | In re Bruce Bunting | 1. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP17-441)<br>2. Petitioner's *Pro Se* Petition for *Writ of Mandamus* | 1. Dismissed<br>2. Dismissed |
| 242P09-2 | State v. Roger Blackstock | 1. Def's *Pro Se* Motion for PDR (COAP17-266)<br>2. Def's *Pro Se* Motion to Appoint Counsel | 1. Dismissed<br>2. Dismissed as moot<br>**Ervin, J., recused** |
| 243P17 | State v. Pierre Je Bron Moore | 1. Def's Petition for *Writ of Mandamus* (COA16-999)<br>2. Def's Petition for Writ of Prohibition<br>3. Def's Motion for Temporary Stay<br>4. Def's Petition for *Writ of Supersedeas* | 1.<br>2.<br>3. Denied **07/28/2017**<br>4. |

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

17 AUGUST 2017

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| 244P17 | In the Matter of J.L.T. and S.R.J.T. | 1. Petitioner's Motion for Temporary Stay (COA16-1242)<br>2. Petitioner's Petition for *Writ of Supersedeas*<br>3. Petitioner's PDR Under N.C.G.S. § 7A-31 | 1. Allowed **07/24/2017**<br>2.<br>3. |
| 245P17 | Bank of America, N.A. v. Angel L. Rivera and wife, Jennifer L. Wilson a/k/a Jennifer Wilson | 1. Def's (Jennifer L. Wilson) *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA16-166)<br>2. Def's (Jennifer L. Wilson) *Pro Se* PDR Under N.C.G.S. § 7A-31<br>3. Def's (Jennifer L. Wilson) *Pro Se* Motion to Withdraw Notice of Appeal and PDR | 1. ---<br>2. ---<br>3. Allowed **Ervin, J., recused** |
| 249P17 | Columbus County Department of Social Services ex rel. Tiffanee A. Moore v. Calvin T. Norton | 1. Def's *Pro Se* Motion for Temporary Stay (COA16-735)<br>2. Def's *Pro Se* Petition for *Writ of Supersedeas*<br>3. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question<br>4. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 | 1. Denied **08/02/2017**<br>2.<br>3.<br>4. |
| 265P17 | State v. Shannon Dale Isom | 1. Def's Motion for Temporary Stay (COA16-1052)<br>2. Def's Petition for *Writ of Supersedeas*<br>3. Def's PDR Under N.C.G.S. § 7A-31 | 1. Allowed **08/04/2017**<br>2.<br>3. |
| 266P17 | State v. Jawanz Bacon | 1. State's Motion for Temporary Stay<br>2. State's Petition for *Writ of Supersedeas* | 1. Allowed **08/04/2017**<br>2. |
| 271PA15-2 | State v. Felix Ricardo Saldierna | 1. State's Motion for Temporary Stay<br>2. State's Petition for *Writ of Supersedeas* | 1. Allowed **08/03/2017**<br>2. |
| 272P17 | State v. Clarence Joseph Trent | 1. Def's Motion for Temporary Stay (COA16-839)<br>2. Def's Petition for *Writ of Supersedeas* | 1. Allowed **08/11/2017**<br>2. **Morgan, J., recused** |

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

17 AUGUST 2017

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| 277P17 | Casey Rafeal Tyler v. North Carolina Department of Public Safety | Petitioner's *Pro Se* Motion for PDR | Denied **08/16/2017** |
| 282P16-4 | Jeremy Bruns and Jenny Bruns v. Rhonda Bryant, Dalton Bryant, Sr., Dalton Bryant, Jr., Pat McCrory, as Governor of North Carolina, Frank Perry, as Secretary of the North Carolina Department of Public Safety, Anthony Tata, as Secretary of the North Carolina Department of Transportation, Veronica McClain, USAA, and State of North Carolina | Plts' *Pro Se* Motion for Reconsideration of Denied Motion to Reject, Dismiss, and Strike Response to Notice of Appeal by Attorney General, Dismissing the Appeal as Moot, Dismissing the Notice of Appeal, and Denying Our Petition for Discretionary Review of the Decision of the North Carolina Court of Appeals Arising from the Supreme Court North Carolina's Orders Issued 15 June 2017 | Dismissed |
| 295P12-3 | State v. Lawrence Donell Flood, Sr. | Def's PDR Under N.C.G.S. § 7A-31 (COA16-252) | Denied |
| 309P15-3 | State v. Reginald Underwood Fullard | 1. Def's *Pro Se* Motion for Appeal<br>2. Def's *Pro Se* Motion for Appeal for Order Entry | 1. Denied **06/27/2017**<br>2. Denied **06/27/2017** |
| 314P08-2 | John Joseph Zinkand v. State of North Carolina, et al. | 1. Petitioner's *Pro Se* Motion for *De Novo* Review and Injunctive Relief<br>2. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*<br>3. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis*<br>4. Petitioner's *Pro Se* Motion for Petition for an Order for Default Judgment | 1. Dismissed **07/07/2017**<br>2. Denied **07/07/2017**<br>3. Allowed **07/07/2017**<br>4. Dismissed **07/07/2017** |

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

17 AUGUST 2017

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| 355P16 | Rodney K. Adams, Elizabeth I. Allen, Joseph J. Bateman, William Paul Bateman, Gilbert A. Breedlove, Debra D. Carswell, Jason Gray Cheek, Christopher E. Duckworth, Bryan G. Farley, Melissa Ferrel, James Robert Freeman, Joshua Phillip Grant, Wanda M. Hammock, Marlene Hammond, Thomas Murphy Harris, Ronald E. Hodges, Thomas W. Holland, Gary H. Littleton, Linda B. Long, Pansy K. Martin, Sharon S. McLaurin, Bruce A. McPherson, Thomas G. Miller, Jeffrey Mitchell, Donald D. Paschall, Sr., Robert Warren Pearce, Connie C. Peele, Julian R. Poteat, Margaret L. Rathbone, Ronald Raymond Roberts, Jr., Rae Renee Rothrock, Suzanne Sheehan, Susan B. Smevog, Kenneth Spears, Steven R. Storch, Cecil Lynn Webb, Emily Alicia Westover, William Eric Whitten, and William T. Winslow, individually and on behalf of a class of similarly situated persons v. The State of North Carolina, Patrick L. McCrory, Governor of the State of North Carolina, in his official capacity, Lee Harris Roberts, State Budget Director, in his official capacity, and Dr. Linda Morrison Combs, State Controller, in her official capacity | Plts' PDR Under N.C.G.S. § 7A-31 (COA15-1275) | Denied |

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

17 AUGUST 2017

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| 382PA16 | King v. Albemarle Hospital Authority, et al. | Motion to Admit Wayne M. Mansulla *Pro Hac Vice* | Allowed **06/29/2017** |
| 411A94-6 | State v. Marcus Reymond Robinson (DEATH) | State's Motion for Extension of Time to File Response to Petition for *Writ of Certiorari* | Allowed **06/30/2017** |
| 421P10-6 | Robert Alan Lillie v. Mark Carver, Superintendent of Caswell Correctional Center | 1. Petitioner's *Pro Se* Motion for PDR (COAP17-154)<br>2. Petitioner's *Pro Se* Motion to Supplement<br>3. Petitioner's *Pro Se* Motion for Judgment on the Pleading | 1. Denied<br>2. Dismissed as moot<br>3. Dismissed |
| 423P16 | Cecelia W. Peoples and Ernest A. Robinson, Jr. v. Thomas H. Tuck | Def's PDR Under N.C.G.S. § 7A-31 (COA16-293) | Special Order |
| 425P15-2 | State v. Dawayne David Knolton | Def's PDR Under N.C.G.S. § 7A-31 (COA16-671) | Denied |
| 441A98-4 | State v. Timon Charles Golphin (DEATH) | State's Motion for Extension of Time to File Response to Petition for *Writ of Certiorari* | Allowed **06/30/2017**<br>**Beasley, J., recused** |
| 459P00-7 | State v. William M. Huggins | Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COA98-236) | Denied |
| 505P96-3 | State of N.C. v. Melvin Lee White, Jr. (DEATH) | Def's Motion for Extension of Time to File Petition for *Writ of Certiorari* | Allowed **06/15/2017** |
| 548A00-2 | State v. Christina Shea Walters (DEATH) | State's Motion for Extension of Time to File Response to Petition for *Writ of Certiorari* | Allowed **06/30/2017** |

COLLEEN BLONDELL
v.
SHAKIL AHMED, SHABANA AHMED, MICHAEL FEKETE, AND
SUSAN ELIZABETH FEKETE

No. 275A16

Filed 29 September 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 786 S.E.2d 405 (2016), reversing and remanding an order allowing summary judgment entered on 12 January 2015 by Judge Howard E. Manning, Jr. in Superior Court, Wake County. Heard in the Supreme Court on 30 August 2017.

*Martin & Gifford, PLLC, by William H. Gifford, Jr., for plaintiff-appellee.*

*Jordan Price Wall Gray Jones & Carlton, PLLC, by J. Matthew Waters and Lori P. Jones, for defendant-appellants Shakil and Shabana Ahmed.*

PER CURIAM.

AFFIRMED.

CATAWBA COUNTY, BY AND THROUGH ITS CHILD SUPPORT AGENCY,
EX REL. SHAWNA RACKLEY
v.
JASON LOGGINS

No. 152PA16

Filed 29 September 2017

**1. Child Custody and Support—voluntary support agreement and order—jurisdiction to change**

The Catawba County district court maintained continuing jurisdiction to modify a Voluntary Support Agreement and Order (VSA) where it had ruled on the original VSA and there were no circumstances that would divest the district court of its jurisdiction.

**2. Child Custody and Support—voluntary support agreement and order—continuing jurisdiction**

Rules of statutory construction confirmed the district court's continuing jurisdiction over a Voluntary Support Agreement and Order (VSA) where the plain language of N.C.G.S. § 50-13.7(a) was clear and unambiguous and imposed no jurisdictional prerequisites.

**3. Child Custody and Support—voluntary support agreement—jurisdiction to modify—legislative history**

Although the plain meaning of N.C.G.S. § 50-13.7(a) was sufficient to determine that the district court had jurisdiction to modify a Voluntary Support Agreement and Order, the legislative history indicated that the legislature did not intend for the statute to create a jurisdictional prerequisite to modify child support orders.

**4. Child Custody and Support—voluntary support agreement—modification—directory rather than mandatory statute**

The provision of N.C.G.S. § 50-13.7(a) requiring that a motion to modify a Voluntary Support Agreement and Order be filed was directory rather than mandatory, so that the absence of a motion to modify a child support order did not divest the district court of jurisdiction to act under the statute. The provision concerned a matter of form, rather than a matter of substance and merely addressed the procedural aspects of modifying a child support order.

**5. Child Custody and Support—voluntary support agreement—jurisdiction to modify—alignment with a change in circumstances**

A North Carolina Supreme Court decision, that N.C.G.S. § 50-13.7(a) did not create a jurisdictional prerequisite and did not contain a mandatory requirement that a party or interested person file a motion for child support modification in order for a district court to exercise jurisdiction, harmoniously aligned with the statutory provision requiring a showing of a change in circumstances for a child support order to be modified.

Chief Justice MARTIN concurring in the result only.

Justice ERVIN joins in this concurring opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 784 S.E.2d 620 (2016), affirming an order entered on 29 December 2014 by Judge Gregory R. Hayes in District Court, Catawba County. Heard in the Supreme Court on (11 April 2017).

*David W. Hood for plaintiff-appellant.*

*Blair E. Cody, III for defendant-appellee.*

*Joshua H. Stein, Attorney General, by John F. Maddrey, Solicitor General, Gerald K. Robbins, Special Deputy Attorney General, and Benjamin Kull, Assistant Attorney General, for North Carolina Department of Health and Human Services, amicus curiae.*

MORGAN, Justice.

## I. Background and Procedural History

In this appeal we consider whether a district court has jurisdiction to modify a child support order without a party filing a motion to modify asserting that there is a change in circumstances. The Court of Appeals concluded that the district court did not have jurisdiction because Catawba County, by and through its Child Support Agency, *ex rel.* Shawna Rackley (plaintiff) failed to comply with procedural mandates to file a motion to modify the child support order at issue as required by N.C.G.S. § 50-13.7(a) (2015). We hold that the district court maintained

continuing jurisdiction to modify the child support order and that plaintiff's failure to file a motion to modify the child support order did not divest the district court of jurisdiction. Accordingly, we reverse and remand the Court of Appeals decision.

On 15 February 1999, the District Court in Catawba County entered a Voluntary Support Agreement and Order (VSA) under which Jason Loggins (defendant) agreed to pay "$0.00" in child support for his two children with Shawna Rackley (Ms. Rackley). Additionally, starting 1 March 1999, defendant was to reimburse the State $1,996.00 for public assistance paid on behalf of his children. Defendant was also required to provide health insurance for the minor children through his employer or when it was available at a reasonable cost.

Defendant failed to reimburse the State as required, and on 19 October 2000 plaintiff filed a motion to show cause. The district court ordered defendant to appear, but he failed to do so. Defendant was arrested and later released on a $500.00 cash bond that was allocated to his arrearage. After hearing the matter in January 2001, the district court found that defendant was employed at Carolina Hardwoods earning $9.95 per hour, and was able to comply with the 1999 VSA. The court ordered defendant to make $50.00 monthly payments towards his then-arrearages of $1,165.12.

Subsequently, a second VSA titled "Modified Voluntary Support Agreement and Order" was signed by defendant on 25 June 2001. This agreement did not reference the original VSA or the 1999 order, nor did it show that the district court established defendant's paternity in 1999. The parties did attach a child support worksheet stating defendant had a monthly gross income of $1,724.66 and recommending $419.00 for his monthly child support obligation.[1] The 2001 VSA was approved by the court and entered on 28 June 2001. This order is the basis of all controversy on appeal. In the 2001 VSA, defendant agreed to pay $419.00 per month in child support starting 1 July 2001 and to reimburse the State $422.78 for public assistance given to his children. In addition, defendant agreed to provide health insurance to his children through his then-employer, Crown Heritage, Inc. Unlike the 1999 VSA, the 2001 VSA contains no modification provision.

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1. The parties attached "Work Sheet A," Form "AOC-CV-627 Rev. 10/98" of the North Carolina Child Support Guidelines. This is the form used to calculate child support when one parent (or a third party) has sole physical custody of all children for whom support is being determined. This form does not contain a provision referencing a change in circumstances. Thus, in the 2001 Order, the trial court did not find that there were changed circumstances.

Throughout the following years, defendant failed to comply with the 2001 VSA. Accordingly, the trial court entered consent contempt orders on 20 November 2003, 21 July 2005 and 25 January 2007. Each time defendant admitted to being in civil contempt for his failure to pay amounts due under the 2001 VSA. By 2007, the amount defendant owed totaled $16,422.28. In the 2007 consent order, the trial court ordered defendant to make monthly child support payments totaling $479.00 with $60.00 going towards arrears. On 5 April 2007, the district court concluded defendant was in compliance with the 25 January 2007 order and determined that his arrearages were $15,572.80. The district court ordered defendant to continue his monthly child support payments of $419.00 plus $60.00 towards arrears. Eventually, defendant again failed to pay the child support ordered by the court.

On 7 April 2011, defendant filed, *pro se*, a motion to modify the 2007 consent order. Defendant stated there was a change in circumstances because he "draw[s] unemployment, [and his] kids [ages 17 and 18] have quit school." The district court heard the matter on 11 August 2011. Ms. Rackley failed to appear. On 15 September 2011 the district court found a change in circumstances, noting that "[d]efendant was drawing unemployment benefits, since has obtained fulltime employment. Oldest child . . . has emancipated according to [N.C.G.S. § 50-13.4(c)]." Based on the child support guidelines, the district court reduced defendant's monthly child support obligation to $247.00 and found his arrears to be $6,640.75.

On 13 March 2014, defendant, now represented by counsel, moved the district court pursuant to N.C.G.S. § 1A-1, Rule 60, to set aside the 2001 VSA as void. Defendant contended that "prior to June 28, 2001 there was [sic] not any motions filed by [Ms. Rackley] or on her behalf to modify the 'then' existing child support obligation [of $0.00 under the 1999 VSA]." A hearing was held on 31 July 2014, during which defendant asserted that the 1999 VSA was a permanent order and that the trial court did not have jurisdiction to modify it without a motion in the cause by plaintiff and a showing of a change in circumstances. He argued that the 2001 VSA was void and, as a result, unenforceable. Plaintiff's counsel conceded, "There's no indication that [the 1999 VSA] was a temporary order. We use the colloquial term 'permanent' although every order can be modified, but I would agree that that's what we normally refer to as a permanent order rather than a temporary order." Following the hearing, defense counsel tendered a draft order to the district court without serving it upon plaintiff's counsel. The district court entered an order on 18 December 2014 granting defendant's motion but a few days later set aside that order because it contained "errors and was not presented

following approved procedure" in that defendant did not serve the proposed order on plaintiff before tendering it to the court.

On 29 December 2014, the district court entered a second order granting defendant's Rule 60 Motion. The district court found that it did not have jurisdiction to enter the 2001 VSA because there was no precipitating motion filed by plaintiff or on her behalf, nor was there any proof of a change in circumstances; therefore, the order resulting from the 2001 VSA was void. Plaintiff filed a timely notice of appeal.

In the Court of Appeals, plaintiff argued, in pertinent part, that the district court erroneously concluded that a motion to modify a child support obligation must precede a modification order. The Court of Appeals reasoned that the plain language of N.C.G.S. § 50-13.7(a) "requires a 'motion in the cause and a showing of changed circumstances' as a necessary condition for the [district] court to modify an existing support order." *Catawba County ex rel. Rackley v. Loggins*, ___ N.C. App. ___, ___, 784 S.E.2d 620, 625-26 (2016) (quoting N.C.G.S. § 50-13.7(a) (2015)). The Court of Appeals recognized that a district court is without authority to sua sponte modify an existing support order. *Id.* at ___, 784 S.E.2d at 626 (quoting *Royall v. Sawyer*, 120 N.C. App. 880, 882, 463 S.E.2d 578, 580 (1995)). Therefore, according to the Court of Appeals, it was "impossible to enforce the second [VSA] and order because the trial court did not have jurisdiction to accept the second [VSA] and enter the modified order." *Id.* at ___, 784 S.E.2d at 626 (citation omitted).

**II. Standard of Review**

Rule 12(b)(1) of the Rules of Civil Procedure allows for dismissal based upon a trial court's lack of jurisdiction over the subject matter of the claim. N.C.G.S. § 1A-1, Rule 12(b)(1) (2015). We review the decision of a trial court to dismiss an action for lack of subject matter jurisdiction de novo. *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007); *see Baumann-Chacon v. Baumann*, 212 N.C. App. 137, 139, 710 S.E.2d 431, 433 (2011) (applying a de novo standard of review to a district court's decision to dismiss a plaintiff's claims for child support for lack of subject matter jurisdiction).

**III. Analysis**

Plaintiff contends in the instant case that the trial court retained jurisdiction to modify the VSA notwithstanding plaintiff's failure to file a motion to modify the VSA as addressed in N.C.G.S. § 50-13.7(a). We agree that the trial court retained jurisdiction to modify the VSA because: (1) the court maintained continuing jurisdiction over the child support

issue; (2) the plain language of N.C.G.S. § 50-13.7(a) does not create a jurisdictional prerequisite that would divest the district court of jurisdiction; (3) the legislative history of this statutory provision suggests that the General Assembly did not intend to create a jurisdictional prerequisite; (4) the provision requiring a motion to modify a child support order to be filed so as to prompt a district court's review of an existing child support order is directory rather than mandatory, and therefore did not deprive the district court of jurisdiction; and (5) the VSA filed by plaintiff satisfied the purpose of N.C.G.S. § 50-13.7(a).

*A. District Court Maintained Continuing Jurisdiction*

**[1]** The district court maintained continuing jurisdiction to modify the VSA. "Jurisdiction is '[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it.' " *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 789-90 (2006) (quoting *Black's Law Dictionary* 856 (7th ed. 1999)). The court must have personal jurisdiction and, relevant here, subject matter jurisdiction "or '[j]urisdiction over the nature of the case and the type of relief sought,' in order to decide a case." *Id.* at 590, 636 S.E.2d at 790 (quoting *Black's Law Dictionary* at 596). "The legislature, within constitutional limitations, can fix and circumscribe the jurisdiction of the courts of this State." *Bullington v. Angel*, 220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941). "Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975) (citations omitted), *overruled on other grounds by Quick v. Quick*, 305 N.C. 446, 457-58, 290 S.E.2d 653, 661 (1982).

Without regard to the amount in controversy, the district court conducts "the trial of civil actions and proceedings for annulment, divorce, equitable distribution of property, alimony, child support, child custody and the enforcement of separation or property settlement agreements between spouses, or recovery for the breach thereof." N.C.G.S. § 7A-244 (2015). Subdivision 50-13.7(a) permits a child support order to be "modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party." *Id.* § 50-13.7(a) (2015). Additionally, "[a] judicial decree in a child custody and support matter is subject to alteration upon a change of circumstances affecting the welfare of the child and, therefore, is not final in nature." *Stanback v. Stanback (Stanback II)*, 287 N.C. 448, 456, 215 S.E.2d 30, 36 (1975).

As a result, "the jurisdiction of the court entering such a decree continues as long as the minor child whose custody is the subject of the decree remains within its jurisdiction." *Id.* at 456, 215 S.E.2d at 36 (citing *Spence v. Durham*, 283 N.C. 671, 198 S.E.2d 537 (1973), *cert. denied*, 415 U.S. 918 (1974), and *Stanback v. Stanback*, 266 N.C. 72, 145 S.E.2d 332 (1965)); *see also* N.C.G.S. § 50-13.5(f) (2015) ("An action or proceeding in the courts of this State for custody and support of a minor child may be maintained in the county where the child resides or is physically present or in a county where a parent resides . . . .").

Here, the district court in Catawba County ruled on the original VSA in this action. According to the principles specified above, the district court thereafter retained jurisdiction over further proceedings, including modifications to the VSA. As reasoned by this Court in *Stanback II*, unless the district court "was somehow divested of its continuing jurisdiction, it was the only court which could modify the earlier judgment upon a motion in the cause and a showing of a change of circumstances." 287 N.C. at 456, 215 S.E.2d at 36 (citations omitted). At the time the 2001 VSA was approved, all parties resided in North Carolina. As a result, "the jurisdiction of the [district court] continue[d] as long as the minor child whose custody is the subject of the decree remain[ed] within its jurisdiction." *Id.* at 456, 215 S.E. 2d at 36. No circumstances are present here that would divest the district court of its jurisdiction to modify the VSA. *See id.* at 456, 215 S.E. 2d at 36; *Story v. Story*, 221 N.C. 114, 115-16, 19 S.E.2d 136, 137-38 (1942) (concluding that while an order requiring the husband to make monthly payments for child support was a consent judgment, the court had jurisdiction to hear the wife's subsequent motion for modification of the order, thereby allowing the court to award permanent custody of the child to the wife and to increase the husband's monthly payments); *Massey v. Massey*, 121 N.C. App. 263, 273, 465 S.E.2d 313, 319 (1996) ("In view of our holding affirming the trial court's voiding of the parties' Stipulation of Dismissal and because of the court's continuing jurisdiction acquired in consequence of its rendering the original child custody and support order, . . . we discern no abuse of discretion on the part of the trial court in its order of consolidation and no injury or prejudice suffered by [the] defendant."); *Jackson v. Jackson*, 68 N.C. App. 499, 501-02, 315 S.E.2d 90, 91 (1984) (holding that because the district court originally had jurisdiction over the child custody and support dispute, it had continuing jurisdiction to rule on a subsequent motion filed by the defendant for custody and support and sequestration of the marital home for the children's use and benefit). Thus, the district court maintained continuing jurisdiction to modify the 2001 VSA.

*B. Plain Meaning of the Statute Does Not Impose a Jurisdictional Prerequisite*

**[2]** Rules of statutory construction confirm the district court's jurisdiction. "It is well settled that '[w]here the language of a **statute** is **clear** and unambiguous, there is no room for judicial construction and the courts must construe the **statute** using its **plain meaning**.' " *In re Estate of Lunsford*, 359 N.C. 382, 391-92, 610 S.E.2d 366, 372 (2005) (emphases added) (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)).

In *In re D.S.*, 364 N.C. 184, 185, 694 S.E.2d 758, 759 (2010) the defendant, a fifth-grade student, was charged as a juvenile for touching a classmate "multiple times on her buttocks and between her legs with a straw-like candy, known as Pixy Stix." A juvenile court counselor filed a juvenile delinquency petition against the defendant alleging simple assault. *Id.* at 185, 694 S.E.2d at 759. Over a month later, the juvenile court counselor filed a second petition alleging that the defendant had also committed sexual battery during the same incident. *Id.* at 185-86, 694 S.E.2d at 759. On appeal the defendant argued, and the Court of Appeals agreed, that the second petition was not filed within the time period mandated by N.C.G.S. § 7B-1703, the pertinent statute, and therefore the district court lacked subject matter jurisdiction over the sexual battery allegation. *Id.* at 186, 694 S.E.2d at 759-60. In reversing the decision of the Court of Appeals, this Court reasoned that

> [o]n its face section 7B-1703 does not mention jurisdiction, nor does it indicate that a [juvenile court counselor's] failure to meet the timing requirements contained therein divests the district court of subject matter jurisdiction. We believe that had the legislature intended section 7B-1703 to implicate subject matter jurisdiction, the legislature would have either included these requirements in Chapter 7B, Article 16 or expressly stated so in section 7B-1703 itself. Because the legislature did neither, we conclude that it did not intend for the section 7B-1703 timelines to function as prerequisites for district court jurisdiction over allegedly delinquent juveniles. We note that this decision is consistent with the conclusions reached in prior North Carolina appellate decisions that have addressed Chapter 7B timeline requirements and jurisdiction, particularly in the contexts of abuse, neglect, and dependency and termination of parental rights.

*Id.* at 193-94, 694 S.E.2d at 764 (internal citation omitted).

While the subject matter of *In re D.S.* is distinguishable, the essence of this Court's reasoning is applicable in the case *sub judice*. Subsection 50-13.7(a) states that a child support order can be "modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party." N.C.G.S. § 50-13.7(a). Just as with the controlling statute in *In re D.S.*, subsection 50-13.7(a) does not indicate that a party's failure to file a motion divests the court of jurisdiction. There is no language in either law establishing jurisdictional consequences for failure to follow the statutory provisions; the statutory language is clear and unambiguous and the plain meaning of each statute imposes no jurisdictional prerequisites. As we reasoned in *In re D.S.* regarding the statute at issue there, the legislature here could have set forth requirements that would affect jurisdiction in N.C.G.S. § 50-13.7(a). *Compare In re A.R.G.*, 361 N.C. 392, 398-99, 646 S.E.2d 349, 353 (2007) (holding that while the county department of social services failed to comply with the applicable statute requiring a juvenile's address to be included in a petition alleging that a child was a neglected and dependent juvenile, "[n]othing in the statute suggests that the information required is jurisdictional" and stating that to hold otherwise "would elevate form over substance"), *with In re T.R.P.*, 360 N.C. at 591, 636 S.E.2d at 790-91 (concluding that a petition filed by the county department of social services alleging that a child was a neglected juvenile was not verified as required by statute and therefore, rendered the judgment void because "verification of the petition in an abuse, neglect, or dependency action . . . is a vital link in the chain of proceedings carefully designed to protect children at risk on one hand while avoiding undue interference with family rights on the other"). We decline to create a jurisdictional prerequisite in this statute where one cannot be originally found. Thus, the district court had jurisdiction to modify the child support order.[2]

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2. Defendant also argues that a district court's jurisdiction "is limited to the specific issues properly raised by a party or interested person in their motion in the cause." Defendant cites Court of Appeals case law suggesting that it is improper for courts to address issues other than those properly raised, namely, *Van Nynatten v. Van Nynatten*, 113 N.C. App. 142, 147, 438 S.E.2d 417, 419 (1993), and *Smith v. Smith*, 15 N.C. App. 180, 183, 189 S.E.2d 525, 526 (1972). Here the only issue addressed by the district court was modification of the VSA, a child support issue over which the court had continuing jurisdiction; therefore, this case is distinguished from the cases cited above in which the district court addressed child support when the only issue before the court was alimony and vice versa. *Van Nynatten*, 113 N.C. App. at 147, 438 S.E.2d at 419; *Smith*, 15 N.C. App. at 183, 189 S.E.2d at 526.

*C. The Legislative History Suggests that the General Assembly Did Not Intend to Create a Jurisdictional Prerequisite*

**[3]** While the plain meaning of N.C.G.S. § 50-13.7(a) is sufficient for us to determine that the district court had jurisdiction to modify the VSA, the legislative history of the statute indicates that the legislature did not intend for the statute to create a jurisdictional prerequisite to modify child support orders. To determine legislative intent, this Court can also consider "the legislative history of an act and the circumstances surrounding its adoption." *In re Banks*, 295 N.C. 236, 239-40, 244 S.E.2d 386, 389 (1978) (citation omitted). The legislative history of N.C.G.S. § 50-13.7(a) and other domestic relations statutes yields critical insight regarding the General Assembly's intent here.

As early as 1859, judges had statutory authority in certain cases to "make all needful rules and orders concerning [child] custody, as shall best promote the welfare of the children." Act of Feb. 15, 1859, ch. 53, sec. 1, 1858-59 N.C. Sess. Laws 91, 92. Dissatisfied parties could appeal to the Supreme Court. *Id.*, sec. 2, at 92. In 1872, the General Assembly enacted a law regarding child support and custody in divorce actions:

> After the filing of a complaint in any proceeding for divorce, whether from the bonds of matrimony, or from bed and board, both before and after final judgment therein, it shall be lawful for the judge of the court, in which such application is or was pending, to make such orders respecting the care, custody, tuition and maintenance of the children of the marriage as may be proper, and from time to time to modify or vacate such orders: *Provided*, [sic] That no order respecting the children, shall be made on the application of either party without five, [sic] days notice to the other party, unless it shall appear that the party having the possession or control of such children, [sic] has removed or is about to remove the children or himself, beyond the jurisdiction of the court.

Act of Feb. 12, 1872, ch. 193, sec. 46, 1871-72 N.C. Sess. Laws 328, 343 (consequences of divorce upon the right to custody of the children). Unlike the current statute, in the original version of the law the legislature restricted the court's authority by expressly stating that, except in exigent circumstances, an order to vacate or modify could not be entered if the other party was not given five days notice. The same language regarding the establishment and modification of support orders—including the mandatory five-day notice requirement—survived various

revisions of the law. *See* 1 N.C. Cons. Stat. § 1664 (1919); 1 N.C. Rev. § 1570 (1905); 1 N.C. Code § 1296 (1883). The same language was later incorporated in N.C.G.S. § 50-13 (1943) along with additional provisions regarding custody; however, in 1967 N.C.G.S. § 50-13 (1943) was repealed and replaced with the original version of the current statute, N.C.G.S. § 50-13.7(a) (1967). Act of July 6, 1967, ch. 1153, secs. 1, 2, 1967 N.C. Sess. Laws 1772-73, 1777. The five-day notice requirement was conspicuously removed from the latest version of the law.

Likewise, our alimony statutes are derived from the same Act of 1872 that originated the child support and custody statute under present review. Two of these alimony laws are relevant here. The first of them allowed alimony *pendente lite*. The language in this alimony enactment is similar to that used to establish and modify child support and custody orders, stating that "such order may be modified or vacated at any time, on the application of either party or of any one [sic] interested: *Provided*, That no order allowing alimony *pendente lite* shall be made unless the husband shall have had five days' notice thereof." Ch. 193, sec. 38, 1871-72 N.C. Sess. Laws at 340 (alimony *pendente lite*). The laws were later codified, with the modification and mandatory notice provisions surviving in subsequent versions of the *pendente lite* alimony law. *See* 1 N.C. Code § 1291 (1883); 1 N.C. Cons. Stat. § 1666 (1919); N.C.G.S. § 50-15 (1943). The second of the alimony laws allowed alimony without divorce. While this edict did not originally have the language concerning modifications or notice, such wording was later added in 1919 and survived several revisions of the law. *See* Ch. 193, sec. 39, 1871-72 N.C. Sess. Laws at 341; 1 N.C. Cons. Stat. § 1667 (1919); N.C.G.S. § 50-16 (1943).

Later, this Court addressed whether the five-day notice provision was jurisdictional with respect to the alimony laws. *Barnwell v. Barnwell*, 241 N.C. 565, 566, 85 S.E.2d 916, 916-17 (1955), involved a civil action for alimony without divorce under N.C.G.S. § 50-16 in which a district court entered an order for alimony *pendente lite* without notice to the defendant. This Court determined that the failure to comply with the five-day notice requirement in N.C.G.S. § 50-16 rendered the order void.[3] *Id.* at 567-68, 85 S.E.2d at 918. In 1967 both alimony statutes were

3. The Court did not expressly use the term "jurisdictional prerequisite," but after stating that the order was "void," the Court cited *Collins v. N.C. State Highway & Pub. Works Comm'n*, 237 N.C. 277, 281, 74 S.E.2d 709, 713 (1953), in which this Court stated that a lack of jurisdiction renders a judgment "void." Moreover, we have consistently used the terms "void" and "nullity" to describe a lack of jurisdiction. *See In re T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 790 ("A judgment is void, when there is a want of jurisdiction by the court over the subject matter . . . ." (quoting *Hart v. Thomasville Motors, Inc.*,

repealed and the statutory framework that exists today was enacted as evidenced in N.C.G.S. §§ 50-16.1A through 50-16.10. The notice provision remained intact until it was repealed in 1995. Act of June 21 1995, ch. 319, sec. 6, 1995 N.C. Sess. Laws 641, 646-47 (changing the laws pertaining to alimony) (codified at N.C.G.S. § 50-16.8 (1995)). In its present form, the relevant alimony statute includes the same language as appears in N.C.G.S. § 50-13.7(a) and which is at issue here: "An order of a court . . . for alimony . . . may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." N.C.G.S. § 50-16.9(a) (2015). Moreover, both the child support modification statute at issue here and the alimony statute cited for purposes of instructive comparison were enacted by the General Assembly on the same day in successive acts. Act of July 6, 1967, ch. 1152, 1967 N.C. Sess. Laws 1766 (alimony); Ch. 1153, 1967 N.C. Sess. Laws 1772 (child custody and support). As stated above, the notice provision was removed from the child support statute in 1967, but remained in the alimony statute until 1995. This comprehensive analysis of the legislative history of N.C.G.S. § 50-13.7(a), the governing statute in the case at bar, establishes that the legislature did not intend that subsection 50-13.7(a) create a jurisdictional prerequisite.

*D. The Provision in N.C.G.S. § 50-13.7(a) Is Directory Rather than Mandatory*

**[4]** The provision of N.C.G.S. § 50-13.7(a) requiring a motion to be filed is directory rather than mandatory; consequently, the absence of a motion to modify a child support order does not divest the district court of jurisdiction to act under the purview of the statute. With the empirical subject of jurisdiction substantively questioned, defendant argues that "a motion in the cause by an interested party pursuant to N.C.G.S. § 50-13.7(a) [must be filed]. Without a motion in the cause the trial court is without authority/jurisdiction to modify the existing order." This Court

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244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956))); *Ridge Cmty. Inv'rs, Inc. v. Berry*, 293 N.C. 688, 696, 239 S.E.2d 566, 571 (1977) ("[T]he clerk having undertaken to enter a kind of judgment which she had no jurisdiction to enter [,] the judgment so entered is void and is a nullity, and may be so treated at all times." (quoting *Moore v. Moore*, 224 N.C. 552, 555, 31 S.E.2d 690, 692 (1944))); *Ellis v. Ellis*, 190 N.C. 418, 421, 130 S.E. 7, 9 (1925) ("If a judgment is void, it must be from one or more of the following causes: 1. Want of jurisdiction over the subject-matter; 2. Want of jurisdiction over the parties to the action, or some of them; or 3. Want of power to grant the relief contained in the judgment. In pronouncing judgments of the first and second classes, the court acts without jurisdiction, while in those of the third class it acts in excess of jurisdiction." (quoting 1 A.C. Freeman, *A Treatise on the Law of Judgments* § 116 at 176 (4th ed. 1892))).

has previously held that a provision in a statute that is directory rather than mandatory is not jurisdictional. *See In re D.S.*, 364 N.C. at 193-94, 694 S.E.2d at 763-64 (citing *In re C.L.C.*, 171 N.C. App. 438, 443-45, 615 S.E.2d 704, 707-08 (2005)) (concluding that various statutory timelines governing the filing of a petition to terminate parental rights, the scheduling of the initial post-disposition custody review hearing and the filing of permanency planning orders under cited provisions of the juvenile code are "directory, rather than mandatory and thus, not jurisdictional" (quoting *In re B.M.*, 168 N.C. App. 350, 354, 607 S.E.2d 698, 701 (2005)), *aff'd per curiam in part and disc. rev. improvidently allowed*, 360 N.C. 475, 628 S.E.2d 760 (2006)). " 'Directory' has been defined in *Black's Law Dictionary* as '[a] provision in a statute, rule of procedure, or the like, which is a mere direction or instruction of no obligatory force, and involving no invalidating consequence for its disregard, as opposed to an imperative or mandatory provision, which must be followed.' " *State v. Fulp*, 355 N.C. 171, 176, 558 S.E.2d 156, 159 (2002) (quoting *Black's Law Dictionary* 460 (6th ed. 1990)). We have reasoned that:

> In determining the mandatory or directory nature of a statute, the importance of the provision involved may be taken into consideration. Generally speaking, those provisions which are a mere matter of form, or which are not material, do not affect any substantial right, and do not relate to the essence of the thing to be done so that compliance is a matter of convenience rather than substance, are considered to be directory.

*State v. House*, 295 N.C. 189, 203, 244 S.E.2d 654, 661-62 (1978) (quoting 73 Am. Jur. 2d, stat. § 19, at 280 (1974) (footnote call numbers omitted)). This Court has determined that "[t]he meaning and intention of the Legislature must govern; and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it in the one way or the other." *Spruill v. Davenport*, 178 N.C. 364, 368-69, 100 S.E. 527, 530 (1919) (citation omitted).

We conclude that failure to follow the directory requirements of N.C.G.S. § 50-13.7(a) regarding the filing of a motion in the cause does not divest the district court of jurisdiction. The provision requiring a motion to be filed for a child support order to be modified is directory, not mandatory, in nature. The provision concerns a matter of form, rather than a matter of substance as defendant contends, and merely addresses the procedural aspects of modifying a child support order. This Court has issued consistent determinations to this effect, even under varying

circumstances. *See House*, 295 N.C. at 200-03, 244 S.E.2d at 660-62 (concluding that while a grand jury foreman signed an indictment that failed to explicitly indicate that at least twelve jurors concurred in the finding but stated that the jury found the indictment to be a true bill, such omission violated only a directory provision); *State v. Rogers*, 275 N.C. 411, 422-23, 168 S.E.2d 345, 351-52 (1969) (concluding that statutory provisions requiring county commissioners making up a jury list to use, in addition to a tax list, "a list of names of persons who do not appear upon the tax list," are "directory and not mandatory in the absence of bad faith or corruption"), *cert. denied*, 396 U.S. 1024 (1970); *N.C. State Art Soc'y., Inc. v. Bridges*, 235 N.C. 125, 130, 69 S.E.2d 1, 4-5 (1952) (concluding that a statute requiring one of two particular individuals to appraise art selected to be purchased by the State Art Commission was directory and the decision to have a different qualified person to appraise the art constituted substantial compliance with the statute). Thus, the provision stating that a child support order may be modified "upon" a motion in the cause is merely directory; therefore, plaintiff's failure to do so does not divest the district court of jurisdiction.

*E. The VSA Satisfied the Purposes of the Provisions in N.C.G.S. § 50-13.7(a)*

**[5]** While N.C.G.S. § 50-13.7(a) does not create a jurisdictional prerequisite and does not contain a mandatory requirement that a party or interested person file a motion for child support modification in order for a district court to exercise jurisdiction over such a matter, defendant nonetheless asserts that a trial court must construe the statute in such a fashion to abide by the procedural requirements of N.C.G.S. § 50-13.7(a). According to defendant, to hold otherwise will encourage parties to disregard other procedural requirements such as filing complaints, issuing summonses and observing other mandatory provisions. This Court is not persuaded by defendant's "snowball effect" argument. Here, plaintiff filed a VSA, which was sufficient to satisfy the purposes of N.C.G.S. § 50-13.7(a). A primary purpose of a requirement to file a motion in order to modify child support is to make the court aware of "important new facts unknown to the court at the time of the prior custody decree." *Tank v. Tank*, 2004 ND 15, ¶ 10, 673 N.W.2d 622, 626 (2004) (citations omitted). When a VSA is filed to modify an earlier court order on child support, the VSA is customarily a request to modify the child support order because circumstances have changed. Thus, a VSA submitted to the district court without such a motion still serves the purpose highlighted in *Tank*, a case from the State of North Dakota that is instructive for this analysis. Thus, our decision also harmoniously aligns with the

statutory provision requiring a showing of a change in circumstances in order for a child support order to be modified.

**IV. Conclusion**

In light of a VSA's inherent satisfaction of the purposes of N.C.G.S. § 50-13.7(a), coupled with the analysis employed regarding statutory construction, previous case law application and legislative history review, this Court concludes that plaintiff's failure to file a motion to modify defendant's child support obligation did not divest the district court of jurisdiction to modify the VSA at issue here under N.C.G.S. § 50-13.7(a). Accordingly, we reverse the decision of the COA affirming the trial court's order declaring the 2001 VSA void and remand this case to that court for further remand to the District Court, Catawba County for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Chief Justice MARTIN concurring in the result only.

In this case, we must decide whether the district court had the power to modify a child support order even though no party had filed a motion in the cause. Under subsection 50-13.7(a) of our General Statutes, "an order of a court of this State for support of a minor child may be modified or vacated at any time, *upon motion in the cause* and a showing of changed circumstances." N.C.G.S. § 50-13.7(a) (2015) (emphasis added). Here, the district court acted only after defendant had entered into a proposed Modified Voluntary Support Agreement and Order (the consent order), which the parties then submitted to the district court for approval. Because the consent order served as the functional equivalent of a joint motion, I concur in the result that the majority opinion reaches.

But I do not concur in the majority's reasoning, as the majority's rationale seems to extend much further than the context of this case. Because it holds that the "motion in the cause" language of subsection 50-13.7(a) is directory rather than mandatory, the majority seems to allow a district court to modify a child support order—and thus to alter the legal rights and duties of the parties involved—sua sponte, without any party invoking the court's power. This rule, if the majority is indeed establishing it, ignores the plain language of the very statutory provision that gives district courts the power to modify these kinds of orders. It also potentially subverts the customary role that courts play in our adversarial system: to rule on the issues actually raised and argued by the parties. This seems imprudent at best, and may raise serious jurisdictional

concerns as well. I therefore write separately to express my opinion that the majority's reasoning should be read narrowly.

This Court said in *State v. House* that, "[i]n determining the mandatory or directory nature of a statute, the importance of the provision involved may be taken into consideration." 295 N.C. 189, 203, 244 S.E.2d 654, 661 (1978) (quoting 73 Am. Jur. 2d *Statutes* § 19, at 280 (1974)). "Generally speaking, those provisions which are a mere matter of form, or which are not material, do not affect any substantial right, and do not relate to the essence of the thing to be done so that compliance is a matter of convenience rather than substance, are considered to be directory." *Id.* at 203, 244 S.E.2d at 661-62 (quoting 73 Am. Jur. 2d *Statutes* § 19, at 280). Under this standard, a provision that requires a motion in order for a district court to modify an existing support order should be viewed as mandatory for several reasons.

First of all, the motion requirement in subsection 50-13.7(a) is not "a mere matter of form." It defines both the role of the parties and the role of the court in child support proceedings. If a party wishes to have a child support order modified, that party must file a motion in the cause *and* serve it on the opposing party. That gives the opposing party notice of the motion and the chance to present arguments opposing it. And that is how our adversarial system normally operates. But parties have no opportunity to contest a potential modification when a court acts sua sponte. Granting a court the power to act sua sponte in this context, as the majority appears to do, both destabilizes already concluded agreements and affects the substantial rights of parties who rely on those agreements. Parties also have an interest in the finality of judgments and the repose that they provide. Under the majority's apparent rationale, though, cases once resolved could be reopened even though neither party wants to continue litigating.

*In re T.R.P.* is an analogous case. There, we held that a statutory provision requiring a verification signature on a juvenile petition—the lack of which would in many cases be a simple oversight—was mandatory. 360 N.C. 588, 598, 636 S.E.2d 787, 794-95 (2006). Requiring the verification procedure "respect[ed] both the right to family autonomy and the needs of the child." *Id.* at 598, 636 S.E.2d at 794. A similar logic motivates the language of subsection 50-13.7(a). A district court can always modify a support order on request of a party who shows a change in circumstances and good reason to modify the order. But if the majority ruling is read to permit even sua sponte modifications, it would disturb several decades of Court of Appeals precedent that domestic relations parties and social services agencies throughout North Carolina have

presumably come to rely on. *See Royall v. Sawyer*, 120 N.C. App. 880, 882, 463 S.E.2d 578, 580 (1995) (concluding that a child support agreement could not be modified without a motion to modify the agreement); *Kennedy v. Kennedy*, 107 N.C. App. 695, 703, 421 S.E.2d 795, 799 (1992) (noting that a district court may modify a custody order only upon a motion by either party or by anyone interested); *Smith v. Smith*, 15 N.C. App. 180, 182-83, 189 S.E.2d 525, 526 (1972) (holding that it was error for the trial court to modify a custody and support order when the only question before the trial court at the time was alimony).

I would also observe that the General Assembly has not amended the motion requirement in subsection 50-13.7(a) in response to this longstanding Court of Appeals precedent. That suggests that the Court of Appeals correctly understood the General Assembly's intent, or, at a minimum, that the General Assembly has acquiesced to the Court of Appeals' reading. "The legislature's inactivity in the face of the [judiciary's] repeated pronouncements [on this issue] can only be interpreted as acquiescence by, and implicit approval from, that body." *In re T.R.P.*, 360 N.C. at 594, 636 S.E.2d at 792 (alterations in original) (quoting *Rowan Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 9, 418 S.E.2d 648, 654 (1992)).

The majority holds that a district court's failure to observe subsection 50-13.7(a)'s motion requirement is not jurisdictional, but I believe that it may very well be. At the very least, the majority does not establish that it is not. The majority's discussion of jurisdiction establishes only that the district court here had continuing jurisdiction over this case and these parties. That is clear. But by focusing on continuing jurisdiction, the majority ducks the real issue: whether, in the absence of a motion or its functional equivalent, a district court has the power to modify a child support order, or instead lacks the power to do so unless and until it receives a request from an interested party to modify the order.

The term "[j]urisdiction" refers to "[a] court's power to decide a case *or issue a decree*." *In re M.I.W.*, 365 N.C. 374, 379, 722 S.E.2d 469, 473 (2012) (second set of brackets in original) (emphasis added) (quoting *Black's Law Dictionary* 927 (9th ed. 2009)). "[H]aving jurisdiction is simply a state of being that requires, and in some cases allows, no substantive action from the court." *Id.* at 379, 722 S.E.2d at 473. Put another way, in our adversarial system of justice, a court with jurisdiction sometimes *cannot* act—at least not until a party has asked it to. A court that has subject-matter jurisdiction over a case and personal jurisdiction over the parties may thus still lack the "power to grant the relief contained in [its] judgment." *Ellis v. Ellis*, 190 N.C. 418, 421, 130 S.E. 7, 9

(1925) (quoting 1 A. C. Freeman, *Freeman on Judgments* § 116 (4th ed. 1892)). And a court that enters a judgment without the power to do so "acts in excess of jurisdiction." *Id.* (quoting 1 A. C. Freeman, *Freeman on Judgments* § 116 (4th ed. 1892)). That judgment is therefore void and "may be impeached collaterally or by direct attack." *Id.* at 421-22, 130 S.E. at 9; *see also State ex rel. Hanson v. Yandle*, 235 N.C. 532, 535, 70 S.E.2d 565, 568 (1952) ("If the court was without authority, its judgment . . . is void and of no effect. A lack of jurisdiction or power in the court entering a judgment always avoids the judgment . . . ."). Hence the concern here: a district court that ignores a mandatory motion requirement in issuing an order may well be acting in excess of its jurisdiction, and its order may well be void.

Defending its position, the majority notes that "the jurisdiction of the court entering . . . a [child support] decree continues as long as the minor child whose custody is the subject of the decree remains within its jurisdiction," quoting *Stanback v. Stanback*, 287 N.C. 448, 456, 215 S.E.2d 30, 36 (1975). But again, the issue here is not whether the district court had continuing jurisdiction, but whether the district court exceeded the scope of its jurisdiction.

A court can, of course, dismiss a case sua sponte for lack of subject-matter jurisdiction, *see* N.C. R. Civ. P. 12(h)(3); *accord* Fed. R. Civ. P. 12(h)(3), but that is one of the few exceptions that proves the rule. Many other things, including personal jurisdiction, are waivable and should not be raised sua sponte. *See* N.C. R. Civ. P. 12(h)(1); *accord* Fed. R. Civ. P. 12(h)(1). Courts always have jurisdiction to determine subject-matter jurisdiction, but they do not always have—in fact, they usually do not have—the power to determine other matters unless asked to do so by a party.

By ignoring the possibility that a district court that modified a support order sua sponte may be acting in excess of its jurisdiction, and by reading the standard for directory versus mandatory statutes in a way that strongly favors the "directory" label, the majority raises several troubling questions. What must the General Assembly do to make a procedural rule actually binding on the courts? Does the magic word "jurisdictional" now have to be in the statute's text? Would a court with both subject-matter and personal jurisdiction have the power to issue a summary judgment order when no party had moved for summary judgment? Would a court be able to issue a final judgment in a case that had disputed material facts in the absence of settlement or trial? These last two questions show the error in the majority's thinking, and the inconsistency of its reasoning with foundational principles of our adversarial

system: a district court can plainly have jurisdiction over a case but lack the power to issue a certain decree.

The consent order satisfied subsection 50-13.7(a)'s motion requirement, so the district court here did not act sua sponte. We therefore do not have to decide whether a district court that did act sua sponte in this context would be exceeding its jurisdiction. It is important, however, that we distinguish in future cases between a court's jurisdiction over a case, on the one hand, and a court's power to issue a particular order or remedy, on the other. Those two things are not the same. Accordingly, I concur in the result only.

Justice ERVIN joins in this concurring opinion.

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DEPARTMENT OF TRANSPORTATION
v.
ADAMS OUTDOOR ADVERTISING OF CHARLOTTE LIMITED PARTNERSHIP

No. 206PA16

Filed 29 September 2017

**1. Eminent Domain—condemnation of billboard leasehold—valuation—value of physical structure not recoverable**

In a case involving the condemnation of land which contained a billboard, evidence concerning the value that the billboard added to the leasehold interest held by an outdoor advertising company was admissible to help the trier of fact determine the fair market value of that interest. The value of the physical structure, which was the personal property of the advertising company, was not recoverable.

**2. Eminent Domain—condemnation of billboard leasehold—valuation—rental income**

The rental income from a billboard was admissible in determining the fair market value of the advertising company's leasehold interest in a condemnation action where the advertising company would enter into long-term contracts that gave advertisers the right to occupy and use billboard space on its property. Care must be taken to distinguish between income from the property and income from the business conducted on the property.

**3. Eminent Domain—condemnation of billboard leasehold—valuation—permits—nonconforming use**

Evidence of a billboard company's permits that permitted nonconforming use was admissible to help the trier of fact determine the fair market value of the company's condemned leasehold interest.

**4. Eminent Domain—condemnation of billboard leasehold—valuation—lease extensions**

A Department of Transportation appraiser incorrectly valued a leasehold interest held by a billboard company where the lease included an automatic ten-year extension followed by optional renewal periods. Under the automatic extension, the advertising company essentially had a contractual right to possess the leased property for twenty years and it was a proper factor for the trier of fact to consider. However, the optional ten-year lease extensions should not have been considered.

**5. Eminent Domain—condemnation of billboard leasehold—valuation—specific billboard—not considered properly**

A Department of Transportation appraiser incorrectly applied the bonus value method of valuing a condemned leasehold interest held by a billboard interest where, in part, he did not account for the value of the specific nonconforming billboard, in its specific location, and the enhanced rental income that it generated, along with the permits that permitted a continuing nonconforming use.

Justice HUDSON concurring in part and dissenting in part.

Justices BEASLEY and MORGAN join in this concurring and dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 785 S.E.2d 151 (2016), reversing an order entered on 27 August 2014 by Judge Lisa C. Bell in Superior Court, Mecklenburg County. Heard in the Supreme Court on 21 March 2017.

*Joshua H. Stein, Attorney General, by Kenneth A. Sack, Assistant Attorney General, for plaintiff-appellee.*

*Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Craig D. Justus, for defendant-appellant.*

MARTIN, Chief Justice.

In this appeal, we consider whether the Court of Appeals erred in reversing the trial court's order addressing the appropriate measure of damages in a condemnation action. The North Carolina Department of Transportation (DOT) condemned a leasehold interest held by Adams Outdoor Advertising of Charlotte Limited Partnership (Adams Outdoor). Adams Outdoor owned a billboard situated on the leasehold and rented out space on the billboard to advertisers. At the time of the taking, the billboard did not conform to city or state regulations, but Adams Outdoor held permits that allowed for the billboard's continued use. We must address which Article of Chapter 136 of our General Statutes applies to this condemnation proceeding and which evidence is admissible to help the trier of fact determine the fair market value of Adams Outdoor's condemned leasehold interest. We affirm the decision of the Court of Appeals in part and reverse it in part.

## I. Background

Defendant Adams Outdoor is an outdoor advertising company that rents out advertising space on billboards. In October 2001, Adams Outdoor acquired a billboard at the corner of Sharon Amity Road and Independence Boulevard in Charlotte, North Carolina. Approximately 85,000 vehicles drove by this location each day. Adams Outdoor rented out advertising space on the billboard and collected payments from the advertisers.

The billboard, which was constructed in 1981, was 65 feet tall and had two back-to-back sign face displays of approximately 14 feet by 48 feet each, or 672 square feet of advertising space per face. The billboard weighed approximately 30,000 pounds, had a steel monopole support, and was attached to the land by a foundation that was dug 18 feet into the ground, 6 feet around, and backfilled with concrete. The billboard was a legal height when it was built, but by the time Adams Outdoor acquired it, it no longer conformed to revised DOT height regulations. Because the billboard already existed when the regulations changed, Adams Outdoor received a permit that allowed it to continue to use the billboard even though it was nonconforming.

At the same time that it acquired the billboard, Adams Outdoor acquired the lease for the lot on which the billboard was located. When Adams Outdoor acquired the lease, the lease was operating on a year-to-year basis. In 2006, Adams Outdoor negotiated a new lease with the landowner. The new lease term started in August 2007 and ran for ten

years, and the lease also provided that this term would be automatically extended for another ten years. After the automatically extended term, the parties had the option to let the lease continue to automatically renew for successive ten-year terms, but either party could decline to renew the lease with ninety days' notice before any given renewal. The lease permitted Adams Outdoor to use the lot for outdoor advertising purposes only and provided that Adams Outdoor could remove the billboard either before or within a reasonable time after the lease expired or was terminated. During the existence of the lease, Adams Outdoor, but not the landlord, could cancel the lease at any time if one of a small number of specific circumstances arose.

This lease was recorded in the Mecklenburg County Register of Deeds Office. While the recorded lease was in effect, the City of Charlotte also changed its regulations in a way that made the billboard nonconforming. As with the change in DOT's regulations, the billboard was grandfathered in as a nonconforming billboard, and Adams Outdoor received a permit for its continued use.

Plaintiff DOT purchased the fee simple interest in the parcel of land on which Adams Outdoor's billboard stood. In December 2011, DOT filed a civil action and declaration of taking of Adams Outdoor's interest in the property "for public use in the construction of [a] . . . highway project." DOT hired an appraiser to estimate the value of the leasehold interest. To estimate this value, the appraiser used the "bonus value" approach, which compares the rent stipulated in the lease to the fair market rental value of that lease. The appraiser concluded that, because Adams Outdoor was paying a higher rent for this property than it paid in what the appraiser considered to be reasonably similar leases, the lease had negative value and just compensation was zero. Adams Outdoor did not agree with this assessment, and both parties moved for a section 108 hearing to determine the issues raised by the pleadings, including whether a taking had occurred and, if so, the extent of that taking; the proper classification of the billboard; the proper way to determine the amount of compensation due to Adams Outdoor; and whether certain evidence was admissible to help determine the fair market value of the leasehold interest.[1] The trial court granted these motions and held the section 108 hearing.

1. The purpose of a section 108 hearing is to allow a judge to "hear and determine any and all issues raised by the pleadings other than the issue of damages." N.C.G.S. § 136-108 (2015).

The trial court's findings of fact after the hearing included, among other things, that "[b]ecause of the nonconforming nature of the Billboard, and as a consequence of the highly restrictive requirements for new billboard locations, the Billboard could not be moved in its entirety and relocated"; that Adams Outdoor "earned substantial rental income from leasing space on the Billboard to advertisers"; that "[t]he Billboard and its outdoor advertising use is essentially self-operating as rental property for advertisers to display their messages to the intended viewing audience"; that "[b]ecause Adams possessed a valid State permit for the Billboard, neither the City of Charlotte nor any other local regulatory authority could require its removal by way of regulations . . . without paying just compensation"; and that "DOT's expert . . . was directed by the DOT to specifically exclude the value of the outdoor advertising in determining his opinion on just compensation."

The trial court then concluded that, "[b]ecause the DOT caused the removal of Adams' nonconforming outdoor advertising property interests . . . by way of condemnation, [Article 11 of Chapter 136] is applicable and controlling in setting the conditions of measuring just compensation." The trial court therefore ordered that the monies that DOT owed to Adams "must include the value of the outdoor advertising, taking into account the lease portfolio (including any reasonable expectation of renewal), the physical structure, and the accompanying permits." The trial court also concluded that DOT's bonus value method was "improper" and should be excluded.

DOT appealed, and the Court of Appeals reversed. *Dep't of Transp. v. Adams Outdoor Advert. of Charlotte Ltd. P'ship*, ___ N.C. App. ___, ___, 785 S.E.2d 151, 161 (2016). The Court of Appeals determined that the controlling statutory framework was Article 9 rather than Article 11 of Chapter 136 of the North Carolina General Statutes. *Id.* at ___, 785 S.E.2d at 155. The Court of Appeals also held that the billboard was noncompensable personal property, and that the alleged loss of revenue from renting advertising space, the permits issued to defendant, and the option to renew the lease were not compensable property interests. *Id.* at ___, 785 S.E.2d at 157 60. Finally, the Court of Appeals reversed the trial court's order excluding bonus value method evidence because, it said, that part of the order was based on the "erroneous premise" that the billboard was "a permanent leasehold improvement" instead of personal property. *Id.* at ___, 785 S.E.2d at 160 61.

Adams Outdoor petitioned this Court for discretionary review, and we granted its petition. We must decide (1) whether the Court of Appeals erred in its conclusion that the fair market value provision

in Article 9, not Article 11, governs this condemnation proceeding; (2) whether the value that the billboard added to that of the leasehold interest should be considered in determining the fair market value of that interest; (3) whether the income derived from renting out advertising space should be considered in determining the fair market value of the leasehold interest; (4) whether the fact that permits had been issued to Adams Outdoor for continued use of the billboard should be considered in determining the fair market value of the leasehold interest; (5) whether the automatic renewal of the lease and the options to renew the lease should be considered in determining the fair market value of the leasehold interest; and (6) whether DOT's bonus value method evidence should be considered in determining the fair market value of the leasehold interest.

This Court reviews a trial court's findings of fact to determine whether they are supported by competent evidence and "whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). This Court reviews conclusions of law de novo. *E.g.*, *id.* at 168, 712 S.E.2d at 878. It also reviews questions of statutory interpretation de novo. *E.g.*, *Hammond v. Saini*, 367 N.C. 607, 609, 766 S.E.2d 590, 592 (2014).

## II. Analysis

### *1. The controlling statutory scheme*

**[1]** Using its power of eminent domain, the government may take private property for public use. *State v. Core Banks Club Props., Inc.*, 275 N.C. 328, 334, 167 S.E.2d 385, 388 (1969). When the State takes private property for public use, "the owner must be justly compensated." *Dep't of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 4, 637 S.E.2d 885, 889 (2006). The possessor of a recorded leasehold interest is likewise entitled to just compensation when the State takes that interest. *See Givens v. Sellars*, 273 N.C. 44, 50, 159 S.E.2d 530, 536 (1968) (citing 26 Am. Jur. 2d *Eminent Domain* § 79 (1966)); *see also* 26 Am. Jur. 2d *Eminent Domain* § 138 (2014) ("A leasehold may be classified as 'property' subject to the Takings Clause of the U.S. Constitution's Fifth Amendment.").

Under the eminent domain power set forth in Article 2 of Chapter 136, DOT has the right to "acquire by gift, purchase, or otherwise . . . any road or highway, or tract of land or other property whatsoever that may be necessary for a State transportation system and adjacent utility rights-of-way." N.C.G.S. § 136-18(2)(e) (Supp. 2016). When DOT acquires property by condemnation, Article 9 of Chapter 136 sets out the appropriate measure of damages to which the owner of condemned property

is entitled. *Id.* § 136-112(2) (2015). Under this Article, the measure of damages when DOT takes an entire tract of land is "the fair market value of the property at the time of taking." *Id.*

Under the eminent domain power set forth in Article 11 of Chapter 136, titled "Outdoor Advertising Control Act," DOT also has the power "to acquire by . . . condemnation all outdoor advertising and all property rights pertaining thereto which are prohibited under the provisions of G.S. 136-129, 136-129.1 or 136-129.2, provided such outdoor advertising is in lawful existence on the effective date of this Article." *Id.* § 136-131 (2015). Under Article 11, however, the measure of damages when the outdoor advertising owner does not own the underlying fee interest in the property is "limited to the fair market value . . . of the outdoor advertising owner's interest in the real property on which the outdoor advertising is located *and such value shall include the value of the outdoor advertising.*" *Id.* (emphasis added).

Adams Outdoor argues, and the trial court agreed, that compensation for the leasehold interest should be measured according to Article 11, not Article 9. If section 136-131 of Article 11 controls in this case, then the fair market value of the leasehold interest would necessarily include the value of the outdoor advertising.

In statutory interpretation, we first look at the statute's plain meaning. "When the language of a statute is plain and free from ambiguity, expressing a single, definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended, and the statute must be interpreted accordingly." *State Highway Comm'n v. Hemphill*, 269 N.C. 535, 539, 153 S.E.2d 22, 26 (1967) (quoting *State ex rel. Long v. Smitherman*, 251 N.C. 682, 684, 111 S.E.2d 834, 836 (1960)); *accord Falk v. Fannie Mae*, 367 N.C. 594, 602, 766 S.E.2d 271, 277 (2014). Here, the statute gives DOT the power "to acquire by purchase, gift, or condemnation all outdoor advertising and all property rights pertaining thereto w*hich are prohibited under the provisions of G.S. 136-129*, *136-129.1 or 136-129.2*." N.C.G.S. § 136-131 (emphasis added). These provisions all provide limitations on the construction or maintenance of an outdoor advertising device. *Id.* §§ 136-129, -129.1, -129.2 (2015). The explicit reason for enacting the Outdoor Advertising Control Act, moreover, was "to provide and declare . . . a . . . statutory basis for the regulation and control of outdoor advertising." *Id.* § 136-127 (2015). Thus, Article 11 does not give DOT the power to condemn any billboard (along with its related property rights) for any reason. It gives DOT the power to condemn a billboard specifically when DOT is condemning the billboard because it is prohibited by Article 11.

Here, though, DOT condemned the leasehold interest to widen a highway, not because the billboard that sat on the fee was nonconforming. DOT's authority to do this is found in N.C.G.S. § 136-18(2)(e), which gives DOT the power to condemn property when condemnation of that property is necessary for a state road or highway. DOT therefore was not exercising its authority under Article 11 to acquire prohibited outdoor advertising and all related property rights by condemnation; it was exercising its authority under N.C.G.S. § 136-18(2)(e) to condemn property in order to widen a highway. After all, even if the billboard had been conforming, DOT *still* would have condemned the leasehold interest because it needed the property for its highway-widening project. So the fair market valuation provision specific to Article 11 does not govern this condemnation proceeding; the general fair market valuation provision in Article 9 does instead.[2] But because Article 9 still requires compensation for the fair market value of the property interest taken, DOT has to compensate Adams Outdoor for the fair market value of its leasehold interest.

*2. The outdoor advertising structure (the billboard)*

In a proceeding to determine the fair market value of property under Article 9, "[a]ll factors pertinent to a determination of what a buyer, willing to buy but not under compulsion to do so, would pay and what a seller, willing to sell but not under compulsion to do so, would take for the property must be considered." *M.M. Fowler*, 361 N.C. at 17, 637 S.E.2d at 896 (alteration in original) (quoting *City of Charlotte v. Charlotte Park & Recreation Comm'n*, 278 N.C. 26, 34, 178 S.E.2d 601, 606 (1971)). In other words, the fair market value is the price to which a willing buyer and a willing seller would agree. So the question here is whether a billboard owned by Adams Outdoor, and situated on the site of Adams Outdoor's leasehold interest, would be a factor that a willing buyer and a willing seller would consider when agreeing on the price of that leasehold interest. We are not considering the fair market value of the physical billboard structure as compensable property; we are considering only whether any value that the presence of the billboard

2. Article 9 does not specify the measure of damages where, as here, DOT purchases a tract of land and then condemns a leasehold interest in that land. Section 136-112 is the only provision in Article 9 specifying the measure of damages when DOT condemns property. This provision discusses the appropriate measure of damages when DOT condemns a partial tract of land versus an entire tract of land. *See* N.C.G.S. § 136-112(1), (2). Because DOT condemned Adams Outdoor's entire property interest—that is to say, because it condemned Adams Outdoor's leasehold interest in an entire tract of land—subsection 136-112(2) applies here.

adds to the value of Adams Outdoor's leasehold interest should be a factor in determining the fair market value of that interest.

The lease here permitted Adams Outdoor to use the property only "for the purpose of erecting, operating, maintaining, repairing, modifying and reconstructing outdoor advertising structures." And, although Adams Outdoor could cancel the lease during the first twenty years of the lease term only under limited circumstances, these circumstances included if the view of the billboard was obstructed, if the property was no longer suitable for the billboard, or if the value of the billboard was substantially diminished. These facts show that the value of the leasehold interest was inextricably tied to the value that the billboard added to it.

The value that the billboard added to the leasehold would not just come from rental income, which we discuss separately below. It would also come from the inherent value of the billboard's presence on the property: that is, from the potential to rent it out to advertisers even if it is not currently being used in that way, and from the ability to use the billboard to communicate messages to an audience of approximately 85,000 vehicles per day. Certainly a willing buyer who is purchasing a leasehold that can be used only for outdoor advertising purposes would consider whether the property actually had a billboard on it in determining the price that he or she was willing to pay for the leasehold interest. And certainly a seller who owns a grandfathered-in nonconforming billboard on a leasehold that can be used only for outdoor advertising purposes would consider the presence of that billboard on it in determining the price for which he or she was willing to sell the leasehold interest. We therefore hold that evidence concerning the value that the billboard added to the leasehold interest is admissible to help the trier of fact determine the fair market value of that interest.

The Court of Appeals concluded that the billboard cannot be considered in this condemnation action because, as a trade fixture, it is noncompensable personal property. A trade fixture is a fixture that is attached to land by agreement between a landlord and tenant for use in exercising a trade. *Stephens v. Carter*, 246 N.C. 318, 320-21, 98 S.E.2d 311, 312-13 (1957). It may be removed after the tenancy and belongs to the tenant as personal property. *Id.* Here, Adams Outdoor's billboard was attached to the land for the purpose of conducting an outdoor advertising business, and Adams Outdoor's lease states that "[a]ll Structures erected by or for the Lessee . . . shall at all times be and remain the property of the Lessee and may be removed by the Lessee . . . , notwithstanding that such Structures are intended . . . to be permanently affixed to the

Property." This language clearly indicates that the parties agreed the billboard would be treated as a trade fixture that would remain the personal property of Adams Outdoor. So we agree with the Court of Appeals that this billboard was a trade fixture, and thus was Adams Outdoor's personal property.

As a general rule, the value of personal property cannot be recovered in a condemnation action. *Lyerly v. N.C. State Highway Comm'n*, 264 N.C. 649, 649-50, 142 S.E.2d 658, 658 (1965) (per curiam). And our holding is consistent with this rule. To be clear, we do not hold that Adams Outdoor has the right to recover the value of the physical billboard structure—that is, the value of its personal property—in this condemnation action. It does not. So we are not saying that the trier of fact should add the fair market value of the physical billboard structure to the amount that it determines to be the fair market value of the leasehold interest. But the fact that the billboard, as a trade fixture, was Adams Outdoor's personal property does not preclude the trier of fact from considering the presence of the billboard on the leased property in determining the fair market value of the leasehold interest. Again, a willing buyer and a willing seller would consider the billboard's presence in agreeing on a price for the leasehold interest itself. We hold only that the trier of fact may therefore consider the value that the billboard's presence adds to the value of that leasehold interest.

*3. The payments from advertisers*

**[2]** "Injury to a business, including lost profits, is [a] noncompensable loss." *M.M. Fowler*, 361 N.C. at 7, 637 S.E.2d at 890. "[R]evenue derived directly from the condemned property itself, such as rental income," however, is a proper consideration in determining the fair market value of condemned property. *Id.* at 7, 637 S.E.2d at 890.[3] Adams Outdoor argues that the lease payments made by advertisers to display their messages on the billboard should be considered rental income and should therefore be admissible to help determine the fair market value of the leasehold interest here. In deciding this question, "care must be taken to distinguish between income from the property and income from the business conducted on the property." *Id.* at 7, 637 S.E.2d at 890 (quoting 4 Julius L. Sackman et al., *Nichols on Eminent Domain* § 12B.09, at 12B-56 to -59 (rev. 3d ed. 2006)).

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3. The majority and dissenting opinions in *Department of Transportation v. M.M. Fowler, Inc.* agreed that it is proper to consider rental income in determining fair market value of condemned property. *Compare* 361 N.C. at 7, 637 S.E.2d at 890 (majority opinion), *with id.* at 18, 637 S.E.2d at 897 (Martin, J., dissenting).

Rental income would obviously include, at the very least, payments received by a landlord who is renting out residential space in a house or apartment building or commercial space in an office building. Here, as in those scenarios, Adams Outdoor was renting out space from its structure—that is, space from its billboard. As with many residential or commercial leases, moreover, Adams Outdoor would enter into long-term contracts with particular parties that would give those parties the right to occupy and use space located on real property—which here meant giving advertisers the right to occupy and use billboard space on its property. As the trial court found, Adams Outdoor was therefore earning "substantial rental income from leasing space on the [b]illboard to advertisers," and the billboard was "essentially self-operating . . . rental property." This rental income is admissible to help the trier of fact determine the fair market value of Adams Outdoor's leasehold interest.

*4. The permits*

**[3]** "A permit grants a privilege. It does not convey either a constitutional right or a property right." *Hursey v. Town of Gibsonville*, 284 N.C. 522, 529, 202 S.E.2d 161, 166 (1974). The question here, however, is not whether the possession of a permit confers a compensable property right. Instead, the question is whether evidence of permits that Adams Outdoor possessed—and that allowed Adams Outdoor to continue using a nonconforming billboard that had been grandfathered in—is admissible to help the trier of fact determine the fair market value of the leasehold interest to which the permits pertained.

"The jury should take into consideration, in arriving at the fair market value of the [property] taken, all the capabilities of the property, and all the uses to which it could have been applied or for which it was adapted, which affected its value in the market at the time of the taking . . . ." *Barnes v. N.C. State Highway Comm'n*, 250 N.C. 378, 387, 109 S.E.2d 219, 227 (1959). We have stated that a jury may consider "the reasonable probability of a change in the zoning ordinance or of a permit for a non-conforming use." *Northgate Shopping Ctr., Inc. v. State Highway Comm'n*, 265 N.C. 209, 212-13, 143 S.E.2d 244, 246 (1965) (citing *Barnes*, 250 N.C. at 391, 109 S.E.2d at 229-30).

If the reasonable probability of obtaining a permit is admissible, then the existence of already-issued permits should likewise be admissible. Here, taking Adams Outdoor's permits into account makes particular sense given that Adams Outdoor's lease permitted it to cancel the lease or to seek rent abatement if Adams Outdoor was unable to maintain its permits. Evidence of these permits would certainly help inform the trier of fact about the value of a leasehold interest that exists solely

to maintain and use the very billboard whose use is sanctioned by the permits. So, for all of these reasons, we hold that evidence of Adams Outdoor's permits is admissible to help the trier of fact determine the fair market value of Adams Outdoor's leasehold interest.

*5. The automatic extension and the options to renew*

**[4]** As we have already noted, Adams Outdoor's ten-year lease granted an automatic ten year extension followed by optional ten year renewal periods. We need to determine whether either of these provisions should be considered by the trier of fact in assessing the fair market value of the leasehold interest. We will address each provision separately.

*A. The automatic ten-year extension*

In *United States v. Petty Motor Co.*, the Supreme Court of the United States held that, when a tenant has a contractual right to renew its lease, "[t]he measure of damages" includes "the value of the right to renew" the lease. 327 U.S. 372, 381 (1946); *accord Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 304 (1976).

Here the automatic ten-year extension provision in Adams Outdoor's lease was an even stronger provision than one that guarantees a contractual right to renew. Under the terms of the automatic extension provision, the lease extension would occur without Adams Outdoor taking any action—Adams Outdoor did not even need to exercise a right to renew—and the landlord could not cancel or decline the extension. Thus, Adams Outdoor essentially had a contractual right to possess the leased property for twenty years (the initial ten-year term plus the automatic ten-year extension). The fact that the lease allowed Adams Outdoor to cancel the lease if one of a small set of specific circumstances arose does not change our analysis. After all, even if one of those circumstances arose, Adams Outdoor did not have to cancel the lease; it could choose not to cancel it and continue to possess the leasehold for the full twenty-year term.

Because, under *Petty Motor*, a provision that guarantees a contractual right to renew is a proper factor for the trier of fact to consider in determining the fair market value of the leasehold interest, it follows that this automatic extension provision, which is even stronger in substance, is also a proper factor for the trier of fact to consider.

*B. The optional ten-year renewals*

The Supreme Court of the United States has drawn a distinction between a contractual right to renew, which is compensable, and a mere

expectancy in the renewal of a lease, which is not. *See Petty Motor*, 327 U.S. at 380 n.9 ("The fact that some tenants had occupied their leaseholds by mutual consent for long periods of years does not add to their rights."). In other words, the mere fact that a tenant had previously renewed its lease and expected to keep renewing its lease does not create a compensable property interest in the tenant's expectation that it would be able to keep renewing. This expectation "add[s] nothing to the . . . legal rights" of a tenant, "and legal rights are all that must be paid for." *Id.* (quoting *Emery v. Boston Terminal Co.*, 178 Mass. 172, 185, 59 N.E. 763, 765 (1901)).

As a result, it is not proper for the trier of fact to consider the optional ten-year lease extensions, as distinct from the first automatic lease extension, in determining the fair market value of Adams Outdoor's leasehold interest. Unlike the automatic extension, any of these optional extensions could be cancelled at will by either Adams Outdoor or the landlord, as long as the cancelling party gave the notice specified in the lease. The lease provision concerning these optional extensions did not give Adams Outdoor a *right* to renew the lease, since the landlord could choose not to go forward with a renewal; the provision created only an *expectancy* in the renewal of the lease.

Adams Outdoor argues that, under *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973), its renewal expectancy should be a factor in determining the fair market value of its leasehold interest. But *Almota* dealt with a different issue than the one that we consider here. In *Almota*, the Supreme Court addressed whether the likelihood that a lease would be renewed may be factored into the fair market value of *structural improvements* built on the leased land. *See id.* at 473-78. Here, though, the question is whether the mere expectancy of a lease's renewal can be factored into the fair market value of *the leasehold interest itself*. Under *Petty Motor*, it is clear that it cannot be. Adams Outdoor's expectation that it would continue to possess the leased land and rent space on its billboard on that land, despite *either party's* ability to cancel the optional lease renewals at will, is a mere expectancy that may not be considered in determining the fair market value of Adams Outdoor's leasehold interest.

*6. The bonus value method*

**[5]** As we have already discussed, just compensation for a property interest is the fair market value of that interest—that is, the price that a willing buyer and a willing seller would agree on for the sale of that interest. This Court noted in *Ross v. Perry* that the typical

measure of damages for the taking of a leasehold interest is "the difference between the rental value of the unexpired term and the rent reserved in the lease." 281 N.C. at 576, 189 S.E.2d at 229. The Supreme Court of the United States adopted a similar calculation in *Petty Motor*, holding that this calculation should also include the value of any right to renew the lease. 327 U.S. at 381; *accord Alamo Land*, 424 U.S. at 304.

At first glance, the bonus value calculations in *Ross* and *Petty Motor* may seem to conflict with the willing buyer, willing seller approach. On closer inspection, though, the bonus value method is actually just another way to calculate the fair market value of the leasehold interest.

Under the bonus value method, "[i]t is generally held that the fair market value of a leasehold is computed by first determining the fair market *renta*l value of the premises and then subtracting from that value the amount of rent to be paid for the remainder of the term pursuant to the lease agreement." 4 Julius L. Sackman, *Nichols on Eminent Domain* § 13.08[6], at 13-72 (3d ed. 2017) (emphasis added). Whether one is determining the fair market value of a leasehold or the fair market rental value of real property underlying that leasehold, however, the property interest being valued is the same: namely, the right to possess land for a certain period of time.

But the total fair market rental value of real property will still be higher than the fair market value of a tenant's leasehold on that property for the same lease term. That is because a landlord who rents out real property owns the property in fee simple. A tenant who sells his or her leasehold to another tenant, by contrast, owes rent that the other tenant will still have to pay when he or she takes over the lease. A willing buyer and a willing seller of the tenant's leasehold will therefore take into account the rent that is owed under the remainder of the lease when negotiating the price of the leasehold, and will adjust the price downward accordingly. No such adjustment is necessary when determining the fair market rental value of property—that is, the price that a willing tenant and a willing landlord would agree on.

That is why the bonus value method offsets the amount of rent actually owed under the lease for the remainder of the lease term against the fair market rental value of the property in question. A willing buyer and willing landlord would not take that offset into account in negotiating the total price of a lease, so the offset would not be reflected in that price. But, logically, a tenant who willingly buys a leasehold from another tenant would agree to pay only to the extent that the value of the leasehold exceeded what he or she would be paying in rent. Otherwise,

he or she would be compensating the selling tenant for rent that the selling tenant had not yet paid under the lease. So the buying tenant would intuitively make that offset. As a result, the fair market value of a leasehold interest using either the bonus value method or the willing buyer, willing seller approach should, as a practical matter, be the same.

In any determination of the fair market value of a given property interest, however, the jury should consider the same factors that private parties would consider in the sale of that property interest. *Barnes*, 250 N.C. at 387, 109 S.E.2d at 227. As we have already discussed, these factors in this case include the billboard, rental payments, permits, and automatic lease extension. DOT argues that the bonus value method described by DOT's appraiser properly measured the value of Adams Outdoor's leasehold interest. It did not, though, because the appraiser did not consider all of the appropriate factors.[4]

DOT's appraiser testified that he thought that all of the rights granted through the lease would be adequately reflected in the rent being paid. Because of this, he determined the market rental value of the leasehold interest solely by using the rent specified in two of Adams Outdoor's other leases for sites near the site of this lease. But the appraiser's methodology was flawed for two reasons. First, he did not determine whether the nearby leases were truly comparable to Adams Outdoor's lease with respect to the rights granted, such as the right of first refusal to purchase the property and the fact that any successors or assigns of the landlord were bound by Adams Outdoor's lease and did not have the ability to terminate it. Second, he did not account for the value that Adams Outdoor's specific nonconforming billboard, in its specific location, and the enhanced rental income that it generated, along with the permits for the use of that billboard and the automatic lease extension that would have allowed Adams Outdoor to keep using that billboard, added to the value of Adams Outdoor's leasehold interest. By not accounting for these factors, the market rent that DOT's appraiser used in his bonus value method calculation did not properly reflect the fair market rental value of the leasehold interest, leading to a negative valuation.

Any evidence that does not aid the jury in fixing a fair market value of the land "may 'confuse the minds of the jury, and should be excluded.' "

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4. Eminent domain cases, like many other cases involving specialized knowledge, will generally require the use of expert testimony. Because the trier of fact will rely on the specialized knowledge of expert witnesses in eminent domain cases, expert testimony about fair market valuations should take into account all of the factors that a willing buyer and a willing seller would consider in valuing a property interest.

*M.M. Fowler*, 361 N.C. at 6, 637 S.E.2d at 890 (quoting *Abernathy v. S. & W. Ry. Co.*, 150 N.C. 97, 109, 63 S.E. 180, 185 (1908)). In particular, an expert witness must use a "method of proof [that] is sufficiently reliable." *Dep't of Transp. v. Haywood County*, 360 N.C. 349, 352, 626 S.E.2d 645, 647 (2006). Here, DOT's appraiser applied the bonus value method incorrectly, which made his method of proof unreliable. Because of this, DOT's bonus value method evidence would confuse the jury and is not admissible.

## III. Conclusion

We conclude that (1) the fair market value provision of Article 9, not Article 11, governs this condemnation proceeding; (2) the value added by Adams Outdoor's billboard may be considered in determining the fair market value of Adams Outdoor's leasehold interest; (3) evidence of rental income derived from leasing advertising space on the billboard may be considered in determining the fair market value of the leasehold interest; (4) the value added to the leasehold interest by the permits issued to Adams Outdoor may be considered in determining the fair market value of the leasehold interest; (5) the automatic ten-year extension of the lease may be considered in determining the fair market value of the leasehold interest, but the options to renew the lease after the automatic ten-year extension may not be; and (6) the bonus value method evidence offered by DOT may not be considered in determining the fair market value of the leasehold interest. We therefore affirm the decision of the Court of Appeals in part and reverse it in part, and remand this case to the Court of Appeals for further remand to the superior court for proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Justice HUDSON concurring in part and dissenting in part.

I agree with the majority that Article 9 and not 11 of N.C.G.S. Chapter 136 governs in this condemnation proceeding. I also agree with the majority's analysis regarding the permits, the lease extensions, and most of its approach to the bonus value method. I disagree with the majority's analysis regarding whether the billboard and the lost income may properly be considered in the valuation of just compensation under Article 9. Accordingly, I would affirm in part, modify and affirm in part, and reverse in part the decision of the Court of Appeals.

Controlling Statutory Scheme

In my view, the Court of Appeals correctly reversed the trial court's decision and concluded that Article 11 does not apply here. As noted below, the trial court's findings and conclusions were based on the erroneous assumption that Article 11 does apply. Specifically, the trial court concluded:

> 3. N.C. Gen. Stat. § 136-131 specifically addresses the subject matter of the DOT condemning nonconforming outdoor advertising locations. It provides that in any such condemnation, just compensation to the owner of the outdoor advertising shall be measured by the fair market value at the time of the taking of the outdoor advertising owner's interest in the real property on which the outdoor advertising is located and such value shall include the value of the outdoor advertising.
>
> . . . .
>
> 5. Because the DOT caused the removal of Adams' nonconforming outdoor advertising property interests at the CHS Lot by way of condemnation, N.C. Gen. Stat. § 136-131 is applicable and controlling in setting the conditions of measuring just compensation.
>
> 6. Although the DOT did not file an action specifically for the *taking* of the *Billboard structure*, its position that the physical structure of the Billboard and the leasehold interest are separate and distinct interests which should be valued separately is contrary to the plain and specific directives in N.C. Gen. Stat. § 136-131 that just compensation to Adams shall include the value of the outdoor advertising.

The trial court's ruling was based upon a misapprehension of law. Accordingly, I agree with the majority that remand is necessary for a determination of just compensation due to Adams Outdoor under Article 9.

Classification of Billboard

Article 9 sets forth the procedures by which the DOT may condemn property, *see* N.C.G.S. §§ 136-103 to -121.1 (2015 & Supp. 2016), and provides that when the DOT condemns an entire tract of land, the measure of damages is "the fair market value of the property at the time of

taking," *id.* § 136-112(2) (2015). In determining the fair market value of condemned property, and therefore the compensation to be awarded to the property owner, permanent improvements, such as buildings, "must be taken into account . . . in so far as they add to the market value of the land to which they are affixed." *Proctor v. State Highway & Pub. Works Comm'n*, 230 N.C. 687, 691, 55 S.E.2d 479, 482 (1949); id. at 691, 55 S.E.2d at 482 ("Buildings must be regarded as a part of the real estate upon which they stand. Indeed, they are ordinarily without value or utility apart from such realty."). On the other hand, "[n]o allowance can be made for personal property, as distinguished from fixtures, located on the condemned premises." *Lyerly v. N.C. State Highway Comm'n*, 264 N.C. 649, 650, 142 S.E.2d 658, 658 (1965) (per curiam) (quoting 29 C.J.S. *Eminent Domain* § 175a(1), at 1045 (1941)), *quoted in Midgett v. N.C. State Highway Comm'n*, 260 N.C. 241, 249, 132 S.E.2d 599, 607 (1963), *overruled on other grounds by Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 304 S.E.2d 164 (1983).

Fixtures, which are objects that are attached to land, are generally treated as permanent improvements and "understood to be a part of the realty." *Lee-Moore Oil Co. v. Cleary*, 295 N.C. 417, 419, 245 S.E.2d 720, 722 (1978) (quoting *Feimster v. Johnson*, 64 N.C. 259, 260 (1870)); *see also Fixture*, *Black's Law Dictionary* (10th ed. 2014) (defining a "fixture" as "[p]ersonal property that is attached to land or a building and that is regarded as an irremovable part of the real property, such as a fireplace built into a home"). Whether a fixture is an improvement or remains personal property can depend upon whether it is installed by the property owner or a party owning an interest less than the fee, because when a property owner installs a fixture, "the purpose is to enhance the value of the freehold, and to be permanent," but with a tenant "a different purpose is to be served." *Stephens v. Carter*, 246 N.C. 318, 321, 98 S.E.2d 311, 313 (1957) (quoting *Springs v. Atl. Ref. Co.*, 205 N.C. 444, 449, 171 S.E. 635, 637-38 (1933)). This is particularly true with trade fixtures, which are installed for the purposes of exercising a trade and remain the removable personal property of the tenant. *Id.* at 320-21, 98 S.E.2d at 312-13; *see also Wilson v. McLeod Oil Co.*, 327 N.C. 491, 515, 398 S.E.2d 586, 598-99 (1990) ("[W]hen additions are made to [the] land by its owner, it is generally viewed that the purpose of the addition is to enhance the value of the land, and the chattel becomes a part of the land. On the other hand, where the improvement is made by one who does not own the fee, such as a tenant, the law is indulgent and, in order to encourage industry, the tenant is permitted 'the greatest latitude' in removing equipment which he has installed upon the [land]." (internal citations omitted) (quoting *Little v. Nat'l Serv. Indus.*, 79 N.C. App. 688,

692-93, 340 S.E.2d 510, 513 (1986))). "Whether a thing attached to [the] land be a fixture or chattel personal, depends upon the agreement of the parties, express or implied." *Lee-Moore Oil Co.*, 295 N.C. at 419, 245 S.E.2d at 722 (quoting *Feimster*, 64 N.C. at 261); *see also Stephens*, 246 N.C. at 321, 98 S.E.2d at 312 ("The character of the structure, its purpose and the circumstances under which it was erected, the understanding and agreement of the parties at the time the erection was made, must all be considered in determining whether it became a part of the freehold or not." (quoting *W. N.C. R.R. v. Deal*, 90 N.C. 110, 113-14 (1884))).

Here the trial court found, *inter alia*:

> 32. Because of the permanent nature of the Billboard's construction including being affixed to the land by a concrete foundation 18 feet deep and six feet in diameter, removal and relocation of the entire sign would be impossible.
>
> . . . .
>
> 40. As the Lease states, Adams and C.H.S. Corporation intended the Billboard to be permanently affixed to the CHS Lot.
>
> 41. The Billboard was a leasehold improvement . . . .

Further, the trial court concluded:

> 8. The property adversely affected by the DOT's condemnation is Adam's [sic] leasehold interest as improved by the Billboard.
>
> . . . .
>
> 11. . . . The Billboard could not be relocated intact due to the permanent nature of its construction and because State and local laws prevented such activity. . . .
>
> 12. As between the landowner and Adams, the Billboard was the property of Adams and upon expiration of the Lease, Adams retained the discretion to salvage its sign parts. Notwithstanding, the way the Billboard was constructed and affixed to the land made it a leasehold improvement, and for purposes of condemnation, the right of Adams as the tenant to salvage parts cannot be used as a basis for adversely affecting just compensation.

> 13. As of the Date of Taking, Adams' recorded Lease constituted an interest in real property as improved by a sign.

I agree with the Court of Appeals that the trial court's findings and conclusions—that the billboard was a permanent improvement as opposed to personal property—were not supported by the evidence and were contrary to law.

It is not disputed that the billboard was erected for business purposes and therefore is a trade fixture. Looking to the express agreement of Adams Outdoor and C.H.S. Corporation (CHS), then-owner of the land, the lease provided:

> All Structures erected by or for the Lessee . . . on the Property shall at all times be and remain the property of the Lessee and may be removed by the Lessee before or within a reasonable time of termination or expiration of this lease, notwithstanding that such Structures are intended by Lessor and Lessee to be permanently affixed to the Property.

It is clear that the intent of the parties was that any structures affixed to the property, including the billboard at issue here, did not become part of the real property, but instead remained the removable personal property of Adams Outdoor. Additionally, as the Court of Appeals noted: Adams Outdoor classified its billboard structures as "Business Personal Property" for tax purposes and paid property taxes in accordance with that classification, and Adams Outdoor's vice president for real estate admitted that the billboard was personal property. *DOT v. Adams Outdoor Advert. of Charlotte, Ltd. P'ship*, ___ N.C. App. ___, ___, 785 S.E.2d 151, 157-58 (2016).

Moreover, in considering the "[t]he character of the structure, its purpose and the circumstances under which it was erected," *Stephens*, 246 N.C. at 321, 98 S.E.2d at 312, the billboard, unlike a building or other permanent improvements, is not "without value or utility apart from [the] realty," *Proctor*, 230 N.C. at 691, 55 S.E.2d at 482. As the Court of Appeals pointed out, Adams Outdoor in fact "removed the billboard and structure from the CHS Lot by carefully dismantling them and reinstalling major components thereof at another billboard location along Independence Boulevard, as permitted by the lease agreement." *Adams Outdoor*, ___ N.C. App. at ___, 785 S.E.2d at 157. Nor was the billboard erected to "enhance the value of the freehold, and to be permanent." *Stephens*, 246 N.C. at 321, 98 S.E.2d at 313. Rather, as the majority notes, "Adams Outdoor's billboard was attached to the land for the purpose

of conducting an outdoor advertising business." The billboard was intended to last only until Adams Outdoor decided to remove it, or for as long as the lease itself, which could be terminated at Adams Outdoor's discretion if and when one of the circumstances enumerated in the agreement made the advertising business unprofitable.[1] Accordingly, the billboard was a trade fixture that remained the personal property of Adams Outdoor.

While explicitly agreeing that the billboard was personal property, the majority nevertheless deems it appropriate in determining the value of the leasehold for the trial court to consider the "inherent value of the billboard's presence on the property." But, pursuant to the agreement of the parties, this particular billboard's "presence on the property" was not bound to the lease, as Adams Outdoor specifically contracted for the right to remove it as personal property. *See Ingold v. Phoenix Assurance Co.*, 230 N.C. 142, 145, 52 S.E.2d 366, 368 (1949) ("[T]he intent of the parties as evidenced by their contract, express or implied, is controlling."). Moreover, as the majority itself then explains, the value of the billboard consists entirely of its potential to produce income, "that is, from the potential to rent it out to advertisers." As discussed more fully below, I do not view this potential as compensable under Article 9, and therefore conclude that this "value" should not be considered in determining the fair market value of Adams Outdoor's leasehold interest. Accordingly, I disagree with the majority and would affirm the Court of Appeals on this issue.

Loss of Income

I also disagree with the majority's Article 9 analysis regarding the consideration of the income from the advertising business located

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1. The lease's cancellation provision reads:

> CANCELLATION: If, in Lessee's sole opinion: a) the view of the advertising copy on any Structure becomes obstructed; b) the Property cannot be safely used for the erection, maintenance or operation of any Structure for any reason; c) the value of any Structure is substantially diminished, in the sole judgment of the Lessee, for any reason; d) the Lessee is unable to obtain, maintain or continue in force any necessary permit for the erection, use or maintenance of any Structure as originally erected; or, e) the use of any Structure, as originally erected, is prevented by law or by exercise of any governmental power; then Lessee may, at its option, either: (i) reduce and abate rent in proportion to the impact or loss that such occurrence has upon the value of Lessee's Structure for so long as such occurrence continues; or, (ii) cancel this Lease and receive a refund of any prepaid rent, prorated as of the date of cancellation.

on the billboard. Historically, this Court has not considered business income in determining just compensation in a condemnation action.[2] The majority, citing M.M. Fowler, states that "care must be taken to distinguish between income from the property and income from the business conducted on the property"; however, the majority then proceeds to misapply this very principle. *DOT v. M.M. Fowler, Inc.*, 361 N.C. 1, 7, 637 S.E.2d 885, 890 (2006) (quoting 4 Julius L. Sackman et al., *Nichols on Eminent Domain*, § 12B.09, at 12B-56 to -59 (rev. 3d ed. 2006)). In my opinion, the revenue from advertisements placed on the billboard is business income, and is not equivalent to rental income received for the use of the land. In holding to the contrary, the majority relies solely upon *M.M. Fowler*, but in my view, the majority's conclusion is difficult to square with our Court's decision in *M.M. Fowler*. As such, I dissent on this issue as well.

Most recently we addressed lost business income in the context of a condemnation action in *M.M. Fowler*, in which we stated that "[t]he longstanding rule in North Carolina is that evidence of lost business profits is inadmissible in condemnation actions." 361 N.C. at 7, 637 S.E.2d at 891 (citing *Pemberton v. City of Greensboro*, 208 N.C. 466,

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2. When U.S. Supreme Court Justice Oliver Wendell Holmes served on the Supreme Judicial Court of Massachusetts, he explained, in a passage often quoted by this Court, *see Pemberton v. City of Greensboro*, 208 N.C. 466, 470, 181 S.E. 258, 260 (1935); *Williams*, 252 N.C. at 148, 113 S.E.2d at 268; *DOT v. M.M. Fowler, Inc.*, 361 N.C. 1, 8-9, 637 S.E.2d 885, 891 (2006), that

> [i]t generally has been assumed, we think, that injury to a business is not an appropriation of property which must be paid for. There are many serious pecuniary injuries which may be inflicted without compensation. It would be impracticable to forbid all laws which might result in such damage, unless they provided a *quid pro quo*. No doubt a business may be property in a broad sense of the word, and property of great value. It may be assumed for the purposes of this case that there might be such a taking of it as required compensation. But a business is less tangible in nature and more uncertain in its vicissitudes than the rights which the Constitution undertakes absolutely to protect. It seems to us, in like manner, that the diminution of its value is a vaguer injury than the taking or appropriation with which the Constitution deals. A business might be destroyed by the construction of a more popular street into which travel was diverted, as well as by competition, but there would be as little claim in the one case as in the other. It seems to us that the case stands no differently when the business is destroyed by taking the land on which it was carried on, except so far as it may have enhanced the value of the land.

*Pemberton*, 208 N.C. at 470, 181 S.E. at 260 (citations omitted) (quoting *Sawyer v. Commonwealth*, 182 Mass. 245, 247, 65 N.E. 52, 53 (1902)).

470-72, 181 S.E. 258, 260-61 (1935)). More specifically, the Court held in *M.M. Fowler* that:

> Admission of evidence that does not help the jury calculate the fair market value of the land or diminution in its value may "confuse the minds of the jury, and should be excluded." In particular, specific evidence of a landowner's noncompensable losses following condemnation is inadmissible.
>
> Injury to a business, including lost profits, is one such noncompensable loss. It is important to note that revenue derived directly from the condemned property itself, such as rental income, is distinct from profits of a business located on the property. . . . When evidence of income is used to valuate property, "care must be taken to distinguish between income from the property and income from the business conducted on the property."

*Id.* at 6-7, 637 S.E.2d at 890 (citations omitted). Accordingly, there is a distinction between "revenue derived directly from the condemned property itself, such as rental income,"[3] and revenue from "a business located on the property." *Id.* at 7, 637 S.E.2d at 890. The latter was at issue in *M.M. Fowler* when the landowner "attempted to recover for harm to its business rather than damage to the land itself." *Id.* at 7, 13, 637 S.E.2d at 890, 894.

Regarding lost profits from a business located on the property, the Court held that quantified evidence of lost business profits was inadmissible to determine the fair market value of the land. *Id.* at 14-15, 637 S.E.2d at 895. In discussing our prior decision in *Kirkman v. State Highway Commission*, 257 N.C. 428, 126 S.E.2d 107 (1962), the Court opined:

> *Kirkman* clearly does not permit quantified evidence of lost business profits. There is no difference between using lost profits to determine the fair market value of the land and awarding them as a separate item of damages. By either improper calculation, the business receives compensation for its lost profits.

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3. Although the trial court's order refers to "rental income" from the billboard, it appears that the court is actually referring to business revenue received by Adams Outdoor from entities placing ads on the billboard. For condemnation purposes, the only "rental" paid here was by Adams Outdoor to CHS to lease the land on which to place its billboard.

> Thus, in *Kirkman*, we did not approve the use of quantified evidence of lost profits. To the contrary, this Court held unquantified lost business profits are a fact that can be *generally* considered in determining whether there has been a diminution in value in the land that remains after a partial taking. Our decision in *Kirkman* must be read with our other cases, which clarify that although the jury may consider adverse effects resulting from condemnation that decrease the value of the remaining property, these effects "are not separate items of damage, recoverable as such, but are relevant only as circumstances tending to show a diminution in the over-all fair market value of the property." Allowing the jury to consider that the land may be less valuable due to the condemnation's effect on the landowner's business does not require quantified evidence of lost profits also be admitted. This is an important distinction which unifies our analysis in both *Kirkman* and *Pemberton*. Neither opinion sanctions admission of quantified lost profits evidence.

*Id.* at 14-15, 637 S.E.2d at 895 (citations omitted). Notably, *M.M. Fowler* involved a partial condemnation, as opposed to a condemnation of an entire tract; however, it appears that while quantified evidence of lost profits from a business located on a property is inadmissible, unquantified evidence of those profits may be "broadly" or "generally" considered in determining the fair market value. *Id.* at 14-15, 637 S.E.2d at 895.

Here the revenue received by Adams Outdoor from advertisers to display advertisements on the billboard was not rental income derived directly from the property, but rather business profits from an advertising business located on the property. Adams Outdoor is attempting "to recover for harm to its business rather than damage to the land itself." *Id.* at 7, 13, 637 S.E.2d at 890, 894. The contracts between Adams Outdoor and its advertisers are not contracts for others to personally occupy and enjoy the real property, but rather for the advertisers to attach their personal property advertisements to Adams Outdoor's personal property, which is attached to the real property for the sole purpose of operating a business. Moreover, unlike the real property that was taken by DOT, this business is not intended to last forever, but only so long as it is profitable. *See* footnote 1. In my view, the revenue Adams Outdoor received from this business conducted on the property is too attenuated to be considered "revenue derived directly from the condemned property itself." *Id.* at 7, 637 S.E.2d at 890.

I am unable to conclude, as the majority does, that Adams Outdoor's renting of billboard space is analogous to the renting of residential space in a house or apartment building, or commercial space in an office building. Houses, apartment buildings, and office buildings are permanent improvements and considered part of the real property itself—tenants of those buildings contract for the right to occupy and use some part of that real property. As previously discussed, the billboard here is not part of the real property, but rather is personal property belonging to Adams Outdoor.

Accordingly, the revenue that Adams Outdoor seeks to have considered is lost business profit. Under *M.M. Fowler* quantified evidence of this revenue may not be considered; however, unquantified evidence of Adams Outdoor's lost business profits may be "broadly" or "generally" considered in determining the fair market value of the leasehold interest. *Id.* at 14-15, 637 S.E.2d at 895. The Court of Appeals correctly determined that the revenue was lost business profit but did not acknowledge that Adams Outdoor's lost business could be considered more generally as unquantified evidence. Thus, I would modify and affirm the decision of the Court of Appeals on this issue.

The Permits, Lease Extensions, Bonus Value Method

The grandfathered permits allowing Adams Outdoor to operate a billboard (otherwise nonconforming) specifically enabled Adams Outdoor to station its personal property and conduct its business in a manner and location that would not otherwise be legally possible. Accordingly, I agree with the majority that evidence of Adams Outdoor's permits is admissible in determining the fair market value of the leasehold interest. I also agree with the majority's analysis concluding that the automatic ten-year extension of the lease is a proper factor for consideration in determining the fair market value of Adams Outdoor's leasehold, and that the subsequent optional ten-year extensions are too speculative to consider. Additionally, I agree with the majority's analysis regarding the bonus value method; I note only that, because I disagree with the majority's analysis regarding the consideration of the billboard and the advertising revenue, I disagree with which factors would constitute the "appropriate factors."

Conclusion

For the reasons set forth herein, I respectfully concur in part, and dissent in part.

Justices BEASLEY and MORGAN join in this concurring and dissenting opinion.

IN THE MATTER OF THE ESTATE OF CATHLEEN BASS SKINNER

No. 277A16

Filed 29 September 2017

**Fiduciaries—guardian of the person and trustee of special needs trust—removal**

The Assistant Clerk did not err by determining that the guardian of a person and trustee of her special needs trust (Mr. Skinner) exceeded the scope of his discretion and that his breaches of fiduciary duty justified his removal. The focus was upon the broader issue of whether the guardian or trustee acted in such a manner as to violate his fiduciary duty, and the fact that Mr. Skinner's conduct may have been consistent with the terms of the Special Needs Trust did not insulate him from removal.

Justice MORGAN dissenting.

Justices NEWBY and JACKSON join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 787 S.E.2d 440 (2016), reversing an order entered on 22 October 2014 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Supreme Court on 29 August 2017.

*Ward and Smith, P.A., by Jenna Fruechtenicht Butler and Alexander C. Dale, for petitioner-appellants Nancy Bass-Clark and Douglas Ray Bass.*

*Braswell Law, PLLC, by Ira Braswell IV, for respondent-appellee Mark Skinner.*

ERVIN, Justice.

The resolution of this case hinges upon the identification and proper application of the appropriate standard of review for use in reviewing an order removing a guardian of the estate and trustee under a special needs trust for breach of fiduciary duty. After careful consideration of the record evidence in light of the relevant legal principles, we conclude that the Court of Appeals erred by reversing the removal order.

On 20 January 2010, a representative from the Adult Protective Services Division of the Wake County Human Services Department filed a petition seeking to have Cathleen Bass Skinner, who was, at that time, known as Cathy Bass, adjudicated as an incompetent and to have a guardian appointed for Ms. Skinner. In support of these requests, Adult Protective Services alleged that Ms. Skinner "is a disabled adult who has short term memory loss," "carries a diagnoses [sic] of seizure disorder and early stages of dementia," "[l]acks sufficient understanding and the capacity to make or communicate responsible decisions concerning her person," and "requires 24 hour supervision, something her siblings and extended family can not [sic] commit to her." On 13 April 2010, Assistant Clerk of Superior Court Bill Burlington found Ms. Skinner incompetent and appointed Wake County Human Services to serve as Ms. Skinner's guardian.

In July 2010, Ms. Skinner's long-time friend, Mark L. Skinner, Jr., retained Gilbert W. File, III, of the Brownlee Law Firm, for the purpose of determining whether he and Ms. Skinner could legally marry and whether he could legally serve as Ms. Skinner's guardian. On 3 August 2010, Mr. and Ms. Skinner married. On the following day, Mr. Skinner filed a motion seeking to have himself appointed as Ms. Skinner's guardian. On 10 October 2010, Mr. Skinner retained Christine S. Eatmon to assist him in litigating his motion to modify the existing guardianship arrangement. On 20 January 2011, following an evidentiary hearing held on 13 January 2011 and with the consent of Mr. Skinner, Ms. Eatmon, the attorneys for Wake County Human Services, Ms. Skinner's former guardian of the person, and Ms. Skinner's guardian ad litem, the Assistant Clerk entered an order concluding that Mr. Skinner should, on a trial basis, be appointed as the guardian of Ms. Skinner's person. On 2 August 2011, the Assistant Clerk made Mr. Skinner's appointment as the guardian of Ms. Skinner's person permanent.

Ms. Skinner's mother, Kathleen Holton Bass, died on 27 August 2012. Along with a number of her siblings and a niece and nephew, Ms. Skinner was named as a beneficiary in Ms. Bass's will. On 23 August 2013, one of Ms. Skinner's brothers, Douglass Bass, and one of Ms. Skinner's sisters, Nancy Bass Clark, filed a motion seeking to have Ms. Clark appointed as the guardian of Ms. Skinner's estate on the grounds that, since Ms. Skinner had been declared incompetent, any distributions payable to Ms. Skinner from Ms. Bass's estate "will need to be distributed to an authorized recipient in order to comply with Estate requirements/laws." On 29 August 2013, Mr. Skinner requested that he be appointed to serve as guardian of Ms. Skinner's estate instead of Ms. Clark. As Kimberly

Richards, who had been appointed to serve as Ms. Skinner's guardian ad litem, noted in her report, Ms. Skinner's family questioned the appropriateness of appointing Mr. Skinner as the guardian of Ms. Skinner's estate given that he had "sold [Ms. Skinner's] car during the pendency of the original incompetency hearing and reportedly used the funds for his own personal gain," took Ms. Skinner "to the bank so that she could withdraw fund[s] to give to him for his use," unsuccessfully sued Ms. Skinner's nephew "for reimbursement of [Mr. Skinner's] travel expenses to visit [Ms. Skinner] after she was placed in a facility by . . . Wake County Human Services," "does not appreciate the full nature of [Ms. Skinner's] mental incapacity," and "removed [Ms. Skinner] from the adult day care center that she formerly attended, perhaps to redirect her social security funds."

On 9 October 2013, after an evidentiary hearing, the Assistant Clerk entered an order appointing Mr. Skinner as the guardian of Ms. Skinner's estate. The Assistant Clerk found, in pertinent part, that:

> 1. That [Ms. Skinner] resides with [Mr.] Skinner, in an apartment located . . . in Wake Forest, North Carolina. Mr. Skinner married [Ms. Skinner] after this court declared her incompetent. To date, no legal action has been filed to challenge the validity of this marriage.
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> 2. That [Ms. Skinner] receives SSI [Supplemental Security Income] benefits of approximately $700.00 per month and is a Medicaid recipient.
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> . . . .
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> 7. [Ms. Skinner's] mother, [Ms. Bass], died on August 27, 2012. [Ms. Skinner] will inherit from her mother. [Ms. Skinner's] inheritance is expected to be between $200,000.00 and $250,000.00.
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> . . . .
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> 11. [Ms. Skinner] would be at risk of losing her SSI benefits and Medicaid assistance if her inheritance is not placed in a Special Needs Trust. [Ms. Skinner] was born October 20, 1951 and at the time of the hearing was 62 years old. [Ms. Skinner] will have medical needs for the remainder of her life.
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> 12. [Mr. and Ms.] Skinner appear to love each other. The Guardian ad Litem . . . . represented to the Court that

> [Ms. Skinner] had expressed a desire that [Mr.] Skinner be the Guardian of her Estate.
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> 13. [Ms.] Richards is of the opinion that [Ms.] Clark should be the guardian of [Ms. Skinner] estate. She expressed concern with regard to [Mr.] Skinner's use of a document he believes is a valid Power of Attorney. Ms. Richards does not believe the Power of Attorney is valid. She further indicated that [Mr.] Skinner does not appreciate the seriousness of Cathy's mental illness, might be resistant to placing the inheritance in a Special Needs Trust, and was further concerned by testimony of [Mr.] Skinner that he had experienced significant losses in an IRA account during the recession.

Based upon these and other findings of fact, the Assistant Clerk concluded as a matter of law, in pertinent part:

> 2. That an inheritance by [Ms. Skinner] of the size testified to in this case would best be managed by a Special Needs Trust. If [Ms. Skinner] were to directly receive the inheritance, it would compromise her ability to receive essential government benefits.
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> . . . .
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> 4. That it is in the best interest of [Ms.] Skinner, that [Mr.] Skinner, be appointed Guardian of the Estate if he can satisfy the following conditions:
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> a. That he can secure a bond in the amount of $250,000.00.
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> b. That he set up a Special Needs Trust for [Ms.] Skinner and that no inheritance received by [Ms.] Skinner be spent except pursuant to the provisions of the Special Needs Trust. . . .
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> c. That the Special Needs Trust shall contain an accounting provision whereby [Mr.] Skinner shall annually report all receipts and expenditures in the Special Needs Trust to [Ms.] Clark.
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> 5. That [Ms.] Clark is capable of, and shall serve as Guardian of the Estate of [Ms.] Skinner should [Mr.] Skinner not be able to meet the above conditions . . . set

> out herein. The same conditions set out herein shall apply if [Ms.] Clark serves as Guardian of the Estate.

Based upon these findings and conclusions, the Assistant Clerk ordered that Mr. Skinner be appointed as guardian of Ms. Skinner's estate subject to the posting of a $250,000.00 bond and the establishment of a Special Needs Trust for the use and benefit of Ms. Skinner, with the Special Needs Trust to contain a provision "requiring an annual accounting to [Ms.] Clark of any and all receipts and expenditures from the Special Needs Trust," and that, in the event that Mr. Skinner failed to comply with these conditions, Ms. Clark be appointed to serve as the guardian of Ms. Skinner's estate.

On 5 December 2013, Mr. Skinner posted the required $250,000.00 bond. On 18 March 2014, Mr. Skinner executed the Cathleen Bass Skinner Special Needs Trust, which was approved by the Assistant Clerk by means of an order entered on 25 March 2014, in which Mr. Skinner's appointment as guardian of Ms. Skinner's estate was reaffirmed. On 30 April 2014, letters appointing Mr. Skinner as the guardian of Ms. Skinner's estate were issued. On 21 May 2014, the Assistant Clerk entered an order directing Ms. Bass's estate to distribute Ms. Skinner's share to the Special Needs Trust.

On 28 July 2014, Mr. Bass and Ms. Clark filed a petition seeking to have Mr. Skinner removed as trustee for the Special Needs Trust "due to his non-compliance with Trust Provision Section 5.04 Duty to Report and Account" and to have Ms. Clark appointed as successor trustee of the Special Needs Trust.[1] On 27 August 2014, following another evidentiary hearing, the Assistant Clerk entered an order removing Mr. Skinner as trustee under the Special Needs Trust and as guardian of Ms. Skinner's estate and appointing Ms. Clark as successor trustee and guardian of Ms. Skinner's estate in lieu of Mr. Skinner.[2] As a basis for these determinations, the Assistant Clerk found as fact, in pertinent part, that:

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1. According to Section 5.04 of the Special Needs Trust, Mr. Skinner was required, among other things, to "cause monthly statements reflecting the current balance of the Trust's assets and all receipts, disbursements and distributions made within the reporting period to be mailed to [Ms. Skinner], [Ms.] Clark . . . and [Ms. Skinner's] legal representative."

2. Although the removal petition filed by Mr. Bass and Ms. Clark did not address the issue of whether Mr. Skinner should be allowed to continue to serve as the guardian of Ms. Skinner's estate, the Assistant Clerk determined that a finding of breach of fiduciary duty "would warrant Mr. Skinner's removal as Guardian of the Estate and the hearing would . . . encompass Mr. Skinner's suitability as Guardian of the Estate in addition to his suitability as Trustee" of the Special Needs Trust. Although the Assistant Clerk "afforded [Mr. Skinner] and his counsel the opportunity to continue the hearing to another date to allow

2. In July 2010, [Mr.] Skinner engaged the Brownlee Law Firm and attorney Gil File to provide legal advice with respect to Mr. Skinner's desire to marry and become Guardian of the Person for [Ms.] Bass. The Brownlee Law Firm charged [Mr.] Skinner the sum of $1,000.00 for these legal services by invoice dated July 16, 2010.

. . . .

4. In October 2010, [Mr.] Skinner engaged the Eatmon Law Firm, P.C. and attorney Christine Eatmon to represent him in connection with pending guardianship of the person and incompetency proceedings. The Eatmon Law Firm charged [Mr.] Skinner the sum of $1,537.50 for these services as evidenced by a Fee Agreement dated October 18, 2010.

. . . .

9. After a contested hearing, [Mr.] Skinner was appointed Guardian of the Estate for [Ms. Skinner] subject to and in accordance with the Order Appointing Guardian of the Estate of Cathleen Bass Skinner entered October 9, 2013 (the "GOE Order").

10. As set forth in the GOE Order, the Court determined that [Ms. Skinner's] share of the Estate of [Ms.] Bass was best managed by a Special Needs Trust and that [Ms. Skinner's] share of the Estate of [Ms.] Bass should be distributed directly to the Cathleen Bass Skinner Special Needs Trust to be used for the sole benefit of [Ms. Skinner] pursuant to and in accordance with the terms of such trust, and in order to preserve those assets for [Ms. Skinner's] long term health needs.

. . . .

14. On or about June 14, 2014, an initial distribution was made to the Trust from the Estate of [Ms.] Bass. On June 16, 2014, the amount of $170,086.67 was deposited

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for additional preparation," Mr. Skinner elected, after conferring with his counsel, "not to continue the hearing to another date and indicated a desire to proceed with the hearing, indicating his understanding and consent as to the expanded scope of what was to be heard and decided."

into the Trust's bank account with Fidelity Bank (the "Trust Account").

15. As of July 31, 2014, only $10,313.66 remains in the Trust Account.

16. The amounts Mr. Skinner has withdrawn from and/or distributed from the Trust Account since June 16, 2014 include a check payable to the Violin Shop, [Mr.] Skinner's personal business, in the amount of $8,387.50[.]

17. Mr. Skinner testified that the $8,387.50 paid from the Trust Account to The Violin Shop included reimbursement for his payment of $1,000.00 to the Brownlee Law Firm and reimbursement for his payment of $1,537.50 to the Eatmon Law Firm.

18. The legal services provided by the Brownlee Law Firm and the Eatmon Law Firm were for Mr. Skinner personally.

19. The legal services provided by the Brownlee Law Firm and the Eatmon Law Firm pre-date the appointment of [Mr.] Skinner as Guardian of the Person for [Ms. Skinner], pre-date the appointment of [Mr.] Skinner (or anyone else) as Guardian of the Estate for [Ms. Skinner] and pre-date the establishment of the Cathleen Bass Special Needs Trust.

20. Mr. Skinner has no authority, implied or explicit, to reimburse himself from the Trust for personal attorney's fees incurred before he became a guardian for [Ms. Skinner] and that had no relationship to his performance of any duties on behalf of [Ms. Skinner] or the Trust.

21. Mr. Skinner also used the Trust assets to purchase a house (Wake Co. Deed Book 014713, Page 01402-06), new furniture, new appliances, and a prepaid burial/funeral insurance policy.

22. Mr. Skinner resides with [Ms. Skinner] in the house purchased by the Trust and he benefits from the Trust purchases and expenditures relating to the house.

23. The terms of the Trust require that the Trust assets be used for [Ms. Skinner's] sole benefit.

> 24. The Trust specifically states that funeral expenses are not permitted to be paid from the Trust prior to reimbursement to North Carolina (or any other state) for medical assistance.

Based upon these findings of fact, the Clerk concluded as a matter of law, in pertinent part, that

> 3. Mr. Skinner's use of Trust assets to reimburse himself for personal expenditures was improper, constitutes self-dealing, and is a breach of his fiduciary duties both as Trustee and as Guardian of the Estate of [Ms. Skinner].
>
> 4. Mr. Skinner's payment of $3,644.00 to Columbus Life for prepaid funeral expenses also is in contradiction to the terms of the Trust and in violation of his fiduciary duties as Trustee.
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> 5. A Trustee is required, among other things, to administer a trust as a prudent person would by considering the purposes, terms, distributional requirements, and other circumstances of the trust in the exercise of reasonable care, skill, and caution.
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> 6. Mr. Skinner has demonstrated that he lacks appropriate judgment and prudence.
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> 7. Mr. Skinner is in breach of his fiduciary duties pursuant to the terms of the Trust, the terms of the GOE Order, and applicable law.
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> 8. Mr. Skinner has wasted the Trust assets, mismanaged the Trust assets, and converted the Trust's assets to his own use.
>
> 9. [In] the discretion of the Court, and based upon the evidence presented at the hearing, Mr. Skinner is unsuitable to continue serving as Trustee of the Trust and Guardian of the Estate [of Ms. Skinner], and the removal of [Mr.] Skinner as Trustee and as Guardian of the Estate best serves the interests of [Ms. Skinner].[3]

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3. In view of the fact that the Assistant Clerk's order did not address Mr. Skinner's compliance with the reporting and accounting provisions of the Special Needs Trust, no issue relating to those provisions was properly before the trial or appellate courts in this case, obviating the necessity for us to examine the extent, if any, to which Mr. Skinner violated those reporting and accounting requirements.

Based upon these findings of fact and conclusions of law, the Assistant Clerk removed Mr. Skinner as Trustee under the Special Needs Trust and guardian of Ms. Skinner's estate, appointed Ms. Clark to replace Mr. Skinner in both of these capacities, precluded Mr. Skinner from spending additional amounts from the Trust or Ms. Skinner's estate, and required Mr. Skinner, among other things, to repay any amounts disbursed from the Trust or Ms. Skinner's estate since the date of the evidentiary hearing, to reimburse the Trust for the payments that he made to himself using Trust assets relating to his legal fee payments to the Eatmon and Brownlee law firms, and to provide all relevant records and make a full accounting to Ms. Clark.

On 5 September 2014, Mr. Skinner filed a notice of appeal seeking review of the Assistant Clerk's order in the Superior Court, Wake County. On 22 October 2014, the trial court entered an order affirming the Assistant Clerk's order. On 18 November 2014, Mr. Skinner noted an appeal to the Court of Appeals from the trial court's order.

In seeking relief from the trial court's order before the Court of Appeals, Mr. Skinner noted that "[t]he standard of review on appeal from a judgment entered after a non-jury trial is 'whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment,' " quoting *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (quoting *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163, *disc. rev. denied*, 354 N.C. 365, 556 S.E.2d 577 (2001)), *disc. rev. denied*, 356 N.C. 434, 572 S.E.2d 428 (2002), with the trial court's legal conclusions being subject to de novo review, citing *In re D.H.*, 177 N.C. App. 700, 703, 629 S.E.2d 920, 922 (2006). According to Mr. Skinner, the record did not contain sufficient evidence to show that he had engaged in self-dealing, committed a breach of fiduciary duty, acted imprudently, wasted or mismanaged trust assets, or converted trust assets to his own use. More specifically, Mr. Skinner contended that "the trial court made no findings that [he] . . . abused his discretion, acted with a dishonest motive, acted beyond the bounds of reasonable judgment or violated any specific provision of the Cathleen Bass Special Needs Trust" by using trust funds to pay for the home and associated services or attorneys' fees associated with the preparation of the trust and that the Assistant Clerk had not given sufficient deference to the discretionary decisions that he had made in the course of acting as the guardian of Ms. Skinner's estate and trustee under the Special Needs Trust.

On the other hand, Mr. Bass and Ms. Clark argued that "great deference [is accorded] to the trial court, and its ruling may be reversed only

upon a showing that its action was manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision," quoting *In re Estate of Newton*, 173 N.C. App. 530, 539, 619 S.E.2d 571, 576, *disc. rev. denied*, 360 N.C. 176, 625 S.E.2d 786 (2005). According to Mr. Bass and Ms. Clark, the record "support[s] the [Assistant] Clerk's conclusion that [Mr. Skinner] inappropriately used trust funds to benefit himself," "lacks appropriate judgment," and "mismanaged the Trust assets," with Mr. Skinner's right to exercise his discretion being insufficient, given the facts at issue in this case, to insulate him from removal as the guardian of Ms. Skinner's person and the trustee under the Special Needs Trust.

On 21 June 2016, the Court of Appeals reversed the Assistant Clerk's order removing Mr. Skinner as the guardian of Ms. Skinner's estate and trustee under the Special Needs Trust. *In re Estate of Skinner*, ___ N.C. App. ___, 787 S.E.2d 440 (2016). After noting that the abuse of discretion standard of review was only relevant with respect to "decisions that are based upon properly supported findings and legally correct conclusions" and that " 'the extent to which the trial court [had] exercised its discretion on the basis of an incorrect understanding of the applicable law raise[d] an issue of law subject to *de novo* review on appeal,' " *id.* at ___, 787 S.E.2d at 444 (quoting *In re A.F.*, 231 N.C. App. 348, 352, 752 S.E.2d 245, 248 (2013) (quoting *Koon v. U.S.*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047, 135 L.Ed.2d 392, 414 (1996))), the Court of Appeals held that the Assistant Clerk had erred by determining that the Special Needs Trust had been created "in order to preserve those assets for [Ms. Skinner's] long term health needs" given that "the subject assets were not intended to be used for [Ms.] Skinner's future medical needs," *id.* at ___, 787 S.E.2d at 445-46 (brackets in original). In addition, the Court of Appeals held that the Assistant Clerk had erred by finding "that the 'trust specifically states that funeral expenses are not permitted to be paid from the Trust prior to reimbursement to North Carolina (or any other state) for medical expenses' " given that "[t]he Trust does not bar the use of Trust funds to purchase a prepaid burial insurance policy," *id.* at ___, 787 S.E.2d at 447. Moreover, the Court of Appeals stated that the Assistant Clerk had erred by deciding that "the terms of the Trust did not permit the Trustee to use Trust assets for the purpose of a house, furniture, or appliances"; that these purchases constituted "waste and mismanagement of Trust assets"; and that the use of these assets by Mr. Skinner violated "the requirement that the Trust be administered for the 'sole benefit' of Ms. Skinner" on the grounds that the house, furniture, and appliances had been titled to the Trust; that the purchase of such assets constituted a permissible use of Trust resources; that, while

"[t]he wisdom of this investment is a separate question," it was "factually and legally inaccurate" to state that the purchase constituted waste or mismanagement "in the absence of any findings regarding the wisdom of this particular investment"; and that "an examination of the relevant regulations in the context of trust common law and the common sense realities of the life of any person, and especially of the challenges faced by a disabled person, makes it clear that the term 'sole benefit' does not mean that a disabled person . . . must live in a state of bizarre isolation in which no other person may 'benefit' from her house or furnishings." *Id.*, at ___, 787 S.E.2d at 448-51 (citing 42 U.S.C. § 1396p(d)(4)(A) and Program Operations Manual Systems Transmittal No. 48, SI 01120 TN 48). Finally, the Court of Appeals held that the Assistant Clerk had erred by concluding that "the Trust funds could not properly be used to reimburse [the] attorneys' fees" that Mr. Skinner incurred in the course of determining whether he could legally marry Ms. Skinner or be appointed as guardian for her on the grounds that "[t]he relevant Trust provisions are ambiguous" and the Assistant Clerk's findings do not "support its implied conclusion that this error constitute[d] 'a serious breach of trust' as opposed to an honest mistake," *id.* at ___, 787 S.E.2d at 452, particularly given "Mr. Skinner's uncontradicted testimony . . . that he believed that he could use Trust funds to reimburse himself for [the relevant] attorneys' fees" and the fact "that [Mr. Skinner had] agreed to repay the Trust when this error was pointed out," *id.*, at ___, 787 S.E.2d at 452. As a result, the Court of Appeals held that the trial court's order upholding the Assistant Clerk's order "must be reversed for application of the proper legal standards." *Id.* at ___, 787 S.E.2d at 453.

Judge Bryant dissented from the Court of Appeals' decision to reverse the trial court's order on the grounds that the majority had effectively "reweigh[ed] the evidence" and "disregard[ed] the deferential standard of review on appeal." *Id.* at ___, 787 S.E.2d at 453 (Bryant, J., dissenting). In the dissenting judge's opinion, the Assistant Clerk "made findings of fact which were supported by competent evidence," except for "the [Assistant] Clerk's finding that funeral expenses are not permitted to be paid from the Trust," and "those findings in turn supported his conclusion that Mr. Skinner 'is unsuitable to continue serving as Trustee of the Trust' and the guardian of Ms. Skinner's estate." *Id.* at ___, 787 S.E.2d at 454. As a result, since "the [Assistant] Clerk's findings of fact are supported by the evidence, which findings in turn support the conclusions of law," the dissenting judge could not find that the Assistant Clerk's decision to remove Mr. Skinner as trustee of the Special Needs Trust and as guardian of Ms. Skinner's estate constituted an abuse of discretion. *Id.* at ___, 787 S.E.2d at 455. Mr. Bass and Ms. Clark noted

an appeal to this Court from the Court of Appeals' decision pursuant to N.C.G.S. § 7A-30(2) (providing for "an appeal . . . of right to the Supreme Court from any decision of the Court of Appeals rendered in a case . . . [i]n which there is a dissent").

In seeking to persuade us to reverse the Court of Appeals' decision, Mr. Bass and Ms. Clark contend that the Court of Appeals erred by failing to limit its review of the Assistant Clerk's order to determining whether an abuse of discretion had occurred. According to Mr. Bass and Ms. Clark, "[b]ecause the removal of a trustee and the removal of a guardian are 'left to the discretion of the clerks of superior court,' appellate review 'is limited to a determination of whether there was a clear abuse of discretion,' " quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). As a result, Mr. Bass and Ms. Clark argue that, "in order to reverse the [Assistant] Clerk's Order, the appellate court was required to find that the [Assistant] Clerk's Order was so manifestly unsupported by reason that it could not have been the result of a reasoned decision." Mr. Bass and Ms. Clark contend that, "regardless of what the trust allowed, [Mr. Skinner] was required to act with prudence and in [Ms. Skinner's] best interests" and that the Assistant Clerk had properly determined "that [Mr. Skinner] had not acted accordingly." Finally, Mr. Bass and Ms. Clark contend that, even if the Court of Appeals had correctly concluded that the Assistant Clerk's order rested on a misinterpretation of the applicable law, the Court of Appeals should have remanded this case to the trial court for further remand to the Assistant Clerk "for consideration of the evidence in its true legal light," quoting *Allen v. Rouse Toyota Jeep, Inc.*, 100 N.C. App. 737, 740, 398 S.E.2d 64, 65 (1990), rather than simply reversing the trial court's decision to uphold the Assistant Clerk's order.

Mr. Skinner, on the other hand, contends that the Court of Appeals correctly applied the applicable standard of review in determining that the Assistant Clerk's order was "so arbitrary that it could not have been the result of a reasoned decision," quoting *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998). According to Mr. Skinner, "[n]o deference . . . is owed to the [trial court] on conclusions of law," which are "are reviewed de novo," quoting *Everett v. Pitt Cty. Bd. of Educ.*, 678 F.3d 281, 288 (4th Cir. 2012) (alterations in original), with "a court by definition [having] abuse[d] its discretion when it makes an error of law," quoting *A Helping Hand LLC v. Baltimore County*, 515 F.3d 356, 370 (4th Cir. 2008) (*rev'd per curiam*, 355 F. App'x 773 (4th Cir. 2009)). Mr. Skinner asserts that the Assistant Clerk's order was replete with "findings and conclusions of law that were unsupported by the evidence of record and inconsistent with prevailing law," including his determination

that the purpose of the Special Needs Trust was to "preserve those assets for [Ms. Skinner's] long term health needs." Thus, Mr. Skinner claims that the Assistant Clerk's decision to remove him as trustee under the Special Needs Trust and as the guardian of Ms. Skinner's estate was unwarranted given that his actions did not "injure[ ] [Ms.] Skinner by causing her to suffer any period of ineligibility for any federal or state government benefits to which she was entitled." As a result, since he acted "in good faith and with an honest purpose to effectuate the trust," Mr. Skinner argues that the Court of Appeals properly overturned the Assistant Clerk's removal order.

In the appointment and removal of guardians and trustees, the superior court exercises derivative jurisdiction, so that "appeals [from the clerk] present for review only errors of law [that were] committed by the clerk," with the trial court in such instances being required to conduct a "hearing on the record rather than *de novo*" and being "confined to the correction of errors of law." *In re Simmons*, 266 N.C. 702, 707, 147 S.E.2d 231, 234 (1966) (citations omitted). In like manner, the essential inquiry that we are required to conduct in this proceeding involves a determination of whether the Assistant Clerk, who effectively served as the trial tribunal in this matter, committed an error of law in the course of determining that Mr. Skinner should be removed as the trustee under the Special Needs Trust and the guardian of Ms. Skinner's person.

The relevant statutory provisions clearly enunciate the approach that the Assistant Clerk was required to take in determining whether the removal petition filed by Mr. Bass and Ms. Clark should have been allowed or denied, as will be set forth in more detail below. In each instance, the clerk is authorized, but not required, to remove a trustee or guardian in the event that the clerk determines that statutory grounds for removal exist. For that reason, the clerk must, in a proceeding convened to consider the removal of a trustee or guardian, ascertain what the relevant facts are, decide whether those facts establish that any of the statutorily specified grounds for removal exist, and, if one or more grounds for removal do exist, make a discretionary determination as to whether the acts or omissions of the trustee or guardian justify removal from the position that he or she occupies, with the exact contours of the applicable standard of review flowing from the nature of the inquiry that the Assistant Clerk is required to undertake. *See id.* at 706, 147 S.E.2d at 234 (affirming a removal order on the grounds that "[t]he records and summary of the evidence warrant the clerk's findings which are sufficient to support the order of removal").

In light of the nature of the review conducted by the Superior Court in cases like this one, involving review of an Assistant Clerk's decision for errors of law, the Assistant Clerk's order can be analogized to that of a trial judge sitting without a jury or by an administrative agency. When the trial court conducts a trial without a jury, "the trial court's findings of fact have the force and effect of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though the evidence could be viewed as supporting a different finding." *Bailey v. State*, 348 N.C. 130, 146, 500 S.E.2d 54, 63 (1998) (citing *Curl v. Key*, 311 N.C. 259, 260, 316 S.E.2d 272, 273 (1984)). Although findings of fact "supported by competent, material and substantial evidence in view of the entire record[ ], are conclusive upon a reviewing court, and not within the scope its of reviewing powers," *In re Berman*, 245 N.C. 612, 616-17, 97 S.E.2d 232, 235 (1957), "[f]indings not supported by competent evidence are not conclusive and will be set aside on appeal." *Penland v. Bird Coal Co.*, 246 N.C. 26, 30, 97 S.E.2d 432, 436 (1957) (citing *Logan v. Johnson*, 218 N.C. 200, 10 S.E.2d 653 (1940)). "[F]acts found under a misapprehension of the law are not binding on this Court and will be set aside, and the cause remanded to the end that the evidence should be considered in its true legal light." *Hanford v. McSwain*, 230 N.C. 229, 233, 53 S.E.2d 84, 87 (1949) (citing, *inter alia*, *McGill v. Town of Lumberton*, 215 N.C. 752, 3 S.E.2d 324 (1939)). Even if one or more factual findings were made in error, the remaining findings may still suffice to support the trial tribunal's legal conclusions. *See In re Greene*, 328 N.C. 639, 650, 403 S.E.2d 257, 263-64 (1991) (per curiam) (concluding that, even though "the finding [by the Commission] that respondent told the prosecuting witness in the assault case that she deserved to be hit and had not been hit that much is not supported by clear and convincing evidence," because "the other findings of the Commission are supported by clear and convincing evidence," "we adopt them as our own" and "agree with the conclusion of the Commission"); *King v. Nat'l Union Fire Ins. Co.*, 258 N.C. 432, 439, 128 S.E.2d 849, 855 (1963) (concluding that, even though "the finding . . . that . . . plaintiff . . . [while] in possession, . . . made extensive repairs and improvements to the dwelling house is not supported by the evidence," "[b]ased upon the crucial findings of fact, which are supported by competent evidence" the trial court's judgment was proper); *In re Estate of Pate*, 119 N.C. App. 400, 403, 459 S.E.2d 1, 2 (noting that, "[i]n a non-jury trial, [w]here there are sufficient findings of fact based on competent evidence to support the trial court's conclusions of law, the judgment will not be disturbed because of other erroneous findings") *disc. rev. denied*, 341 N.C. 649, 462 S.E.2d

515 (1995) (quoting *Black Horse Run Prop. Owners Ass'n—Raleigh v. Kaleel*, 88 N.C. App. 83, 86, 362 S.E.2d 619, 622 (1987) *cert. denied*, 321 N.C. 742, 366 S.E.2d 856 (1988)). On appeal, "[c]onclusions of law drawn by the trial court from its findings of fact are reviewable *de novo*." *In re Foreclosure of Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013) (quoting *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004)). "When an order has been made by the judge in the exercise of the discretion vested in him by the statute, his order is not reviewable by this Court, on appeal, except upon the ground that there has been an abuse of such discretion." *In re LaFayette Bank & Tr.*, 198 N.C. 783, 789-90, 153 S.E. 452, 455 (1930). An abuse of discretion exists when there has been "a showing that [the] actions are manifestly unsupported by reason . . . [and] so arbitrary that the ruling could not have been the result of a reasoned decision." *White*, 312 N.C. at 777, 324 S.E.2d at 833 (citing *Clark v. Clark*, 301 N.C. 123, 271 S.E.2d 58 (1980)).

According to well-established North Carolina law, "[t]he clerk has the power and authority on information or complaint made to remove any guardian." N.C.G.S. § 35A-1290(a) (2015). A clerk has a "duty to remove a guardian or to take other action sufficient to protect the ward's interests" in the event that a "guardian wastes the ward's money or estate or converts it to his own use," "mismanages the ward's estate," "has violated a fiduciary duty through default or misconduct," or is "unsuitable to continue serving as guardian for any reason." *Id.* § 35A-1290(b)(1), (2), (6), (c)(8) (2015), recodified as N.C.G.S. § 35A-1290(b)(1), (2), (6), (15) by Act of June 29, 2017, ch. 158, sec. 4, 2017 N.C. Sess. Laws __, __). Similarly, the clerk "may remove a trustee" who "has committed a serious breach of trust" or in the event that, "[b]ecause of unfitness, unwillingness, or persistent failure . . . to administer the trust effectively," "removal of the trustee best serves the interests of the beneficiaries." *Id.* § 36C-7-706(b)(1), (3) (2015); *see also id.* § 36C-2-203(a)(1) (2015). As a result, the Assistant Clerk had the authority, pursuant to N.C.G.S. § 35A-1290 and N.C.G.S. § 36C-7-706(b), to remove Mr. Skinner as the guardian of Ms. Skinner's estate and as trustee under the Special Needs Trust, for a number of different reasons.

"A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust" and must "exercise reasonable care, skill, and caution" while acting in his or her fiduciary capacity. *Id.* § 36C-9-902 (a) (2015).

> In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for the benefit

> of another, a fiduciary shall observe the standard of judgment and care under the circumstances then prevailing, which an ordinarily prudent person of discretion and intelligence, who is a fiduciary of the property of others, would observe as [such] fiduciary; and if the fiduciary has special skills or is named a fiduciary on the basis of representations of special skills or expertise, he is under a duty to use those skills.

*Id.* § 32-71(a) (2015). While "the terms of the trust, in conjunction with the North Carolina Uniform Trust Code, govern[ ] the duties and powers of a trustee," *id.* § 36C-1-105(a) (2015), those terms do not prevail over the trustee's duty "to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries," *id.* § 36C-1-105(b)(2) (2015). As a result, while "the courts will not undertake to supervise or control [a trustee's] actions" "[w]hen it appears that a trustee has exercised or proposes to exercise discretion in good faith, and with an honest purpose to effectuate the trust," *Lichtenfels v. N.C. Nat'l. Bank*, 268 N.C. 467, 476, 151 S.E.2d 78, 84 (1966) (ellipses in original) (quoting *Carter v. Young*, 193 N.C. 678, 681-82, 137 S.E. 875, 877 (1927)), "[t]he court of equity will always compel a trustee to exercise a mandatory power and will control his exercise of a discretion vested in him when it is shown that he has exercised it dishonestly or from other improper motive." *Kuykendall v. Proctor*, 270 N.C. 510, 520, 155 S.E.2d 293, 302 (1967) (citation omitted).

Similarly, the guardian of an incompetent person's estate "has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, and use of the ward's estate to accomplish the desired result of administering the ward's estate legally and in the ward's best interest." N.C.G.S. § 35A-1251 (Supp. 2016). In carrying out these responsibilities, the guardian is entitled, among other things, "[t]o expend estate income on the ward's behalf and to petition the court for prior approval of expenditures from estate principal," *id.* § 35A-1251(12), and "[t]o acquire and retain every kind of property and every kind of investment," *id.* § 35A-1251(16). This Court affirmed the removal of a guardian after stating that the clerk had found that "the net income from the ward's estate [had] dwindled" and "total expenditures for the period" included the purchase of a truck, refrigerator for the guardian's mother, and a television set, while the "remainder was paid for board and room for the ward." *In re Simmons*, 266 N.C. at 706, 147 S.E.2d at 233*; see also State ex rel. Roebuck v. Nat'l Sur. Co.*, 200

N.C. 196, 202, 156 S.E. 531, 535 (1931) (ordering a surety company that executed a bond for the faithful performance of a bank acting as guardian for a ward to pay the successor guardian a stated sum to reimburse the ward for the bank's failure to "invest[ ] the funds of its ward"; stating that, by "intermingling [the funds of the ward] with other funds of its bank, [the bank] was faithless to the trust reposed in it; and pointing out that its bondsman, the defendant, must suffer the loss for such faithlessness"). As a result, because the "level of conduct for fiduciaries . . . [must be] higher than that trodden by the crowd," *Wachovia Bank & Tr. Co. v. Johnston*, 269 N.C. 701, 711, 153 S.E.2d 449, 457 (1967) (quoting *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 5460 (1928)), Mr. Skinner was required to carry out his duties as guardian and trustee reasonably and prudently and in a manner that served Ms. Skinner's best interests.

The unchallenged findings of fact contained in the Assistant Clerk's order establish that, within less than two months after the $170,086.67 amount that Ms. Skinner inherited from Ms. Bass was transferred to the Special Needs Trust, only $10,313.66 remained available for Ms. Skinner's use. Among other things, Mr. Skinner paid $8,387.50 from the Special Needs Trust to The Violin Shop, with $1,000.00 of this amount being used to reimburse Mr. Skinner for the legal fees that he had paid to the Brownlee Law Firm for advice concerning the extent to which he could lawfully marry Ms. Skinner and become Ms. Skinner's guardian and with another $1,537.50 being used to reimburse Mr. Skinner for the legal fees that he had paid to the Eatmon Law Firm for personal representation in the guardianship and incompetency proceedings. In addition, the unchallenged findings of fact demonstrate that Mr. Skinner used monies derived from the Special Needs Trust to purchase a new house, along with furniture and appliances, in which he and Ms. Skinner were residing at the time of the removal hearing. Thus, the Assistant Clerk's unchallenged findings of fact establish that Mr. Skinner, while acting as the trustee under the Special Needs Trust and as the guardian of Ms. Skinner's estate, spent more than ninety percent of the monies that had been deposited in the Special Needs Trust for purposes for which he received some, if not all, of the benefit within sixty days of obtaining control of those monies. As a result, we have no hesitancy in concluding that the Assistant Clerk's unchallenged findings of fact support his conclusions that "Mr. Skinner's use of Trust assets to reimburse himself for personal expenditures was improper, constitutes self-dealing, and is a breach of his fiduciary duties both as Trustee and Guardian" of Ms. Skinner's estate; that "Mr. Skinner has demonstrated that he lacks appropriate judgment and prudence"; that "Mr. Skinner is

in breach of his fiduciary duties pursuant to the terms of the Trust, the . . . order [appointing him guardian of Ms. Skinner's estate], and the applicable law"; and that "Mr. Skinner has wasted the Trust assets, mismanaged the Trust assets, and converted the Trust assets to his own use." In view of the fact that his findings and conclusions demonstrate that Mr. Skinner had "waste[d] the ward's money or estate or convert[ed] it to his own use," N.C.G.S. § 35A-1290(b)(1), "mismanage[d] the ward's estate," *id.* § 35A-1290(b)(2), and "violated a fiduciary duty through default or misconduct," *id.* § 35A-1290(b)(6), and that Mr. Skinner "has committed a serious breach of trust," *id.* § 36C-7-706(b)(1), the Assistant Clerk had ample justification for determining that grounds for Mr. Skinner's removal as both the guardian of Ms. Skinner's estate and as trustee under the Special Needs Trust existed in this case. Finally, we are unable to say that the Assistant Clerk's determination that removal constituted a valid remedy for Mr. Skinner's breaches of fiduciary duty was "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." *White*, 312 N.C. at 777, 324 S.E.2d at 833. As a result, while the Assistant Clerk appears to have erroneously construed a number of the provisions of the Special Needs Trust and while the entry of a more detailed and clearly focused order would have facilitated our review on appeal, we hold that the Assistant Clerk's order should be affirmed and that the Court of Appeals erred by reaching a contrary conclusion.

In reversing the Assistant Clerk's order, the Court of Appeals focused upon the extent, if any, to which Mr. Skinner's conduct violated the specific provisions of the Special Needs Trust. Although the existence or non-existence of such violations is, of course, relevant to a proper removal inquiry, the Court of Appeals' apparent determination that Mr. Skinner was not subject to removal in the absence of a showing that he had, in fact, violated one or more provisions of the Special Needs Trust misapprehends the applicable law. Instead of being concentrated exclusively upon the extent to which Mr. Skinner's actions violated the provisions of the Special Needs Trust, the Assistant Clerk's order clearly and appropriately recognized that N.C.G.S. §§ 35A-1290 and 36C-7-706(b) focus upon the broader issue of whether the guardian or trustee acted in such a manner as to violate the fiduciary duty that he or she owes to the ward or beneficiary. A careful reading of the challenged removal order satisfies us that the Assistant Clerk did not remove Mr. Skinner from his position as guardian of Ms. Skinner's estate and trustee under the Special Needs Trust because he violated the terms and conditions of the Special Needs Trust; instead, the Assistant Clerk's findings and conclusions satisfy us that he acted as he did on the basis of a belief that

Mr. Skinner's actions, regardless of their consistency with specific provisions of the Special Needs Trust, constituted waste and mismanagement of the assets committed to his care. As we have already noted, the extent to which a guardian or trustee violated his or her fiduciary duty is a separate, and broader, question than the issue of whether he or she violated a specific provision of a written trust instrument. *See* N.C.G.S. § 36C-1-105(b)(2) (providing that "[t]he duty of a trustee . . . to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries" overrides "[t]he terms of a trust"). Thus, the fact that Mr. Skinner's conduct may have been consistent with the terms of the Special Needs Trust did not insulate him from removal.

In seeking to persuade us to reach a different result, Mr. Skinner emphasizes the scope of his discretionary authority and defends the spending decisions upon which the Assistant Clerk's order rests as having benefitted Ms. Skinner and been in her best interest. Although we recognize that a guardian and trustee has discretion in the manner in which he or she attempts to meet the needs of his or her ward or beneficiary, there are, as this Court has previously noted, limits to the scope and extent of that discretion. In view of the fact that the Assistant Clerk's findings of fact demonstrate that Mr. Skinner expended over ninety percent of the monies committed to his custody for Ms. Skinner's use and care within a short time after receiving them in ways that either directly or indirectly benefitted himself while leaving insufficient monies in the Trust to either preserve the assets into which he had invested the bulk of the Trust's funds or to take care of Ms. Skinner's long term needs, we cannot say that the Assistant Clerk erred in determining that Mr. Skinner exceeded the scope of the discretion that was admittedly available to him to such an extent that grounds for his removal as the guardian of Ms. Skinner's person and as trustee under the Special Needs Trust existed under N.C.G.S. §§ 35A-1290 and 36C-7-706(b) and that these breaches of fiduciary duty justified his removal. As a result, the Court of Appeals' decision in this case is reversed.

REVERSED.

Justice MORGAN dissenting.

I respectfully dissent from the decision of the majority that the Assistant Clerk was authorized, in his discretion as exercised under the circumstances presented in this case, to properly remove Mr. Skinner as the Trustee of his legally incompetent wife's Special Needs Trust and guardian of her estate. While the majority in its opinion acknowledges

that the Assistant Clerk erroneously construed a number of the provisions of the Special Needs Trust at issue, my learned colleagues stretch far too much to bring these critical errors within the realm of the proper exercise of broad discretion while simultaneously minimizing these missteps by overemphasizing the strength of his remaining findings. The fundamental misapprehension of the law exhibited by the Assistant Clerk is too profound to be salvaged in this manner. As a result, in my view, Mr. Skinner's removal from his position as Trustee of Mrs. Skinner's Special Needs Trust and guardian of her estate was not justified. I agree with the rationale of the Court of Appeals decision. In my view, the case should be remanded to the trial court for proper application of the correct legal standard.

In the first instance, the Assistant Clerk misinterpreted the essence of a special needs trust when making his decision to remove Mr. Skinner as Trustee and as guardian of his wife's estate. A special needs trust, such as the one at issue in the present case, which meets designated federal requirements as identified in 42 U.S.C. § 1396p(d)(4)(A) allows the beneficiary to maintain eligibility for Medicaid and Social Security disability benefits. "The whole purpose of a special needs trust is to shelter resources so that the state, through Medicaid, pays for medical expenses rather than having the beneficiary's family pay for them." *Hobbs v. Zenderman*, 542 F. Supp. 2d 1220, 1234 (D.N.M. 2008), *aff'd*, 579 F.3d 1171 (10th Cir. 2009); *ACS Recovery Servs., Inc. v. Griffin*, 723 F.3d 518, 539 (5th Cir. 2013) ("The primary purpose of special needs trusts is to allow beneficiaries to maintain eligibility for public benefits—such as Medicaid—while supplementing those benefits so that the beneficiary enjoys a better quality of life." (Haynes, J. concurring in part and dissenting in part), *cert. denied*, 134 S. Ct. 618, 187 L. Ed. 2d 400 (2013)). This was a proper consideration by the Assistant Clerk, manifested by his requirement in his 9 October 2013 order appointing Mr. Skinner as guardian of Mrs. Skinner's estate that a special needs trust be established. This recognition is displayed in the Assistant Clerk's finding, which is also cited in the majority opinion, that "[Mrs. Skinner] would be at risk of losing her SSI benefits and Medicaid assistance if her inheritance is not placed in a Special Needs Trust . . . [Mrs. Skinner] will have medical needs for the remainder of her life."

Subsequently, however, the Assistant Clerk incorrectly determined that the purpose of the Special Needs Trust was to shield Mrs. Skinner's resources for future medical expenses, rather than the actual purpose referenced in federal statutory and case law that authorizes a special needs trust to fund resources that will improve a beneficiary's quality

of life while still protecting that beneficiary's ability to access governmental resources such as Medicaid and Social Security. The Court of Appeals correctly understood and applied this fundamental purpose of a special needs trust in reversing the Assistant Clerk's order that removed Mr. Skinner from the positions of authority for his wife.

The Assistant Clerk's misunderstanding of the purpose of the Special Needs Trust is a misapprehension of law that renders his decision to remove Mr. Skinner as Trustee and guardian of Mrs. Skinner's estate an abuse of discretion. While this Court's standard of review is limited to a determination of whether the Assistant Clerk abused his discretion, "an abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction." *Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047, 135 L. Ed. 2d 392, 414 (1996) (citation omitted). It is well-established in this Court's decisions that a misapprehension of the law is appropriately addressed by remanding the case to the appropriate lower forum in order to apply the correct legal standard. *See*, *e.g.*, *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 523, 398 S.E.2d 586, 603 (1990); *State v. Grundler*, 249 N.C. 399, 402, 106 S.E.2d 488, 490 (1959), *cert. denied*, 362 U.S. 917, 80 S. Ct. 670, 4 L. Ed. 2d 738 (1960).

The Assistant Clerk's decision to remove Mr. Skinner as Trustee is replete with other examples of misapprehensions of the law which amounted to an abuse of discretion, and which were duly noted by the Court of Appeals, in the Assistant Clerk's interpretation of the Special Needs Trust and Mr. Skinner's actions regarding it.

The Assistant Clerk erred by failing to distinguish between the use of Trust funds for funeral expenses after termination of the Trust and the use of Trust funds for the purchase of prepaid funeral or burial insurance during the beneficiary's lifetime. In his removal order, the Assistant Clerk reasoned that "[t]he Trust specifically states that funeral expenses are not permitted to be paid from the Trust prior to reimbursement to North Carolina (or any other state) for medical assistance." The Assistant Clerk then concluded that "Mr. Skinner's payment of $3,644.00 to Columbus Life for prepaid funeral expenses . . . is in contradiction to the terms of the Trust and in violation of his fiduciary duties as Trustee." However, in accord with 42 U.S.C. § 1396p(d)(4)(A), upon the death of a beneficiary or upon early termination, a Special Needs Trust must reimburse the State for medical expenses. To comply with this provision, the Special Needs Trust provides that upon Mrs. Skinner's death, the Trustee is required to "notify the appropriate state agency of [Mrs. Skinner's] death and must promptly obtain an accounting from the states (or local Medicaid agencies of the states) that have made Medicaid payments on

[Mrs. Skinner's] behalf during her lifetime."[1] The Special Needs Trust further provides that after the State is fully reimbursed, the Trustee may pay for funeral expenses. There is no provision in the Special Needs Trust that prevented Mr. Skinner from using trust funds to purchase prepaid funeral and burial insurance during Mrs. Skinner's lifetime. Therefore, the Assistant Clerk misinterpreted the federal statutory provision mandating that, after death, the State was to be reimbursed before other expenses were paid, by erroneously construing the 42 U.S.C. § 1396p(d)(4)(A) language to bar payment for funeral and burial insurance before death.

The Assistant Clerk's inaccurate construction of the purpose of the Special Needs Trust likewise yielded an improper analysis of Mr. Skinner's decision to use trust funds to purchase a house to serve as the marital home for the Skinners, plus some furnishings. The Assistant Clerk found that Mr. Skinner used such assets to purchase the home, new furniture, and new appliances, and that because Mr. Skinner is the husband of the trust beneficiary wife and therefore resides in the home with her, he improperly benefits from the purchases. As a result, the Assistant Clerk reached the conclusion that Mr. Skinner showed a lack of prudence and judgment and "breach[ed] . . . his fiduciary duties pursuant to the terms of the Trust, the terms of the GOE Order, and applicable law."

Contrary to the Assistant Clerk's misapprehension of the law, the purchase of the house and related expenditures were authorized by the Special Needs Trust consistent with the purpose of a special needs trust. Article Two of the Special Needs Trust here provides, in pertinent part, that

> [t]he Trustee will hold, manage, invest and reinvest the Trust Estate, and will pay or apply the income and principal of the Trust Estate in the following manner: . . .
>
> During Beneficiary's lifetime, the Trustee will pay from time to time such amounts from the Trust Funds for the satisfaction and benefit of [the] Beneficiary's Special Needs (as hereinafter defined), as the Trustee determines in the Trustee's discretion, as hereinafter provided.

Section 7.02(a) of the Trust defines the term "special needs" as the "Beneficiary's needs that are not covered or available from any local,

1. Medicaid would have to be paid first if the Special Needs Trust was terminated early as well.

state, or federal government, or any private agency, or any private insurance carrier covering Beneficiary."

Here Mr. Skinner authorized trust assets to pay approximately $135,000.00 for the purchase of the house, which is titled to the Trust, and between $3,200.00 and $4,500.00 for furniture, appliances, and repairs to the house. The evidence shows that the house, furnishings, and appliances are owned by the Trust; the house is handicapped-accessible to readily accommodate Mrs. Skinner; and it is located in close proximity to where Mrs. Skinner previously lived. The determination of Mr. Skinner, in his role as Trustee, to improve Mrs. Skinner's quality of life through this move to a new home is consistent with the express purpose of a special needs trust. With the physical enhancements of new furnishings and fresh repairs for a better house suited to fit Mrs. Skinner's ongoing needs in a neighborhood which was familiar to her, Mr. Skinner's expenditures of the trust funds in this regard fall squarely within his discretionary authority to periodically pay such amounts for the satisfaction and benefit of his wife's special needs. The failure of the Assistant Clerk to recognize Mr. Skinner's sanctioned fulfillment of his duties as Trustee of Mrs. Skinner's Special Needs Trust, coupled with the Assistant Clerk's concomitant negative view of these permissible expenditures, constitutes a clear misapprehension of the law.

Finally, I must address the Assistant Clerk's ruling that Mr. Skinner's reimbursements which he obtained from the Special Needs Trust in the amounts of $1,000.00 and $1,537.50 for his payments to two law firms were unauthorized because these expenditures arose before Mr. Skinner's appointment to the roles of Trustee and guardian of Mrs. Skinner's estate. I embrace the Court of Appeals' position that the Assistant Clerk's misapprehension of the law on the other questioned usages of trust funds extended to a narrow view by the Assistant Clerk that Mr. Skinner was automatically ineligible for any reimbursements of expenditures that he plausibly made with regard to his guardianship status and the potential legal impact of the Skinners' marriage upon her financial well-being. I evaluate the Assistant Clerk's view of Mr. Skinner's withdrawal of $8,387.50 from the Special Needs Trust for payment to his violin business to be consistent with the Assistant Clerk's misapprehension of the law, which was reflected in the Assistant Clerk's dark lens of perceived "self-dealing," "violation of [Mr. Skinner's] fiduciary duties as Trustee," "lack[ ] [of] appropriate judgment," and "waste [ ]," "mismanage[ment]" and "conver[sion]" of Trust assets regarding the prepaid funeral expenses, burial insurance, marital home, marital home furnishings, law firm bills and overall special needs trust administration.

I believe that the Assistant Clerk's fundamental misapprehension of the law amounts to an abuse of discretion that would necessitate a reversal and remand of the trial court's order affirming the Assistant Clerk's order to remove Mr. Skinner as Trustee of his wife's Special Needs Trust and guardian of her estate.

For these reasons, I respectfully dissent and adopt the rationale of the Court of Appeals' decision, and would remand this case to the Court of Appeals for remand to the trial court with instructions to apply the appropriate legal standard.

Justices NEWBY and JACKSON join in this dissenting opinion.

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IN THE MATTER OF M.A.W.

No. 279PA16

Filed 29 September 2017

**Termination of Parental Rights—neglect—sufficiency of findings**

The trial court did not err by terminating respondent's parental rights on the basis of neglect where the findings in the trial court's order were sufficient. Respondent had been incarcerated, and the initial allegations of neglect were based on the mother's actions, but the evidence of prior neglect did not stand alone. Respondent had a long history of criminal activity and substance abuse, and he initially indicated his desire to be involved in the child's life, but he failed to follow through consistently after his release.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 787 S.E.2d 461 (2016), reversing an order entered on 12 August 2015 by Judge J.H. Corpening, II in District Court, New Hanover County. Heard in the Supreme Court on 28 August 2017.

*Regina Floyd-Davis for New Hanover County Department of Social Services, petitioner-appellant.*

*Parker Poe Adams & Bernstein LLP, by William L. Esser IV, for appellant Guardian ad Litem.*

*Rebekah W. Davis for respondent-appellee father.*

JACKSON, Justice.

In this appeal we consider whether the trial court erred by terminating respondent's parental rights on the basis of neglect. Because we conclude that the findings in the trial court's order were sufficient to support termination of respondent's parental rights based upon neglect, we reverse the Court of Appeals' determination that the trial court had erred.

On 11 March 2013, the New Hanover County Department of Social Services (DSS) filed a petition alleging that the minor child M.A.W.[1] was a neglected juvenile. The petition alleged that M.A.W.'s mother "has a history of substance abuse and mental health issues." At the time the petition was filed, respondent father was incarcerated on charges of habitual impaired driving.

At the adjudication hearing on 12 June 2013, the trial court found that M.A.W.'s mother had tested positive for use of the controlled substance commonly known as Percocet without having a valid prescription for the drug. In addition, the trial court found that the mother's history of both substance abuse and mental health issues previously had interfered with her ability to provide appropriate care for her children. The trial court also noted that DNA testing had confirmed respondent's paternity and that respondent had reported participation in various services available to him during his incarceration, including a parenting class and Alcoholics Anonymous meetings. In addition, the trial court observed that respondent had requested a home study on his mother for consideration of placement for M.A.W.

Based upon these and other findings of fact, the trial court concluded as a matter of law that M.A.W. was "neglected" as defined by N.C.G.S. § 7B-101(15) and that it was in the best interest of the child to remain in the legal custody of DSS, which had the discretion to provide or arrange for foster care or another placement. The mother was ordered to comply with her Family Services Agreement, which included participating in treatment for substance abuse and mental health issues; submitting to random drug and alcohol screens; and finding and maintaining suitable housing and employment. Respondent was ordered to enter into a Family Services Agreement and to access services available to him during his incarceration—specifically parenting courses and substance

1. The Court is using initials to protect the identity of the child.

abuse treatment programs. The trial court's order also established a visitation schedule for the mother and for respondent upon his release from incarceration.

After numerous permanency planning review hearings, on 10 April 2014, M.A.W.'s mother voluntarily relinquished her parental rights and executed consent for M.AW.'s adoption by M.A.W.'s maternal relatives. The trial court's 5 May 2014 permanency planning order relieved DSS of reunification efforts with the mother. The order also reported that respondent was still incarcerated, that he "has a drinking problem," and that "[h]is continued sobriety is paramount to any plan of reunification." The trial court added that prior to his incarceration, respondent "reports that he provided for the child financially and emotionally," "was aware of [the mother]'s substance abuse," and had "anticipated the Department's intervention." The trial court endorsed reunification with respondent as the permanent plan for the child and ordered respondent to contact DSS within three days of his release.

Respondent was released from incarceration on 29 August 2014. At a 4 September 2014 permanency planning review hearing, DSS stated that termination of parental rights was not appropriate because respondent needed to be afforded the opportunity to enter into a case plan. At the next review hearing on 8 January 2015, the trial court found, *inter alia*, that respondent had denied several requests from DSS to access the home of his mother, with whom he purported to live, that the court did not know where respondent was residing, and that respondent's initial regular visits with M.A.W. had declined in consistency. Further noting respondent's indication of his ability to pay child support arrearages for another child he had fathered, the trial court determined that respondent intended to disregard child support payments for M.A.W. Based upon these and other findings of fact, the trial court permitted DSS to cease reunification efforts with respondent and changed the permanent plan for M.A.W. to adoption.

On 10 February 2015, DSS filed a petition to terminate respondent's parental rights as to M.A.W. on the grounds of "neglect" and "failure to legitimate." N.C.G.S. § 7B-1111(a)(1), (5) (2015). Following a hearing, the trial court concluded that respondent had neglected M.A.W., and it found "a high probability that there [would] be a repetition of neglect, and that the neglect [would] continue in the foreseeable future." The trial court entered an order on 12 August 2015 terminating respondent's parental rights based upon neglect in accord with N.C.G.S. § 7B-1111(a)(1). Respondent appealed to the Court of Appeals.

In a unanimous opinion filed on 21 June 2016, the Court of Appeals reversed the trial court's termination of respondent father's parental rights, holding that the trial court erred in concluding grounds existed pursuant to N.C.G.S. § 7B-1111(a)(1) to terminate respondent's parental rights. *In re M.A.W.*, ___ N.C. App. ___, ___, 787 S.E.2d 461, 463 (2016). The Court of Appeals stated that "while there was a prior adjudication of neglect, the party responsible for the neglect was the juvenile's mother, not father." *Id.* at ___, 787 S.E.2d at 463. The court further reasoned that "[w]ithout evidence of any prior neglect, [DSS] failed to show neglect at the time of the hearing." *Id.* at ___, 787 S.E.2d at 463 (citing *In re J.G.B.*, 177 N.C. App. 375, 382, 628 S.E.2d 450, 455 (2006)). The Court of Appeals also determined that "the evidence, as well as the trial court's findings, [did] not support a conclusion that there was ongoing neglect at the time of the termination hearing." *Id.* at ___, 787 S.E.2d at 463. Accordingly, the Court of Appeals reversed the order entered by the trial court. DSS appealed to this Court.

Before this Court, DSS argues that the Court of Appeals incorrectly opined that, because respondent was incarcerated at the time of M.A.W.'s removal, he therefore could not have neglected the child. DSS also contends that the Court of Appeals failed to consider the trial court's findings of fact outlining respondent's failures to comply with the directives of that court after his release from incarceration. We agree.

In any proceeding such as this, we are reminded that "the fundamental principle underlying North Carolina's approach to controversies involving child neglect and custody [is] that the best interest of the child is the polar star." *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 251 (1984). Our General Statutes provide that a juvenile shall be deemed neglected if the court finds the juvenile to be a "neglected juvenile" within the meaning of N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is statutorily defined, in pertinent part, as a juvenile "who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; . . . or who lives in an environment injurious to the juvenile's welfare." *Id.* § 7B-101(15) (2015). As in the present case, "if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016) (citing *In re Ballard*, 311 N.C. 708, 713-15, 319 S.E.2d 227, 231-32 (1984)). If past neglect is shown, the trial court also must then consider evidence of changed circumstances. *In re Ballard*, 311 N.C. at 715, 319 S.E.2d at 232.

In a recent case affirmed per curiam by this Court, a child was adjudicated neglected because of the mother's substance abuse. *In re C.L.S.*, ___ N.C. App. ___, ___, 781 S.E.2d 680, 681, *aff'd per curiam*, 369 N.C. 58, 791 S.E.2d 457 (2016). The identity of the father was unknown at the time the adjudication order was entered in that case. *Id.* at ___, 781 S.E.2d at 681. Paternity was then established while the father was incarcerated, and the trial court ceased reunification efforts with the father several months later. *Id.* at ___, 781 S.E.2d at 681-82. The father in *In re C.L.S.* initially indicated his willingness to enter into a case plan, but subsequently failed to comply with the case plan recommendations and failed to obtain and maintain stable housing and employment. *Id.* at ___, 781 S.E.2d at 681. Subsequently, DSS moved to terminate both parents' parental rights on the grounds of neglect. *Id.* at ___, 781 S.E.2d at 681. The trial court terminated both parents' parental rights and the father appealed. *Id.* at ___, 781 S.E.2d at 682. The Court of Appeals majority affirmed the trial court's decision, but the dissent contended that the prior adjudication order could not be used as evidence of past neglect as to the father because the sole party responsible for the neglect was the mother. *Id.* at ___, 781 S.E.2d at 683-84 (Tyson, J., dissenting). Notwithstanding the father's incarceration and lack of established paternity at the time of the neglect adjudication, this Court affirmed the Court of Appeals' decision affirming the trial court's order terminating the father's parental rights. *In re C.L.S.*, 369 N.C. 58, 791 S.E.2d 457 (2016).

Similarly, the neglect allegations in the instant case were based on the mother's actions, and the prior adjudication of neglect occurred while respondent was incarcerated. Our precedents are quite clear—and remain in full force—that "[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005) (quoting *In re Yocum*, 158 N.C. App. 198, 207-08, 580 S.E.2d 399, 405 (Tyson, J., dissenting), *aff'd per curiam*, 357 N.C. 568, 597 S.E.2d 674 (2003)), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006). "[A] prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect." *In re Ballard*, 311 N.C. at 713-14, 319 S.E.2d at 231. During a proceeding to terminate parental rights, "the trial court must admit and consider all evidence of relevant circumstances or events which existed or occurred *either before or after* the prior adjudication of neglect." *Id.* at 716, 319 S.E.2d at 232-33. As the trial court did in *In re C.L.S.*, the trial court here also appropriately considered the prior adjudication of neglect as relevant evidence during the termination hearing. Furthermore, in the present case the trial court made an independent determination that neglect

sufficient to justify termination of respondent's parental rights existed at the time of the termination hearing and that a likelihood of repetition of neglect also existed. *Cf. id.* at 716, 319 S.E.2d at 233 (reversing a trial court's order terminating the respondent's parental rights when the trial court failed to make an independent determination of whether neglect authorizing termination of the respondent's parental rights still existed at the time of the termination hearing).

"[A] prior adjudication of neglect standing alone" likely will be insufficient "to support a termination of parental rights" in cases in which "the parents have been deprived of custody for any significant period before the termination proceeding." *In re Ballard*, 311 N.C. at 714, 319 S.E.2d at 231 (citing *In re Barron*, 268 Minn. 48, 53, 127 N.W.2d 702, 706 (1964)). We also are mindful that "[i]n determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent." *In re Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252.

Here, however, the evidence of prior neglect does not stand alone. In addition to the prior adjudication of neglect, the trial court found that respondent had a long history of criminal activity and substance abuse. Moreover, respondent stipulated to the allegations of neglect that led to M.A.W.'s adjudication as a neglected juvenile and also testified during the hearing on the petition to terminate parental rights that he was aware of the substance abuse issues of M.A.W.'s mother, stating that he "knew it wouldn't be too long that [DSS] would try to take [M.A.W.] too."

The other striking similarity to the facts present in *In re C.L.S.* is that respondent initially indicated his desire to be involved in M.A.W.'s life but after his release, failed to follow through consistently with the court's directives and recommendations. The trial court considered these actions of respondent in evaluating whether there was a likelihood of repetition of neglect. Although respondent completed a parenting course, attended Alcoholics Anonymous meetings, and completed his General Educational Development (GED) program while incarcerated, the trial court made numerous relevant findings of fact supporting termination that illuminated respondent's behavior following his release and which established a likelihood of repetition of neglect.

The trial court previously emphasized the importance of respondent's sobriety based on his history of alcohol abuse, and noted in its order that as of the 29 June 2015 hearing, respondent had "not begun to participate in any aspect of the recommendations from [his] Drug & Alcohol Assessment." In addition, the trial court "stressed the

importance of regular visitation" so that respondent could "establish a father/daughter bond" with M.A.W. Upon his release, respondent was afforded, and initially took advantage of, weekly visitation with the child; however, the trial court found that the regularity of his visits diminished over time. The trial court made several other relevant findings of fact supporting termination:

> 7. . . . The Department has not seen a certificate of completion of parenting, nor is the Department specifically aware of the dynamics of said parenting course.
>
> . . . .
>
> 10. . . . [Respondent] was neither forthcoming with the Department nor compliant with the directives of this Court. The Department attempted to confirm [respondent's] permanent address as given to the Social Worker; however, [she] was denied access to his mother's home . . . .
>
> 11. . . . At a hearing held on 08 January 2015, [respondent] indicated employment with [a cleaning and painting service] averaging $500.00 per week. At this time, [respondent] maintains that he is self-employed . . . . [The trial court] finds his testimony be [sic] lacking in credibility.
>
> 12. . . . [Respondent] was ordered to undergo a Comprehensive Clinical Assessment. Two appointments were scheduled; he did not appear for the first appointment and left thirty (30) minutes into the session on the re-scheduled appointment. [Respondent] presents as angry and defensive. . . .
>
> . . . .
>
> 16. . . . [Respondent] has not provided any care, discipline or supervision of [M.A.W.] since his release from incarceration in August of 2014 . . . .

Based upon these and other findings from the termination hearing, DSS met its burden of proving sufficient facts to enable the trial court to establish by clear, cogent, and convincing evidence that grounds existed to justify termination. *See, e.g.*, *In re Ballard*, 311 N.C. at 716, 319 S.E.2d at 232 (citing former N.C.G.S. § 7A-289.30(e) (relating to termination of parental rights), repealed by Act of Oct. 22, 1998, ch. 202, sec. 5, 1997

N.C. Sess. Laws (Reg. Sess. 1998) 695, 742 (recodifying the Juvenile Code)); *see* N.C.G.S. § 7B-1111(b) (2015).

After review of the testimony during the hearing and the record on appeal, we cannot agree with the conclusion of the Court of Appeals that "there was no evidence before the trial court, and no findings of fact, that father had previously neglected [M.A.W.]" *In re M.A.W.*, ___ N.C. App. at ___, 787 S.E.2d at 463. The trial court properly found that past neglect was established by DSS and that there was a likelihood of repetition of neglect. We therefore hold that the trial court did not err in concluding that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(1) to terminate father's parental rights. Accordingly, we reverse the decision of the Court of Appeals reversing the trial court's order terminating the parental rights of respondent and instruct that court to reinstate the trial court's order.

REVERSED.

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STATE OF NORTH CAROLINA
v.
WILLIAM CLIFTON CRABTREE, SR.

No. 372A16

Filed 29 September 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 790 S.E.2d 709 (2016), finding no error in part and no prejudicial error in part in judgments entered on 19 March 2015 by Judge Beecher R. Gray in Superior Court, Person County. Heard in the Supreme Court on 30 August 2017.

*Joshua H. Stein, Attorney General, by Natalie Whiteman Bacon and Tracy Nayer, Assistant Attorneys General, for the State.*

*Mark Montgomery for defendant-appellant.*

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
JAMISON CHRISTOPHER GOINS

No. 273A16

Filed 29 September 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 789 S.E.2d 466 (2016), reversing an order denying defendant's motion to suppress entered on 15 April 2015 by Judge Stuart Albright, and vacating defendant's guilty plea and judgments entered on 11 May 2015 by Judge Richard S. Gottlieb, all in Superior Court, Guilford County, and remanding the case for further proceedings. Heard in the Supreme Court on 13 June 2017.

*Joshua H. Stein*, *Attorney General*, *by Shawn R. Evans and Kristin J. Uicker*, *Assistant Attorneys General*, *for the State-appellant.*

*Drew Nelson for defendant-appellee.*

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed.

REVERSED.

STATE OF NORTH CAROLINA
v.
TAE KWON HAMMONDS

No. 389A15-2

Filed 29 September 2017

**Confessions and Incriminating Statements—custodial interrogation—civil commitment order**

A trial court's conclusion that defendant was not in custody for purposes of *Miranda* reflected an incorrect application of legal principles to the facts found by the trial court, considering all of the circumstances. Defendant was confined under a civil commitment order and was questioned without his *Miranda* warnings.

Justice ERVIN dissenting.

Chief Justice MARTIN and Justice NEWBY join in this dissenting opinion.

On review pursuant to order of this Court entered on 10 June 2016 following oral argument on 18 May 2016 in session in the Old Burke County Courthouse in the City of Morganton pursuant to N.C.G.S. § 7A-10(a), in which the Court vacated the opinion of the Court of Appeals in *State v. Hammonds*, ___ N.C. App. ___, 777 S.E.2d 359 (2015), vacated an order denying defendant's motion to suppress entered on 24 July 2014 by Judge Tanya T. Wallace in Superior Court, Union County, and certified the case to the trial court for a new hearing and entry of a new order on defendant's motion to suppress. *State v. Hammonds*, 368 N.C. 906, 789 S.E.2d 1 (2016). The Court ordered the parties to submit supplemental briefs after certification of the new order to this Court. Issues raised in the supplemental briefs heard on 13 June 2017.

*Joshua H. Stein, Attorney General, by Joseph E. Elder, Assistant Attorney General, for the State.*

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

HUDSON, Justice.

Here we are asked to decide whether the trial court properly concluded that defendant was not subjected to a custodial interrogation as defined in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), when police questioned him while he was confined under a civil commitment order. After considering the totality of the circumstances, we conclude that defendant was in custody for *Miranda* purposes. Therefore, the failure of police to advise him of his rights under *Miranda* rendered inadmissible the incriminating statements he made during the interrogation. Accordingly, we reverse the trial court's order denying his motion to suppress those statements. Because this error was prejudicial, we vacate defendant's conviction.

## I. FACTUAL AND PROCEDURAL BACKGROUND

On the evening of 10 December 2012 in Monroe, North Carolina, a man stole Stephanie Gaddy's purse in a parking lot while threatening her with a handgun. Shortly after 1:00 p.m. on 11 December 2012, Defendant Tae Kwon Hammonds was taken to the emergency room at a local hospital following an intentional overdose. An involuntary commitment order was issued at 3:50 p.m. upon a finding by a Union County magistrate that defendant was "mentally ill and dangerous to self or others." As directed in the order, the Union County Sheriff's Office took defendant into custody at 4:32 p.m. that same day.

After using surveillance footage to identify defendant as a suspect in the robbery, investigators learned that he was confined at the hospital under the involuntary commitment order. In the early evening of 12 December, while defendant was hospitalized under that order, he was questioned by Detective Jonathan Williams and his supervisor, Lieutenant T.J. Goforth, both of the Monroe Police Department, for about an hour and a half. Without informing him of his *Miranda* rights, the officers elicited self-incriminating statements from defendant during the interview. Defendant was discharged from the hospital later that evening and transported to a treatment facility.

On 4 February 2013, the Union County Grand Jury indicted defendant for robbery with a dangerous weapon. On 30 June 2014, defendant moved to suppress all statements he made to police during the 12 December 2012 interview. In support of his motion, defendant asserted that (1) he was in custody when the statements were taken and was not informed of his *Miranda* rights at that time, and (2) even if he was not in custody, his statements were not made voluntarily.

Defendant was tried during the criminal session of Superior Court, Union County, that began on 30 June 2014 before Judge Tanya T. Wallace. After hearing defendant's motion to suppress, the trial court denied the motion on 1 July 2014. The court also denied defendant's motion to dismiss at the close of the State's evidence. A jury convicted defendant as charged, and the court sentenced him to sixty to eighty-four months of imprisonment. The court also ordered defendant to pay, *inter alia*, fifty dollars in restitution to the victim. On 24 July 2014, the court entered a written order on the motion to suppress in which it made findings of fact and conclusions of law.

Defendant appealed to the Court of Appeals, which on 20 October 2015 issued a divided opinion that found no error in the guilt-innocence portion of defendant's trial but vacated the portion of the trial court's judgment ordering defendant to pay restitution to the victim and remanded the case for a new hearing on that issue. *State v. Hammonds*, ___ N.C. App. ___, ___, 777 S.E.2d 359, 371-72 (2015). Regarding defendant's challenge to the trial court's denial of his suppression motion, the majority (1) concluded that "the trial court properly considered all of the factors to determine if defendant was in custody and did not err in its conclusion of law that based on the totality of the circumstances, defendant was not in custody at the time he was interviewed," and (2) held that "the trial court's findings of fact support its conclusion of law that defendant's confession was voluntary." *Id.* at ___, ___, 777 S.E.2d at 368, 371.

The dissenting judge, however, concluded that the trial court's findings of fact did not reflect consideration of whether defendant "was physically restrained from leaving the place of interrogation" or whether he "was free to refuse to answer questions." *Id.* at ___, 777 S.E.2d at 374 (Inman, J., dissenting) (quoting *State v. Fisher*, 158 N.C. App. 133, 145, 580 S.E.2d 405, 415 (2003), *aff'd per curiam*, 358 N.C. 215, 593 S.E.2d 583 (2004)). The dissenting judge stated that she would reverse the trial court's denial of defendant's motion to suppress and remand "for reconsideration of the motion and the entry of findings and conclusions based upon all pertinent factors." *Id.* at ___, 777 S.E.2d at 375. Defendant filed his appeal of right, and on 28 January 2016 this Court allowed defendant's petition for discretionary review to consider additional issues.

On 9 June 2016, this Court vacated the opinion of the Court of Appeals and the trial court's orders denying defendant's motion to suppress, and we instructed the trial court to hold a new hearing on the motion to suppress. *State v. Hammonds*, 368 N.C. 906, 789 S.E.2d

1 (2016). We directed the trial court to "apply a totality of the circumstances test" when rehearing the motion and to consider all factors, including "whether the involuntarily committed defendant 'was told that he was free to end the questioning.' " *Id.* at 907-08, 789 S.E.2d at 2 (quoting *Howes v. Fields*, 565 U.S. 499, 517, 132 S. Ct. 1181, 1194, 182 L. Ed. 2d 17, 32 (2012)).

After taking additional evidence at a new suppression hearing, the trial court entered an order on 27 September 2016 that again denied defendant's motion to suppress. As directed by this Court, the trial court made new findings of fact and conclusions of law in its order. The matter is now back before this Court for review.

## II. ANALYSIS

On appeal, in addition to challenging several of the trial court's findings of fact, defendant argues that the court's undisputed findings do not support its conclusions of law that (1) he was not in custody for purposes of *Miranda* during his 12 December 2012 interrogation, and (2) his statements to police during that interrogation were voluntary.

The standard of review in evaluating a trial court's "denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015) (quoting *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012)). "[T]he trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (quoting *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000), *cert. denied*, 531 U.S. 1165, 121 S. Ct. 1126, 148 L. Ed. 2d 992 (2001)).

Conclusions of law are fully reviewable on appeal. *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992). "[T]he trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826 (alteration in original) (quoting *State v. Golphin*, 352 N.C. 364, 409, 533 S.E.2d 168, 201 (2000), *cert. denied*, 532 U.S. 931, 121 S. Ct. 1379, 149 L. Ed. 2d 305 (2001)). A trial court's determination of whether an interrogation is conducted while a person is "in custody" for purposes of *Miranda* is a conclusion of law and thus fully reviewable by this Court. *Id.* at 336, 543 S.E.2d at 826.

For the reasons set forth below, we hold that the trial court's conclusion that defendant was not in custody for purposes of *Miranda* reflected an incorrect application of legal principles to the facts found by the trial court.[1]

In *Miranda* the United States Supreme Court recognized the "inherently compelling pressures" exerted upon an individual during an in-custody interrogation by law enforcement officers. 384 U.S. at 467, 86 S. Ct. at 1624, 16 L. Ed. 2d at 719. As a result, the Court prescribed procedural safeguards designed "to combat these pressures and to permit a full opportunity to exercise the [Fifth Amendment] privilege against self-incrimination." *Id.* at 467, 86 S. Ct. at 1624, 16 L. Ed. 2d at 719. These safeguards require that a defendant "be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* at 479, 86 S. Ct. at 1630, 16 L. Ed. 2d at 726.

A *Miranda* warning is only required, however, when an individual is subjected to a "custodial interrogation." *Barden*, 356 N.C. at 337, 572 S.E.2d at 123 (citing, *inter alia*, *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612, 16 L. Ed. 2d at 706). A "custodial interrogation" occurs when "questioning [is] initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612, 16 L. Ed. 2d at 706. In determining whether an individual was subjected to a custodial interrogation, courts consider whether, "based on the totality of the circumstances, . . . there was a 'formal arrest or [a] restraint on freedom of movement of the degree associated with a formal arrest.' " *Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828 (quoting *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405, *cert. denied*, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997)).

> Two discrete inquiries are essential to [this] determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was [not] at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are

1. Defendant's challenges to the trial court's findings of fact are rendered moot by our holding that the court's denial of his motion to suppress must be reversed.

> reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.

*J.D.B. v. North Carolina*, 564 U.S. 261, 270, 131 S. Ct. 2394, 2402, 180 L. Ed. 2d 310, 322 (2011) (quoting *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S. Ct. 457, 465, 133 L. Ed. 2d 383, 394 (1995) (brackets, internal quotation marks, and citations omitted)). Custody for *Miranda* purposes "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*, 511 U.S. 318, 323, 114 S. Ct. 1526, 1529, 128 L. Ed. 2d 293, 298 (1994) (per curiam). That is, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Id.* at 324, 114 S. Ct. at 1529, 128 L. Ed. 2d at 299 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S. Ct. 3138, 3151, 82 L. Ed. 2d 317, 336 (1984)).

As the United States Supreme Court has recently clarified, however, "[n]ot all restraints on freedom of movement amount to custody for purposes of *Miranda*." *Fields*, 565 U.S. at 509, 132 S. Ct. at 1189, 182 L. Ed. 2d at 28. Rather, "the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody." *Id.* at 509, 132 S. Ct. at 1190, 182 L. Ed. 2d at 28 (quoting *Maryland v. Shatzer*, 559 U.S. 98, 112, 130 S. Ct. 1213, 1224, 175 L. Ed. 2d 1045, 1058 (2010)).[2] Therefore, when a suspect's freedom of movement is already restricted because of conditions unrelated to the interrogation—such as civil commitment, criminal confinement, or hospitalization—reviewing courts must consider "all of the features of the interrogation" to determine "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Id.* at 509, 514, 132 S. Ct. at 1190, 1192, 182 L. Ed. 2d at 28, 31.

Here, in its order issued upon rehearing defendant's motion to suppress, the trial court made the following finding of fact in which it recited circumstances it found to support its determination that defendant was not subjected to a custodial interrogation:

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2. For example, "imprisonment alone is not enough to create a custodial situation within the meaning of *Miranda*," *Fields*, 565 U.S. at 511, 132 S. Ct. at 1190, 182 L. Ed. 2d at 28-29, and "the temporary and relatively nonthreatening detention involved in a traffic stop or *Terry* stop does not constitute *Miranda* custody," *Shatzer*, 559 U.S. at 113, 130 S. Ct. at 1224, 175 L. Ed. 2d at 1058 (citation omitted).

> Defendant was interviewed by two (2) detectives from the Monroe Police Department, they were in street clothes, asked permission to sit down (which was given by defendant), did not block the door; were in a room within the emergency department with a blaring loudspeaker and where conversations outside the room could be heard; that defendant was not handcuffed and was not restrained by law enforcement or the hospital, that the door to the room was glass and a sitter was assigned to observe the defendant, that the room had no bathroom, but the patient could walk to the door, open it and request personnel to accompany the patient to the bathroom (or make other requests of staff); that the interview was approximately 1 ½ (one and one half) hours in length (relatively short); that defendant was repeatedly told he was not under arrest and no warrants had been issued; that the conversation was calm and cordial in tone, that the detectives offered food or drink after the interview . . . .

The court also found, notably, the following facts:

> The officers . . . . never informed the defendant he could tell them to leave [and] never informed the defendant he could ask them to stop talking or he could stop talking to them and end the questioning.
>
> The officers did inform him that a*s soon as he talked, they could leave*.

(Emphasis added.)

Based upon its factual findings, the court explained that "after carefully weighing the totality of the circumstances, even the facts of defendant's involuntary commitment and the (very important) factor that defendant was never told he could end the questioning, this Court determines . . . that defendant was not in custody requiring Miranda Rights to be given." The court further concluded that "[a] reasonable person in defendant's position at the time of the interview would not have believed that he was in the custody of law enforcement." Accordingly, the court concluded, "The statements made by defendant were made when defendant was not in custody for purposes of the Miranda [rule]" and "[n]o Constitutional rights of defendant were violated."

In considering whether these conclusions resulted from a correct application of the law to the findings in this case, we focus on whether

"a reasonable person" in defendant's situation would "have felt he . . . was [not] at liberty to terminate the interrogation," *J.D.B.*, 564 U.S. at 270, 131 S. Ct. at 2402, 180 L. Ed. 2d at 322 (quoting *Thompson*, 516 U.S. at 112, 116 S. Ct. at 465, 133 L. Ed. 2d at 394), and "whether the relevant environment present[ed] the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Fields*, 565 U.S. at 509, 132 S. Ct. at 1190, 182 L. Ed. 2d at 28.

The United States Supreme Court in *Howes v. Fields* also addressed a situation in which a defendant's freedom of movement was limited by circumstances not connected to the interrogation. There a prisoner was escorted by corrections officers from his cell to a conference room where two sheriff's deputies questioned him for between five and seven hours without reading him his *Miranda* rights. *Id.* at 502-04, 132 S. Ct. at 1185-86, 182 L. Ed. 2d at 23. The deputies' questions, which elicited incriminating statements, concerned criminal activity unrelated to the offense that had resulted in the suspect's incarceration.

In *Fields* the Court confronted the question of whether, for purposes of *Miranda*, the suspect was "in custody" when he was incarcerated and, consequently, was "not free to leave the conference room by himself." *Id.* at 515, 132 S. Ct. at 1193, 182 L. Ed. 2d at 31. The Court first made clear that "imprisonment *alone* is not enough to create a custodial situation within the meaning of *Miranda*[,]" *id.* at 511, 132 S. Ct. at 1190, 182 L. Ed. 2d at 28-29 (emphasis added), given that the "standard conditions of confinement and associated restrictions on freedom will not necessarily implicate the same interests that the Court sought to protect when it afforded special safeguards to persons subjected to custodial interrogation," *id.* at 512, 132 S. Ct. at 1191, 182 L. Ed. 2d at 29. The Court held that rather than applying a *per se* rule in instances "[w]hen a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation. These include the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted." *Id.* at 514, 132 S. Ct. at 1192, 182 L. Ed. 2d at 30-31 (citation omitted).

In conducting its totality-of-the-circumstances analysis, the Court determined that the following circumstances weighed in favor of concluding that the suspect was in custody under *Miranda*: (1) he neither invited the interview nor consented to it in advance; (2) he was not advised that he was free to decline the interview; (3) "[t]he interview lasted for between five and seven hours in the evening and continued well past" his typical bedtime; (4) the deputies who interviewed him were armed; and (5) "one of the deputies, according to [the suspect],

'[u]sed a very sharp tone,' " and "on one occasion, profanity." *Id.* at 515, 132 S. Ct. at 1192-93, 182 L. Ed. 2d at 31.

The Court determined, on the other hand, that several circumstances weighed against a conclusion that the suspect had been subjected to a custodial interrogation: (1) he "was told at the outset of the interrogation, and was reminded again thereafter, that he could leave and go back to his cell whenever he wanted"; (2) he "was not physically restrained or threatened"; (3) he "was interviewed in a well-lit, average-sized conference room, where he was 'not uncomfortable' "; (4) he "was offered food and water"; and (5) "the door to the conference room was sometimes left open." *Id.* at 515, 132 S. Ct. at 1193, 182 L. Ed. 2d at 31.

The Court ultimately concluded that, "[t]aking into account all of the circumstances of the questioning—*including especially the undisputed fact that [the suspect] was told that he was free to end the questioning and to return to his cell*—we hold that [the suspect] was not in custody within the meaning of *Miranda*." *Id.* at 517, 132 S. Ct. at 1194, 182 L. Ed. 2d at 32 (emphasis added).

Here defendant's freedom of movement was already severely restricted by the civil commitment order. Unlike in *Fields*, however, these officers failed to inform defendant that he was free to terminate the questioning and, more importantly, communicated to him that they would leave only after he spoke to them about the robbery. As noted above, the trial court made an undisputed finding that the officers told defendant that "as soon as he talked, they could leave." Specifically, the transcript of the interrogation reveals that before defendant's incriminating statements, Lieutenant Goforth told him:

> So let's think about Monday night again and what took place Monday evening, okay. All right. And then after we talk about this, we're going to get up and walk out and you can have your supper and you can watch some Christmas shows on TV and rest, okay. And we're going to go back to work and we're going to leave you alone.

We conclude that these statements, made to a suspect whose freedom is already severely restricted because of an involuntary commitment, would lead a reasonable person in this position to believe he was not "at liberty to terminate the interrogation" without first answering his interrogators' questions about his suspected criminal activity. *J.D.B.*, 564 U.S. at 270, 131 S. Ct. at 2402, 180 L. Ed. 2d at 322 (quoting *Thompson*, 516 U.S. at 112, 116 S. Ct. at 465, 133 L. Ed. 2d at 394).

We are mindful that "no single factor is necessarily controlling when we consider the totality of the circumstances." *Barden*, 356 N.C. at 338, 572 S.E.2d at 124 (citation omitted). After considering all of the relevant facts, we conclude that defendant was subjected to a custodial interrogation and thus was entitled to a *Miranda* warning. Accordingly, the trial court's order denying defendant's motion to suppress must be reversed because the trial court's conclusion to the contrary was an erroneous application of the law.

We also conclude that this error was prejudicial and therefore requires us to vacate defendant's conviction. "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C.G.S. § 15A-1443 (2015); *see also State v. Robinson*, 330 N.C. 1, 31, 409 S.E.2d 288, 305 (1991) ("Because the error is of constitutional dimension, the State bears the burden of demonstrating that it was harmless beyond a reasonable doubt." (citing *State v. McKoy*, 327 N.C. 31, 44, 394 S.E.2d 426, 433 (1990))). The State has not attempted to show that the constitutional error alleged by defendant—and found by this Court—was harmless beyond a reasonable doubt. Accordingly, the error is deemed prejudicial.[3]

## III. CONCLUSION

For the reasons stated above, we reverse the trial court's 27 September 2016 order denying defendant's motion to suppress the incriminating statements he made during his 12 December 2012 interrogation. Because this error was prejudicial, we vacate defendant's conviction and remand this case to the superior court for further proceedings not inconsistent with this opinion.

JUDGMENT VACATED; REVERSED AND REMANDED.

Justice ERVIN dissenting.

Although the determination of whether defendant was "in custody" for *Miranda* purposes strikes me as an exceedingly close call in this case, I am forced to conclude, given that we are required to employ

3. Because we hold that the trial court's erroneous conclusion that defendant was not entitled to a *Miranda* warning requires reversal of its suppression order, we need not consider whether his statements should have been suppressed on the alternative ground that they were involuntary.

a "totality of the circumstances" analysis and are bound by the trial court's findings of fact, that defendant was not subjected to "custodial interrogation" when he made the unwarned inculpatory statements which he seeks to suppress. As a result, I respectfully dissent from the Court's decision.

At approximately 8:46 p.m. on 10 December 2012, a group of men robbed Stephanie Gaddy of her purse while threatening her with a handgun. On 11 December 2012, between the hours of 12:45 p.m. and 1:05 p.m., defendant was transported by ambulance and hospitalized as the result of an intentional drug overdose. At about 3:50 p.m. on the same date, a magistrate entered an order involuntarily committing defendant based upon a finding that he was "mentally ill and dangerous to self or others." At 4:32 p.m., the Union County Sheriff's Office took defendant into custody pursuant to the magistrate's order. At about 5:11 p.m. on the following day, while still hospitalized pursuant to the involuntary commitment order, defendant was interrogated by officers of the Monroe Police Department for approximately one hour and twenty-eight minutes, during which time he made a number of inculpatory statements without ever having been advised of his *Miranda* rights.

In denying defendant's suppression motion, the trial court found, in pertinent part, that:

> 7) Jan Kinsella, nurse overseeing defendant at the time, gave permission for Detectives to speak with defendant. She informed them he was awake, conscious and alert and any medications given to defendant "should be out of his system by this time".
>
> 8) That defendant's room was located in the Emergency Department. The room had a solid door, with a full glass panel to the outside. This door was not locked during the interview.
>
> 9) When the officers entered the room, defendant was in a hospital gown in his bed, and Detective Williams sat against the back wall. [Officer] T.J. Goforth sat at the foot of defendant's bed.
>
> 10) There was no bathroom inside defendant's room. To leave the room, a patient must go to the door, open it and summon hospital personnel to accompany him or her. According to hospital records, defendant was ambulatory.

11) The officers were dressed in street clothes, but with visible badges and carrying weapons. They did not identify themselves as members of the Monroe Police Department, but did give first names at some point.

12) Before questioning, the officers asked permission to sit down, which was granted by defendant. Neither officer blocked the door.

13) No law enforcement officer sat outside defendant's room.

14) Outside the room was assigned a "sitter", a person charged to keep eyes on the defendant at all times, pursuant to his status as an involuntary commitment, although neither Defendant nor Officer Williams recalled seeing such at the time of the interview.

15) The officers announced immediately that they were not there to arrest the defendant and they did not have warrants for his arrest. This statement was repeated in various ways throughout the interview. . . .

16) The officers a) never informed the defendant he could leave. In fact, his involuntary commitment status, although civil in nature, effectively confined him to the hospital; b) never informed the defendant he could tell them to leave; and c) never informed the defendant he could ask them to stop talking or he could stop talking to them and end the questioning.

17) The officers did inform him that as soon as he talked, they could leave. The defendant was not in restraints or handcuffs; and was not arrested or served with warrants while at CMC-Union.

18) The defendant was never threatened. . . . The defendant was never isolated without the ability to contact others.

19) The interview with defendant was tape recorded, without the knowledge of the defendant. The tape is approximately one and one-half (1 ½) hours in length; about half of which concerned a theft at the defendant's workplace. The defendant is questioned last about the armed robbery.

20) In the background on the tape, an intercom blares loudly on several occasions. At other times, conversations are heard other than the one between the officers and the defendant. When questioned, Officer Williams describes the Emergency Room as "a very busy place". The defendant never asked to stop the interview, never complained of pain or discomfort, never asked for a break, or for food, beverage, etc.

21) The words spoken by both officers and defendant are conversational and cordial in tone. No voices were raised. The two officers' interrogation does not reveal a "good cop/bad cop" technique; more "very nice cop/nice cop" or at worse, "nice cop/(merely) pleasant cop".

22) The officers do continue the interview until an admission is made; and confront the defendant when they seem to believe he was being less than truthful. The interview is monotonic in tone. . . .

. . . .

58) Defendant had been involuntarily committed as a result of an intentional overdose; he was not free to leave the hospital by virtue of this status; no Miranda rights were given to defendant by law enforcement who were carrying badges and firearms. Defendant was never told he could ask law enforcement to stop questioning or to leave. Defendant had been administered medications in the late evening/early morning hours by physicians and had taken some amount of white pills late December 10, 2012 and early December 11, 2012; some of which may have remained in his system at the time of the interview.

59) Defendant was interviewed by two (2) detectives from the Monroe Police Department, they were in street clothes, asked permission to sit down (which was given by defendant), did not block the door; were in a room within the emergency department with a blaring loudspeaker and where conversations outside the room could be heard; that defendant was not handcuffed and was not restrained by law enforcement or the hospital, that the door to the room was glass and a sitter was assigned to observe the defendant, that the room had no bathroom, but the patient could walk to the door, open it and request personnel to

> accompany the patient to the bathroom (or make other requests of staff); that the interview was approximately 1 ½ (one and one half) hours in length (relatively short); that defendant was repeatedly told he was not under arrest and no warrants had been issued; that the conversation was calm and cordial in tone, that the detectives offered food or drink after the interview and promised nothing except to relay to the District Attorney the defendant's cooperation; that any residual drugs in his system were anti-anxiety or sleep-inducing; as described by the testifying experts; and seemingly lessening, in defendant's mind, the potential of coercion by officers; after carefully weighing the totality of the circumstances, even the facts of defendant's involuntary commitment and the (very important) factor that defendant was never told he could end the questioning, this Court determines by the preponderance of the evidence that the defendant was not coerced to give his statement on December 12, 2012; and the circumstances surrounding the defendant at the time and date in question show, considering the totality of the circumstances, that defendant was not in custody requiring Miranda Rights to be given.

In light of these findings of fact, the trial court concluded as a matter of law that "[a] reasonable person in defendant's position at the time of the interview would not have believed that he was in the custody of law enforcement" and that "[t]he statements made by defendant were made when defendant was not in custody for purposes of . . . Miranda." As a result, the trial court denied defendant's suppression motion.

According to well-established North Carolina law, the standard utilized in reviewing the "denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015) (quoting *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012)). "[T]he trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (quoting *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000), *cert. denied*, 531 U.S. 1165, 121 S. Ct. 1126, 148 L. Ed. 2d 992 (2001)). "[T]he trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *Id.* at 336, 543 S.E.2d at 826 (alteration

in original) (quoting *State v. Golphin*, 352 N.C. 364, 409, 533 S.E.2d 168, 201 (2000), *cert. denied*, 532 U.S. 931, 121 S. Ct. 1379, 149 L. Ed. 2d 305 (2001)).

"[T]he initial inquiry in determining whether *Miranda* warnings were required is whether an individual was 'in custody.' " *Id.* at 337, 543 S.E.2d at 826. In *Miranda*, the United States Supreme Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706 (1966). The extent to which a person is "in custody" for *Miranda*-related purposes depends upon "whether a reasonable person in defendant's position, under the totality of the circumstances, would have believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest." *Buchanan*, 353 N.C. at 339-40, 543 S.E.2d at 828.

As the United States Supreme Court has recently stated, "[n]ot all restraints on freedom of movement amount to custody for purposes of *Miranda*," with the relevant test requiring the reviewing court to focus upon "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Howes v. Fields*, 565 U.S. 499, 509, 132 S. Ct. 1181, 1189-90, 182 L. Ed. 2d. 17, 27 (2012).

> In the paradigmatic *Miranda* situation—a person is arrested in his home or on the street and whisked to a police station for questioning—detention represents a sharp and ominous change, and the shock may give rise to coercive pressures. A person who is "cut off from his normal life and companions" and abruptly transported from the street into a "police-dominated atmosphere" may feel coerced into answering questions.
>
> By contrast, when a person who is already serving a term of imprisonment is questioned, there is usually no such change. . . . For a person serving a term of incarceration, . . . the ordinary restrictions of prison life, while no doubt unpleasant, are expected and familiar and thus do not involve the same "inherently compelling pressures" that are often present when a suspect is yanked from familiar surroundings in the outside world and subjected to interrogation in a police station.

*Id.* at 511, 132 S. Ct. at 1190-91, 182 L. Ed. 2d at 29 (quoting *Maryland v. Shatzer*, 559 U.S. 98, 104-106, 113, 130 S. Ct. 1213, 1219-20, 1224, 175 L. Ed. 2d 1045, 1054 and *Miranda*, 384 U.S. at 456, 86 S. Ct. at 1618, 16 L. Ed. 2d at 713). As a result, a person who is already subject to restraint for some reason, such as imprisonment or service of an involuntary commitment order, is not automatically deemed to be "in custody" for *Miranda*-related purposes. Instead, the necessary restraint equivalent to that associated with a formal arrest must stem from factors that are extraneous to the existing restraint.

After carefully reviewing the trial court's findings of fact, I am satisfied that they support a conclusion that a "reasonable person in defendant's position" would not "have believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest." *Buchanan*, 353 N.C. at 339-40, 543 S.E.2d at 828. As the trial court found, (1) the officers spoke with defendant for approximately ninety minutes in a hospital; (2) on several occasions during the interrogation, the officers clearly informed defendant that he was not under arrest, stating, among other things, that they did not possess warrants for defendant's arrest and "that they were not here to 'lock you up' "; (3) defendant was not handcuffed or formally placed under arrest prior to or during the interrogation; (4) nurses entered and left defendant's room during the interrogation; (5) defendant never lacked the ability to contact others during the interrogation; and (6), while the officers did press defendant on occasion, the interrogation was conducted in a conversational and even "monotonic" manner rather than in a confrontational tone.

As the Court notes, defendant was never asked if he wished to speak to the officers; the officers never told defendant that he could end the interrogation or ask the officers to leave; and the officers did tell defendant that, "after we talk about this, we're going to get up and walk out and you can have your supper and you can watch some Christmas shows on TV and rest, okay." Although these facts admittedly do, as my colleagues suggest, tend to cut in favor of a finding that defendant was "in custody" for *Miranda*-related purposes, I am not persuaded, in light of the totality of the circumstances, that they necessitate a finding to that effect, particularly given the fact that defendant was not isolated from civilian influences and the officers' repeated assurances that defendant was not under arrest and would not be placed under arrest during the time that he was being questioned. In fact, the officers' repeated assurance that defendant was not under arrest seems to me to be more directly relevant to the required "in custody" analysis than their failure to inform

defendant that he could end the interrogation whenever he chose to do so. Similarly, the officers' statement that they would leave once they finished "talk[ing] about this" with defendant does not, when taken in context, strike me as a threat that the conversation would continue until defendant confessed, given that such a "talk" could have concluded with a refusal on defendant's part to answer the officers' questions. When all the information reflected in the trial court's findings is considered as a unified whole and in light of the relevant legal standard, I am compelled to conclude that a reasonable person in the position in which defendant found himself would not believe that he was "under arrest or was restrained in his movement to the degree associated with a formal arrest." *Buchanan*, 353 N.C. at 339-40, 543 S.E.2d at 828. As a result, since the features of a "paradigmatic *Miranda* situation" are simply not present in this case, I respectfully dissent from my colleagues' determination that defendant's inculpatory statements were obtained in violation of *Miranda*.

CHIEF JUSTICE MARTIN and JUSTICE NEWBY join in this dissenting opinion.

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STATE OF NORTH CAROLINA
v.
DERRICK AUNDRA HUEY

No. 355PA15

Filed 29 September 2017

**1. Criminal Law—prosecutor's closing argument—personal opinion—defendant as liar—not prejudicial**

A prosecutor acted improperly but not prejudicially by injecting his own opinion that defendant was lying, stopping just short of directly calling defendant a liar, pursuing the theme that "innocent men don't lie," and insinuating that defendant must be guilty because he lied. The focus of the prosecutor's argument was not on presenting multiple conflicting accounts and allowing the jury to come to its own conclusion regarding defendant's credibility, but to overwhelmingly focus on attacking defendant's credibility through the prosecutor's personal opinion. The prosecutor's statements were not so grossly improper that they amounted to prejudice because the evidence supported a permissible inference that defendant's testimony lacked credibility.

**2. Criminal Law—prosecutor's closing argument—paid expert witness—excuse for defendant—improper**

A prosecutor's assertion that an expert defense witness was "just a $6,000 excuse man" was improper. The statement implied that the witness was not trustworthy because he was paid by defendant for his testimony and went beyond the fact of reimbursement to name-calling.

**3. Criminal Law—prosecutor's closing argument—defense counsel—not to be believed—improper**

A prosecutor improperly argued that defense counsel should not be believed because he was paid to defend the defendant, insinuating that defense counsel (and an expert witness) had conspired to assist defendant in committing perjury. A prosecutor is not permitted to make uncomplimentary statements about defense counsel when there is nothing in the record to justify it.

**4. Criminal Law—prosecutor's improper statements—not prejudicial—evidence against defendant not overcome**

A prosecutor's improper statements were not prejudicial where defendant did not overcome the evidence against him.

**5. Criminal Law—prosecutor's closing arguments—caution urged**

Jury arguments, no matter how effective, must avoid base tactics such as: comments dominated by counsel's personal opinion; insinuations of conspiracy to suborn perjury when there has been no evidence of such action; name-calling; and arguing that a witness is lying solely on the basis that he will be compensated. Holdings finding no prejudice in various closing arguments must not be taken as an invitation to try similar arguments again. Trial judges must be prepared to intervene *ex mero motu* when improper arguments are made.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 777 S.E.2d 303 (2015), finding prejudicial error after appeal from a judgment entered on 18 July 2014 by Judge Eric L. Levinson in Superior Court, Mecklenburg County, and ordering that defendant receive a new trial. Heard in the Supreme Court on 29 August 2017.

*Joshua H. Stein, Attorney General, by Alvin W. Keller, Jr., Assistant Attorney General, and Derrick C. Mertz, Special Deputy Attorney General, for the State-appellant.*

*Sarah Holladay for defendant-appellee.*

BEASLEY, Justice.

In this appeal we consider whether statements made by the prosecutor in his closing argument were improper and prejudicial, such that the trial court should have intervened *ex mero motu*. The Court of Appeals concluded that the prosecutor's insinuations that defendant was a liar and lied on the stand in cahoots with defense counsel and his expert witness were improper, and had the cumulative effect of resulting in unfair prejudice to defendant. The unanimous panel of the Court of Appeals vacated the conviction and ordered a new trial. We hold that while the prosecutor's arguments were improper, the prosecutor's arguments did not amount to prejudicial error in light of the evidence against defendant. Accordingly, we reverse the decision of the Court of Appeals.

On 24 October 2011, defendant was indicted for first-degree murder. Defendant pleaded not guilty, and his trial commenced on 7 July 2014 before Judge Eric L. Levinson in Superior Court, Mecklenburg County. At trial the State's evidence tended to show that on 13 October 2011, at approximately 11:00 p.m., defendant Derrick Aundra Huey retrieved his gun from his truck, put the gun in his pocket, and told an unidentified person to ask James Love to come outside and talk about an earlier disagreement. Defendant then shot Love while they stood in the street. After the shooting defendant called 911 and, without identifying himself, stated, "I shot the motherfucker." A neighbor saw defendant's truck leave the scene after the shooting, but then returned shortly thereafter. Defendant initially denied shooting Love and told the police an unidentified man shot the victim. After listening to the 911 call, defendant admitted that he shot Love. Before trial defendant changed his account of the events in question numerous times. Then four months preceding trial, after communications with his attorney and expert witness, psychiatrist George Patrick Corvin, M.D., defendant changed his story once again and decided to admit to shooting Love, arguing that Love was shot in self-defense.

Defendant's evidence tended to show defendant and the victim had a history of prior altercations. Defendant testified that on the night in question, the victim threatened defendant. According to defendant, he was attempting to purchase drugs from an unidentified man when Love approached. Love hit defendant in the head and threatened him with what defendant believed to be a knife. While Love continued to threaten defendant, the unidentified man drew a handgun. Defendant grabbed the unidentified man's weapon and fired a warning shot. When Love did not

stop his aggressive actions towards defendant, defendant fired another shot, which killed Love. The unidentified man then took the gun and ran away. The defendant's evidence also showed the victim was known to carry a box cutter, and a box cutter was found near the victim's body. Further, the defense presented evidence that defendant has an intelligence quotient (I.Q.) of 61 and suffers from head trauma caused by an attempted suicide by automobile crash. Defendant's expert witness testified that his I.Q. and head trauma affected defendant's decision-making processes. Defendant also suffers from hallucinations, which have been treated with antipsychotic and antidepressant medications.

During closing arguments, the assistant district attorney opened by saying, "Innocent men don't lie." Over the course of his argument, the prosecutor used some variation of the verb "to lie" at least thirteen times. Referring to defendant, the prosecutor said:

> The defendant is not going to give you the truth. He's spent years planning to come in here to tell you he didn't do it, and then in the past four months he's come up with another story, and he's decided to go with that instead. But he's going to stick to that story, that story that he developed after he sat down with his attorney and his defense experts and decided on what he wanted to tell you. You're not going to find the truth there.

The prosecutor continued:

> [Dr. Corvin] sat down with Mr. Smith and the defendant and made sure the defendant understood the law, understood what he was charged with, what the elements were, and understood the defenses and what they meant and the law about the defenses. As he sits there on the stand, as he sits there right now, it has been explained to the defendant you're supposed to consider the fierceness of the assault that he was victim to. So isn't it interesting that four months ago it went from a grab to it went to a punch, a slash, a hack, not just at me but at everybody. All of a sudden a grab went to a wild-armed (phonetic) handle. Now that the law has been explained to him, now that he's been talked out of claiming I didn't do it.
>
> . . . But when the defendant was given a chance to just tell you the truth, he decided he's going to tell you whatever version he thought would get you to vote not guilty.

Referring to defense counsel, the prosecutor said:

> Mr. Smith tells you all we're trying to hide from this. All the evidence shows the box cutter was involved, the box cutter was involved, all the evidence. Do you know who's not a witness in this case? Mr. Smith. He wasn't there. He's paid to defend the defendant.

Referring to the defense's expert witness, Dr. Corvin, the prosecutor stated:

> Now, I want to talk a little bit about Dr. Corvin, some of his opinions. But before we do that, we've got to make something clear. Make no mistake. Dr. Corvin has a client here. He works for the defendant. He is not an impartial mental-health expert. . . . Dr. Corvin is a part of the defense team, he has a specific purpose, and he's paid for it. You heard Dr. Corvin makes over $300,000 a year just working for criminal defendants. He is not impartial. In fact, I'd suggest to you he's just a $6,000 excuse man. That's what he is. . . . Dr. Corvin came in here and did exactly what he was paid to do[.]

The prosecutor repeated the theme of "innocent men don't lie" once more in the opening of his rebuttal argument, stating: "I'm going to say this again, innocent men don't lie, they simply don't have to. The truth shall set you free unless, of course, you're on trial for a murder that you committed." Defense counsel did not object at any of these points during the prosecutor's closing arguments. The trial court did not intervene *ex meru moto* at any time during the prosecutor's closing arguments.

On 18 July 2014, the jury found defendant guilty of voluntary manslaughter. Defendant appealed the conviction to the Court of Appeals, arguing "the trial court erred by failing to intervene *ex mero motu* when the State made improper statements during closing arguments."[1] *State v. Huey*, ___ N.C. App. ___, ___, 777 S.E.2d 303, 305 (2015). The Court of Appeals agreed with defendant, relying heavily on *State v. Hembree*, in which this Court held the prosecutor's statements in closing argument were grossly improper and the trial court erred by failing to intervene

1. On appeal, defendant also argued the trial court erred in instructing the jury on flight. The Court of Appeals rejected this argument, concluding "[t]here is some evidence in the record supporting the theory that Defendant drove away briefly in order to dispose of the firearm he used to shoot Love." *Huey*, ___ N.C. App. ___, 777 S.E.2d at 308 (2015). That decision is not on appeal to this Court.

*ex mero motu*, but did not address whether this error, which was one of three identified by the defendant, was prejudicial in isolation. 368 N.C. 2, 20, 770 S.E.2d 77, 89 (2015). In this case the Court of Appeals summarily determined that defendant's entire defense was predicated on his credibility and the credibility of his expert witness; therefore, the panel concluded that the trial court's error in failing to intervene *ex mero motu* in the prosecutor's improper closing argument could not be deemed harmless. *Huey*, ___ N.C. App. at ___, 777 S.E.2d at 308. The court vacated defendant's conviction and sentence and remanded the case for a new trial. *Id.* at ___, 777 S.E.2d at 308.

In an attempt to strike a balance between allowing attorneys appropriate latitude to argue heated cases and enforcing proper boundaries to maintain professionalism, this Court has considered prosecutors' closing arguments at length.

> The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene ex mero motu. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord . . . .

*State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citing *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999)). Thus, when defense counsel fails to object to the prosecutor's improper argument and the trial court fails to intervene, the standard of review requires a two-step analytical inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial. *See Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157 (1986); *see also Jones*, 355 N.C. at 133-34, 558 S.E.2d at 107-08. Only when it finds both an improper argument and prejudice will this Court conclude that the error merits appropriate relief. *See Jones*, 355 N.C. at 134-35, 558 S.E.2d at 108-09 (ordering a new sentencing hearing because the prejudicial arguments were made during the sentencing phase of the defendant's capital trial).

First, although control of jury argument is left to the discretion of the trial judge, trial counsel must nevertheless conduct themselves

within certain statutory parameters. *State v. Wiley*, 355 N.C. 592, 632, 565 S.E.2d 22, 50 (2002), *cert. denied* 537 U.S. 1117, 154 L. Ed. 2d 795 (2003). It is improper for lawyers in their closing arguments to "become abusive, inject [their] personal experiences, express [their] personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record." N.C.G.S. § 15A-1230(a)(2015). Within these statutory confines, we have long recognized that " 'prosecutors are given wide latitude in the scope of their argument' and may 'argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom.' " *State v. Phillips*, 365 N.C. 103, 135, 711 S.E.2d 122, 145 (2011) (quoting *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008)), *cert. denied*, 565 U.S. 1204, 182 L. Ed. 2d 176 (2012).

If an argument is improper, and opposing counsel fails to object to it, the second step of the analysis requires a showing that the argument is *so grossly* improper that a defendant's right to a fair trial was prejudiced by the trial court's failure to intervene. *Jones*, 355 N.C. at 133, 558 S.E.2d at 107. Our standard of review dictates that "[o]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Anthony*, 354 N.C. 372, 427, 555 S.E.2d 557, 592 (2001) (quoting *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996)). "[I]t 'is not enough that the prosecutors' remarks were undesirable or even universally condemned.' " *Darden*, 477 U.S. at 181, 91 L. Ed. 2d at 157 (quoting *Darden v. Wainwright*, 699 F.2d 1031, 1036 (11th Cir. 1083)). For an appellate court to order a new trial, the "relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Id.* at 181, 91 L. Ed. 2d at 157 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)); *State v. Mann*, 355 N.C. 294, 307-08, 560 S.E.2d 776, 785 ("[T]o warrant a new trial, the prosecutor's remarks must have perverted or contaminated the trial such that they rendered the proceedings fundamentally unfair."), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002). In determining whether a prosecutor's statements reached this level of gross impropriety, we consider the statements "in context and in light of the overall factual circumstances to which they refer." *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995) (citing *State v. Pinch*, 306 N.C. 1, 24, 292 S.E.2d 203, 221, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *and overruled on other grounds by*, *inter alia*,

*State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988)). When this Court has found the existence of overwhelming evidence against a defendant, we have not found statements that are improper to amount to prejudice and reversible error. *State v. Sexton*, 336 N.C. 321, 363-64, 444 S.E.2d 879, 903 (concluding the trial court was not required to intervene *ex mero motu* when prosecutor directly called the defendant a liar), *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994), *grant of postconviction relief aff'd*, 352 N.C. 336, 532 S.E.2d 179 (2000).

Despite this deferential standard, this Court has held that improper arguments amount to prejudice when the circumstances required. In *Jones* this Court held that it was reversible error when the trial court failed to intervene in the closing argument of a sentencing hearing after the prosecutor's comment "You got this quitter, this loser, this worthless piece of—who's mean. . . . He's as mean as they come. He's lower than the dirt on a snake's belly." 355 N.C. at 133, 558 S.E.2d at 107. In the context of a sentencing proceeding in a capital case, which involves evidence specifically geared towards a defendant's character, past behavior, and personal qualities, "personal conclusions that. . . amount[ ] to little more than name-calling" and "repeated degradations of the defendant" are "grossly improper and prejudicial." *Id.* at 134, 558 S.E.2d at 108. In *State v. Miller* this Court held the solicitor's remarks during closing arguments, especially those referencing the defendants as "habitual storebreakers," to be "grossly unfair" and "well calculated to mislead and prejudice the jury" because the defendants did not testify or offer their own character evidence, and the State did not present evidence to show the defendants were habitual storebreakers. 271 N.C. 646, 660, 157 S.E.2d 335, 346 (1967). "If verdicts cannot be carried without appealing to prejudice or resorting to unwanted denunciation, they ought not to be carried at all." *State v. Tucker*, 190 N.C. 708, 714, 130 S.E.2d 720, 723 (1925).

Turning to the prosecutor's closing argument in this case, we consider whether his statements were first, improper, and then, so grossly improper as to prejudice defendant's right to due process.

**[1]** First, defendant argues the prosecutor's repeated statements insinuating that defendant lied were improper. Over the course of his argument, the prosecutor used some variation of "lie" at least thirteen times, though never directly calling defendant a liar. "Innocent men don't lie" appeared to be the State's theme: the prosecutor used it at the beginning of his closing argument and again when beginning his rebuttal. The prosecutor also referred to defendant's claim of self-defense as "just not a true statement." The prosecutor commented that the unidentified man

involved in the shooting scenario was "imaginary" and "simply made up." The prosecutor also asserted defendant engaged in "[t]he act of lying" and "trie[d] to hide the truth from you all." Relying on *Hembree*, defendant argues that even though the prosecutor did not directly call defendant a liar, the effect and intimations of his statements are also improper. 368 N.C. at 19-20, 770 S.E.2d at 89.

A prosecutor is not permitted to insult a defendant or assert the defendant is a liar. *See Jones*, 355 N.C. at 133-34, 558 S.E.2d at 107; *Miller*, 271 N.C. at 659, 157 S.E.2d at 345 ("[A prosecutor] can argue to the jury that they should not believe a witness, but he should not call him a liar."). A prosecutor is permitted to address a defendant's multiple accounts of the events at issue to suggest that the "defendant had not told the truth on several occasions and the jury could find from this that he had not told the truth at his trial." *State v. Bunning*, 338 N.C. 483, 489, 450 S.E.2d 462, 465 (1994). In this case there is no doubt the prosecutor's statements directed at defendant's credibility are improper. Statutorily, the prosecutor is not permitted to inject his opinion as to the truth or falsity of the evidence or comment on a defendant's guilt or innocence during his argument. N.C.G.S. § 15A-1230(a). Here the prosecutor injected his own opinion that defendant was lying, stopping just short of directly calling defendant a liar, and his theme, "innocent men don't lie," insinuated that because defendant lied, he must be guilty. The focus of the prosecutor's argument was not on presenting multiple conflicting accounts and allowing the jury to come to its own conclusion regarding defendant's credibility. Rather, the State's argument appeared to overwhelmingly focus on attacking defendant's credibility through the prosecutor's personal opinion.

Nonetheless, even though the statements are improper, we do not find them to be so grossly improper that they amount to prejudice. Unlike the argument at issue in *Miller*, which this Court found prejudicial, the evidence in this case does support a permissible inference that defendant's testimony lacked credibility. Defendant gave six alternating versions of the shooting, five to police and one to the jury.[2] Accordingly,

2. Defendant told the 911 operator he shot the victim. He told Detective Crum he shot the victim, then told Detective Crum he meant to say an unknown male shot the victim. Defendant first told Detective Sterrett an unknown male shot the victim. Then he told Detective Sterrett he shot the victim after taking the gun from his truck and putting the gun in his pocket, and asking someone to get the victim to come outside. Then he told Detective Sterrett he shot the victim after approaching the victim with the gun exposed. At trial, defendant told the jury that while he was talking with a drug dealer, the victim approached and attacked him and the drug dealer, and defendant grabbed the drug dealer's gun and shot the victim.

this was evidence from which the prosecutor could argue defendant had not told the truth on several occasions, from which, the jury could find that defendant had not told the truth at his trial. While we do not approve of the prosecutor's repetitive and dominant insinuations that defendant was a liar, we do believe sufficient evidence to supported the premise that defendant's contradictory statements were untruthful. Further, the evidence supporting defendant's voluntary manslaughter conviction is overwhelming, as discussed below.

**[2]** Next, defendant argues that the prosecutor's assertion that defense expert witness Dr. Corvin was "just a $6,000 excuse man" was also improper. The statement implied Dr. Corvin was not trustworthy because he was paid by defendant for his testimony. Evidence in the record supports the assertion that Dr. Corvin received compensation. Dr. Corvin's practice received over $300,000 in 2012 for services to criminal defendants, and he testified he worked in excess of twenty hours on this case at the legislature-authorized rate of $320 per hour. This Court has held it is proper for an attorney to point out potential bias resulting from payment a witness received or would receive for his services, while it is improper to argue that an expert should not be believed because he would give untruthful or inaccurate testimony in exchange for pay. *State v. Rogers*, 355 N.C. 420, 462-64, 562 S.E.2d 859, 885-86 (2002). Here the prosecutor's statement goes beyond pointing out that Dr. Corvin was reimbursed for his opinion to argue that Dr. Corvin was paid to formulate an excuse for defendant. In *State v. Duke* this Court considered similar language when the prosecutor referred to the defendant's expert witness as the "$15,000 man" twice during closing arguments. 360 N.C. 110, 127-28, 623 S.E.2d 11, 23 (2005), *cert. denied*, 549 U.S. 855, 166 L. Ed. 2d 96 (2006). Though the statement in *Duke* was improper because it insinuated that the defendant's expert would say anything to get paid, we did not find this language "so overreaching as to shift the focus of the jury from its fact-finding function to relying on its own personal prejudices or passions." *Id.* at 130, 623 S.E.2d at 24. As is the case here, the prosecution's statement emphasized the expert witness's fee, and the jury may properly take that information into account when determining the credibility of the expert and the weight to place on his testimony. *Id.* at 130, 623 S.E.2d at 24. In this case we do acknowledge the additional word "excuse" and believe this language amounts to name-calling, which is certainly improper.

**[3]** Finally, defendant argues that the prosecutor improperly argued that defense counsel should not be believed because "[h]e's paid to defend the defendant." Defendant also argues the prosecutor improperly

insinuated that the defense attorney and the defense expert conspired to assist defendant in committing perjury before the jury by stating: "[H]e's going to stick to that story, that story that he developed after he sat down with his attorney and his defense experts and decided on what he wanted to tell you. You're not going to find the truth there." We agree this language was improper. A prosecutor is not permitted to make "uncomplimentary" statements about defense counsel when "there is nothing in the record to justify it." *Miller*, 271 N.C. at 658, 157 S.E.2d at 345.

In *Hembree* this Court considered a similar statement by a prosecutor: "defendant, along with his two attorneys, come together to try and create some sort of story." 368 N.C. at 20, 770 S.E.2d at 89. In *Hembree*, as in the case *sub judice*, there was no evidence in the record to suggest either defendant committed perjury at the behest of his attorney. These arguments are improper because they not only allowed the prosecutor to inject his personal opinion about how defendant's trial strategy was formed, and thus insinuate the falsity of the testimony, but they also portray defense counsel in an "uncomplimentary" light by suggesting defense counsel suborned perjury. In *Hembree* this Court did not consider whether the improper jury argument on its own amounted to prejudice. Instead, this Court held that the cumulative effect of the trial court's three errors (allowing excessive evidence of the defendant's prior conduct under Rule 404(b), allowing impermissible character evidence under Rule 404(a), and failing to intervene in improper jury argument) deprived the defendant of a fair trial without determining whether any single error was prejudicial in isolation. 368 N.C. at 9, 770 S.E.2d at 83. That kind of cumulative effect does not exist in this case. Here the improper jury argument was the single alleged error, occurring over the span of an eleven-day trial, that is before this Court on appeal. We turn now to the prejudice analysis.

**[4]** Though "we have found grossly improper the practice of flatly calling a witness or opposing counsel a liar when there has been no evidence to support the allegation," *id.* at 19, 770 S.E.2d at 89 (quoting *Rogers*, 355 N.C. at 462, 562 S.E.2d at 885), the inquiry does not end there.[3] Despite

3. *Rogers* cites to *Couch v. Private Diagnostic Clinic*, 133 N.C. App. 93, 100, 515 S.E.2d 30, 36 (1999), *aff'd per curiam*, 351 N.C. 92, 520 S.E.2d 785 (1999), in which this Court concluded that counsel "engaged in a grossly improper jury argument that included at least nineteen explicit characterizations of the defense witnesses and opposing counsel as liars," but this Court split over whether the trial court's failure to intervene *ex mero motu* was prejudicial to the defendant. Thus, the Court of Appeals holding that the improper argument was not of "such gross impropriety to entitle the defendants to a new trial," 133 N.C. App. at 100, 515 S.E.2d at 36, was left undisturbed and stands without precedential value.

our agreement with defendant that each of the prosecutor's contested statements are improper, the applicable standard of review requires us to consider whether these improper arguments deprived defendant of a fair trial. To demonstrate prejudice, defendant has the burden to show a "reasonable possibility that, had the error[s] in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a)(2015). The primary focus of our inquiry is not solely on the frequency of the improper arguments or the substance of such statements. While certainly taking such variables into consideration, a reviewing court must focus on the statements' likely effect on the jury's role as fact-finder, namely whether the jury relied on the evidence or on prejudice enflamed by the prosecutor's statements. *See Duke*, 360 N.C. at 130, 623 S.E.2d at 24. Though we cannot always be certain which aspects of evidence and argument the jury actually considered in coming to its decision, we must consider the arguments "in context and in light of the overall factual circumstances to which they refer." *Alston*, 341 N.C. at 239, 461 S.E.2d at 709 (citing *Pinch*, 306 N.C. at 24, 292 S.E.2d at 221). Thus, we look to the evidence presented at trial and compare it with what the jury actually found. Incongruity between the two can indicate prejudice in the conviction.

Here, despite defendant's five conflicting stories before trial, it was undisputed at trial that defendant shot the victim after having previously argued with him. Defendant admitted to being upset because the victim had "cussed him out" before the shooting. Immediately after the shooting, defendant admitted to the 911 operator that he shot the victim. According to defendant's own testimony, despite believing the victim may have had a knife or box cutter in one of his hands, he did not see a weapon in the victim's hand before he shot him. Defendant explained that it was dark at the time, and although he never saw the box cutter, he "felt it." Defendant's injuries from the altercation consisted of a scratch on his collarbone area and a torn t-shirt, while the State presented evidence suggesting the additional "mark" on his head may have been in existence previously. According to defendant's own testimony, the unidentified bystander pulled out a gun to shoot the victim, and defendant grabbed the gun and shot the victim himself. It is undisputed that defendant fled the scene after the shooting. Defendant also testified he returned to the scene after fleeing. Defendant also admitted to drinking before and being high on heroin during the altercation. Finally, even without the prosecutor's statements addressing defendant's credibility, it was relatively clear from Detective Crum's, Detective Sterrett's, and defendant's own testimony that several, widely varying iterations of

defendant's story existed prior to the version defendant presented to the jury at trial.

During its deliberations the jury asked to see a photo of the box cutter as it was found at the scene and the box cutter itself. The jury also asked to see the t-shirt defendant was wearing when he was arrested, which defendant testified had been torn during the altercation with the victim. Further, the jury asked to review the transcripts of the 911 call and Detective Sterrett's interrogation of defendant. Therefore, the jury considered the evidence during deliberations, rather than solely relying on the prosecutor's improper statements. Also, the jury's finding that defendant was guilty of voluntary manslaughter, rather than first-degree murder, indicates the jury was persuaded by defendant's and his expert's testimony to some extent. If the prosecutor's statements had destroyed all credibility of the defense team, as defendant asserts, there would be no testimony to support a finding of voluntary manslaughter; however, the jury convicted defendant of voluntary manslaughter, indicating they found he acted in imperfect self-defense. A finding of self-defense, whether perfect or imperfect, requires the jury to find a defendant's testimony credible to some degree because the jury must find that the defendant possessed an honest and reasonable belief it was necessary to kill the victim in order to save himself from death or great bodily harm. *See State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981). Here the jury was properly instructed on self-defense and imperfect self-defense. From the evidence against defendant in this case, it is reasonable that a jury could find defendant used excessive force as there is no evidence he actually saw a weapon in the victim's hand. Defendant has not overcome the evidence against him and thus has failed to show prejudice. Therefore, it was error for the Court of Appeals to assume prejudice without considering the evidence against defendant and the jury's finding of voluntary manslaughter rather than first-degree murder.

**[5]** For the foregoing reasons, we hold it was not reversible error when the trial court failed to intervene *ex mero motu* in the prosecutor's closing arguments. Nonetheless, we are disturbed that some counsel may be purposefully crafting improper arguments, attempting to get away with as much as opposing counsel and the trial court will allow, rather than adhering to statutory requirements and general standards of professionalism. Our concern stems from the fact that the same closing argument language continues to reappear before this Court despite our repeated warnings that such arguments are improper. *See Jones*, 355 N.C. at 134-35, 558 S.E.2d at 108-09; *see also Rogers*, 355 N.C. at 464-65, 562 S.E.2d at 886.

"The power and effectiveness of a closing argument is a vital part of the adversarial process that forms the basis of our justice system. A well-reasoned, well-articulated closing argument can be a critical part of winning a case." *Jones*, 355 N.C. at 135, 558 S.E.2d at 108. Yet, arguments, no matter how effective, must avoid base tactics such as: (1) comments dominated by counsel's personal opinion; (2) insinuations of conspiracy to suborn perjury when there has been no evidence of such action; (3) name-calling; and (4) arguing a witness is lying solely on the basis that he will be compensated. Our holding here, and other similar holdings finding no prejudice in various closing arguments, must not be taken as an invitation to try similar arguments again. We, once again, instruct trial judges to be prepared to intervene *ex mero motu* when improper arguments are made.

Therefore, for the reasons stated above, we reverse the decision of the Court of Appeals as to the issue before us on appeal and instruct that court to reinstate the trial court's judgment.

REVERSED.

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STATE OF NORTH CAROLINA
v.
ALONZO ANTONIO MURRELL

No. 233PA16

Filed 29 September 2017

**Indictment and Information—armed robbery—dangerous weapon—not sufficiently described**

An armed robbery indictment was insufficient where the dangerous weapon element was alleged to be a note that said "armed." The nature, identity, or deadly character of that unidentified weapon was not described at any point in the indictment.

Justice JACKSON dissenting.

Chief Justice MARTIN and Justice NEWBY join in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, ___ S.E.2d ___ (2016), arresting a judgment entered on 15 May 2015 by Judge John E. Nobles, Jr., in Superior Court, Onslow County, and remanding for resentencing. Heard in the Supreme Court on 10 April 2017.

*Joshua H. Stein, Attorney General, by Oliver G. Wheeler, IV, Assistant Attorney General, for the State-appellant.*

*Glenn Gerding, Appellate Defender, by Daniel L. Spiegel, Assistant Appellate Defender, for defendant-appellee.*

ERVIN, Justice.

The issue before us in this case is whether an indictment returned for the purpose of charging defendant with the offense of robbery with a dangerous weapon sufficed to give the trial court jurisdiction to enter judgment against defendant based upon his conviction for having committed that offense. After careful consideration of the record in light of the applicable law, we hold that the challenged indictment was fatally defective because it did not sufficiently allege all of the essential elements of the offense of robbery with a dangerous weapon and, for that reason, affirm the Court of Appeals' decision.

At 11:45 a.m. on 13 September 2013, Stacy Phillips, a teller at a PNC Bank branch located in Jacksonville, was the victim of a robbery. At that time, a man entered the bank and laid a note on the counter in front of Ms. Phillips. "[T]he first thing [Ms. Phillips] saw on [the note] was 'armed,' " which led her to believe that a robbery was in progress. More specifically, the note that the man placed before Ms. Phillips read "armed" and instructed, "eyes down, 2,000 — or two straps of hundreds, two straps of fifties, two straps of twenties, no devices." In spite of the fact that the only item that she saw in the robber's possession was a case that he carried under his arm, Ms. Phillips believed that the robber was armed based upon the information contained in the note that he presented to her.

Although Ms. Phillips attempted to grab the note, the robber said, "Don't touch it." At that point, Ms. Phillips gave the robber a bait strap, which included $330 in marked bills; some additional $20, $50, and $100 bills; and a dye pack, all of which the robber placed in the case. As the robber reached the door and began to leave the bank, Ms. Phillips

activated a silent alarm and complied with PNC's robbery protocol by calling the police, locking the facility's doors, preparing an account of what she had experienced, and providing assistance to the other persons present at the time of the robbery.

Detective Gary Manning of the Jacksonville Police Department, accompanied by several other officers, arrived at the bank shortly after the robbery. After securing the crime scene and obtaining information from other witnesses, Detective Manning viewed surveillance video footage related to the robbery. As he did so, Detective Manning observed that a "red bloom . . . emanat[ed] from the . . . front passenger area of the vehicle" apparently used by the robber to facilitate his escape. According to Karen Salefsky, the bank manager, the "red bloom" that could be seen in the surveillance video resulted from the explosion of the dye pack contained in the bait strap.

On the following day, Detective Manning received a call from an individual who "had found money in a dumpster in Phoenix Park Apartments." While searching the dumpster, Detective Manning retrieved money "stained with a bright red" dye "consistent with the manner in which a dye pack is prepared." In addition, Detective Manning determined that the serial numbers of the currency retrieved from the dumpster matched those printed on the currency taken during the robbery.

On 23 September 2013, Crime Stoppers received a tip identifying the suspect depicted in the surveillance footage, which had been released to the public, as defendant, a resident of Kinston. After noticing "a striking resemblance between photographs . . . of [defendant] and the person depicted in the surveillance footage," Detective Manning began to investigate defendant's possible connection to the robbery. Detective Manning learned that defendant had access to a vehicle resembling the one shown in the surveillance video footage, which was a black Suzuki XL7 that was registered to defendant's girlfriend, Heather Crider. On 4 October 2013, Ms. Crider's Suzuki XL7 was located in downtown Kinston. While searching the vehicle with Ms. Crider's consent, Detective Manning observed red smudges on the vehicle's exterior consistent with those that would have been made during the release of the dye pack contained in the bait strap.

At the time that he was arrested in Kinston on 11 October 2013, defendant possessed a duffle bag that contained, among other things, a green bed sheet stained with red material that was consistent with the color of certain stains found in the dumpster and on the exterior of Ms. Crider's Suzuki XL7. After waiving his *Miranda* rights, defendant

admitted that he had robbed the Jacksonville PNC Bank and gave an account of that episode consistent with the information that Detective Manning developed during his investigation. Although defendant told Detective Manning that he had been "provided" with a "pee shooter," which Detective Manning "took to mean a small caliber pistol," before entering the PNC Bank, investigating officers never recovered it or any other weapon believed to have been used during the robbery.

On 12 August 2014, the Onslow County grand jury returned a bill of indictment that was intended to charge defendant with robbery with a dangerous weapon. The indictment alleged, in pertinent part, that:

> defendant [ ] unlawfully, willfully and feloniously did steal, take and carry away another's personal property, U.S. Money from PNC Financial Services Group, Inc., at the location of "PNC Bank" . . . when a bank employee, Stacy Phillips was present. The defendant committed this act by way of it reasonably appearing to the victim Stacy Phillips that a dangerous weapon was in the defendant's possession, being used and threatened to be used by communicating that he was armed to her in a note with demands and instructions for her to complete, whereby the life of Stacy Phillips was threatened and endangered.

The charges against defendant came on for trial before the trial court and a jury at the 11 May 2015 criminal session of the Superior Court, Onslow County. On 15 May 2015, the jury returned a verdict convicting defendant as charged. Based upon the jury's verdict, the trial court entered a judgment sentencing defendant to a term of fifty-three to seventy-six months imprisonment. Defendant noted an appeal from the trial court's judgment to the Court of Appeals.

In seeking relief from the trial court's judgment before the Court of Appeals, defendant argued, among other things, that the trial court had erred by failing to dismiss the indictment returned against him in this case on the grounds that it failed to properly charge him with the commission of robbery with a dangerous weapon. According to defendant, "[t]he requirements for an indictment charging a crime in which one of the elements is the use of a deadly weapon are (1) to 'name the weapon and (2) either to state expressly that the weapon used was a "deadly weapon" or to allege such facts as would necessarily demonstrate the deadly character of the weapon,' " quoting *State v. Brinson*, 337 N.C. 764, 768, 448 S.E.2d 822, 824 (1994) (emphasis omitted) (quoting *State*

*v. Palmer*, 293 N.C. 633, 639-40, 239 S.E.2d 406, 411 (1997)). More specifically, defendant asserted that

> [a]lthough the language "robbery with a dangerous weapon" appears in the caption, the indictment fails to name any weapon. Since no weapon was named, the State could not expressly state that the weapon was a deadly weapon or allege facts that demonstrate the deadly character of the weapon. The indictment also fails to allege any facts of how the victim's life was threatened or endangered. The indictment simply states that it appeared to the victim that Mr. Murrell possessed a "dangerous weapon."

In defendant's view, "[b]ecause the dangerous weapon [that] Mr. Murrell allegedly possessed inside the bank was not named[,] the trial court was without subject matter jurisdiction." In support of this contention, defendant pointed out that "the 'implement' alleged in the indictment is a note which contained the word 'armed,' " which "is not an article, instrument or substance likely to produce death or great bodily harm," citing *State v. Wiggins*, 78 N.C. App. 405, 406, 337 S.E.2d 198, 199 (1985), and which "cannot[, for that reason,] constitute a dangerous weapon for purposes of robbery with a dangerous weapon pursuant to N.C.[G.S.] § 14-87."

The State, on the other hand, argued that the indictment intended to charge defendant with robbery with a dangerous weapon sufficed to establish the trial court's jurisdiction because it alleged "that Defendant handed a note saying 'armed' to the victim, and that it reasonably appeared to the victim that Defendant possessed a 'dangerous weapon.' " According to the State, the indictment at issue in this case alleged the essential elements of the crime of robbery with a deadly weapon, citing *State v. Beaty*, 306 N.C. 491, 496, 293 S.E.2d 760, 764 (1982), *disapproved of on other grounds by State v. White*, 322 N.C. 506, 518, 369 S.E.2d 813, 819 (1988), given that the indictment included references to "deadly weapon" and "armed."

On 19 April 2016, the Court of Appeals filed an opinion holding that the indictment intended to charge defendant with robbery with a dangerous weapon was fatally defective because it failed to name any dangerous weapon that defendant allegedly employed. *State v. Murrell*, ___ N.C. App ___, ___ S.E.2d ___, 2016 WL 1565576, at *5, (Apr. 19, 2016) (No. COA15-1097) (unpublished). As a result, the Court of Appeals arrested judgment with respect to the charge of robbery with a dangerous weapon. *Id.* However, given that the challenged indictment sufficiently alleged the commission of a common law robbery, the Court of

Appeals remanded this case to the Superior Court, Onslow County, "for entry of judgment and resentencing on common law robbery." *Id.* (quoting *State v. Marshall*, 188 N.C App. 744, 752, 656 S.E.2d 709, 715, *disc. rev. denied*, 362 N.C. 368, 661 S.E.2d 890 (2008)). On 22 September 2016, this Court granted the State's discretionary review petition.

In seeking to persuade this Court to reverse the Court of Appeals' decision, the State argues that the indictment at issue in this case sufficed to charge the commission of a robbery with a dangerous weapon because it alleged all of the elements of that criminal offense. As an initial matter, the State notes that this Court has held that "[i]t is sufficient for indictments or warrants seeking to charge a crime in which one of the elements is the use of a deadly weapon (1) to name the weapon and (2) either to state expressly that the weapon used was a 'deadly weapon' or to allege such facts as would necessarily demonstrate the deadly character of the weapon," quoting *Palmer*, 293 N.C. at 639-40, 239 S.E.2d at 411 (emphasis omitted). The indictment at issue in this case satisfies the first of these two approaches, according to the State, because "the indictment *did* name a weapon" given the allegation that defendant presented a "note saying that [he] was armed," and because this statement "amounts to [an allegation concerning the] actual threatened use of a dangerous weapon." In addition, the State asserts that the indictment at issue in this case satisfies the second of the approaches delineated in *Palmer* because "the indictment here expressly states that it appeared that Defendant possessed a 'dangerous weapon.' " As a result, contrary to the Court of Appeals' decision, the State contends that "the indictment meets the aforementioned requirements for robbery with a dangerous weapon."

On the other hand, defendant asserts that the indictment that was intended to charge defendant with robbery with a dangerous weapon in this case failed to satisfy either of the approaches delineated in *Palmer* and did not, for that reason, suffice to support defendant's conviction for robbery with a dangerous weapon given its failure to "specify a dangerous weapon," to "set forth any facts describing a dangerous weapon," or to "allege that Mr. Murrell possessed any weapon at all." According to defendant, *Palmer* requires "some minimal degree of specificity in describing the dangerous weapon at issue in an indictment for robbery with a dangerous weapon." In defendant's view, "[t]he State . . . must prove that the instrument in question is a dangerous weapon"; in the event that "the State cannot name a dangerous weapon nor describe one, the State cannot allege nor prove [armed robbery]." A note containing the word "armed," cannot, in defendant's view, constitute a

"dangerous weapon." According to defendant, the indictment fails to allege that defendant possessed a dangerous weapon while committing the robbery, citing *State v. Keller*, 214 N.C. 447, 449, 199 S.E. 620, 621 (1938) (holding that robbery with a dangerous weapon "requires as a constituent element the presence of firearms [or some other dangerous weapon]"). A mere allegation that defendant informed the bank teller that he was armed simply "fails to allege that Mr. Murrell in fact possessed a dangerous weapon." (Emphasis omitted.) Put another way, defendant argues that the indictment alleged that defendant "conveyed the impression that he possessed some type of weapon" while failing to allege the actual possession of a dangerous weapon. As a result, defendant asserts that "[t]he indictment was fatally defective and conferred jurisdiction only for common law robbery."

According to well-established North Carolina law, a valid indictment is necessary to confer jurisdiction upon the trial court. *See*, *e.g.*, *State v. Morgan*, 226 N.C. 414, 415, 38 S.E.2d 166, 167 (1946); *see also State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996). Generally speaking, an indictment is sufficient if it: (1) "apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense"; (2) "protect[s] him from subsequent prosecution for the same offense"; and (3) "enable[s] the court to know what judgment to pronounce in the event of conviction." *State v. Coker*, 312 N.C. 432, 434-35, 323 S.E.2d 343, 346 (1984) (citations omitted); *see also* N.C.G.S. § 15A-924(a)(5) (2015) (requiring that a criminal pleading contain "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation"). In order to satisfy the relevant statutory requirements, including the provision of adequate notice, an "indictment must allege lucidly and accurately all the essential elements of the offense endeavored to be charged." *State v. Ellis*, 368 N.C. 342, 344, 776 S.E.2d 675, 677 (2015) (quoting *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600, *cert. denied*, 539 U.S. 985, 124 S. Ct. 44, 156 L. Ed. 2d 702 (2003)). Consistent with this general rule, "[a]n indictment charging a statutory offense must allege all of the essential elements of the offense." *Snyder*, 343 N.C. at 65, 468 S.E.2d at 224 (citation omitted). "A criminal pleading . . . is fatally defective if it 'fails to state some essential and necessary element of the offense of which the defendant is found guilty,' " *Ellis*, 368 N.C. at 344, 776 S.E.2d at 677 (quoting *State v. Gregory*, 223 N.C. 415, 418, 27 S.E.2d 140, 142 (1943)), with the presence or absence of such a fatal defect to be "judged based solely upon

the language of the criminal pleading in question without giving any consideration to the evidence that is ultimately offered in support of the accusation contained in that pleading," *id.* at 347, 776 S.E.2d at 679.

> Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night . . . shall be guilty of a Class D felony.

N.C.G.S. § 14-87(a) (2015) (defining "Robbery with firearms or other dangerous weapons"). As a result, the essential elements of the offense of robbery with a dangerous weapon are (1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use, or threatened use of firearms or other dangerous weapon,[1] implement, or means; and (3) a danger or threat to the life of the victim. *See State v. Moore*, 279 N.C. 455, 458, 183 S.E.2d 546, 548 (1971); *see also* N.C.G.S. § 14-87(a). Although the indictment at issue in this case clearly alleges that defendant unlawfully took the personal property of another while threatening the life of the victim, we do not believe that the indictment adequately alleges the possession, use, or threatened use of firearms or other dangerous weapon, implement, or means.

As this Court has previously stated, "robbery *with* firearms of necessity requires as a constituent element the presence of firearms," *Keller*, 214 N.C. at 449, 199 S.E. at 621, or, by logical extension, the presence of a dangerous weapon. *See also State v. Joyner*, 295 N.C. 55, 63, 243 S.E.2d 367, 373 (1978) (stating that "[t]he question in an armed robbery case is whether a person's life was in fact endangered or threatened by defendant's possession, use or threatened use of a dangerous weapon,

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1. A "well-accepted definition of a deadly weapon in this State" is "a weapon which is likely to cause death or serious bodily injury." *State v. Sturdivant*, 304 N.C. 293, 303, 283 S.E.2d 719, 727 (1981) (citations omitted); *see also State v. Watkins*, 200 N.C. 692, 694, 158 S.E. 393, 394 (1931) (stating that "[a]ny instrument which is likely to produce death or great bodily harm, under the circumstances of its use, is properly denominated a deadly weapon"). "Whether an instrument can be considered a dangerous weapon depends upon the nature of the instrument, the manner in which defendant used it or threatened to use it, and in some cases the victim's perception of the instrument and its use." *State v. Peacock*, 313 N.C. 554, 563, 330 S.E.2d 190, 196 (1985) (citations omitted) (finding that the victim's "life was endangered by defendant's use of the glass vase," with which he struck her head).

not whether the victim was scared or in fear of his life"). In evaluating the meaning of the statutory reference to "the use or threatened use of any firearms," N.C.G.S. § 14-87(a), we have previously determined that

> the word "use" as a noun has the meaning of an "act of employing anything, or state of being employed; application; employment . . . . The words "threatened use" coupled, as they are, with the preceding words clearly indicate the threatened act of employing. Hence, construed contextually the clause "*with* the use or threatened use" of a weapon, requires, in the one instance, or presupposes, in the other, the presence of the weapon with which the act may be executed or threatened.

*Keller*, 214 N.C. at 449, 199 S.E. at 621-22 (internal citations omitted); *see also State v. Hinton*, 361 N.C. 207, 211-12, 639 S.E.2d 437, 440 (2007) (stating that "the General Assembly intended to require the State to prove that a defendant used an external dangerous weapon before conviction under the statute is proper"); *State v. Williams*, 335 N.C. 518, 520, 438 S.E.2d 727, 728 (1994) (stating that, "[t]o establish robbery or attempted robbery with a dangerous weapon, the State was required to prove beyond a reasonable doubt that the defendant possessed a firearm or other dangerous weapon at the time of the robbery or attempted robbery and that the victim's life was in danger or threatened") (citing N.C.G.S. § 14-87 (1986)); *State v. Gibbons*, 303 N.C. 484, 491, 279 S.E.2d 574, 578 (1981) (stating that "[o]ur interpretation, which requires both an act of possession and an act with the weapon which endangers or threatens the life of the victim gives substance to all of the terms of the statute"). As a result, an indictment sufficient to charge the offense of robbery with a dangerous weapon must allege the presence of a firearm or dangerous weapon used to threaten or endanger the life of a person.

In *State v. Palmer*, this Court, in addressing the manner in which the use of a "dangerous weapon" must be alleged,[2] held

> that it is sufficient for indictments . . . seeking to charge a crime in which one of the elements is the use of a deadly weapon (1) to name the weapon and (2) either to state expressly that the weapon used was a "deadly weapon" or to allege such facts as would *necessarily* demonstrate

2. "The terms 'dangerous' and 'deadly,' when used to describe a weapon, are practically synonymous." *Sturdivant*, 304 N.C. at 303, 283 S.E.2d at 727 (citing *Black's Law Dictionary* 355, 359 (5th ed. 1979)).

> the deadly character of the weapon. Whether the state can prove the allegation is, of course, a question of evidence which cannot be determined until trial.

293 N.C. at 639-40, 239 S.E.2d at 411.[3] For instance, in *State v. Brinson*, an indictment purporting to charge an assault with a deadly weapon alleged, in pertinent part, that the defendant "unlawfully, willfully and feloniously did assault John Delton Eason, Jr. . . . by . . . slamming his head against the cell bars, a deadly weapon, and floor. The assault was intended to kill and resulted in serious injury, a broken neck . . . and . . . left the victim paralyzed." *Brinson*, 337 N.C. at 767, 448 S.E.2d at 824. This Court determined that the indictment satisfied the first of the two approaches delineated in *Palmer* because it "specifically referred to the cell bars and cell floor" and satisfied the second of the two approaches delineated in *Palmer* by stating that "the victim's broken neck and paralysis resulted from the 'assault,' " " 'necessarily demonstrat[ing] the deadly character' of the cell bars and floor." *Id.* at 768, 448 S.E.2d at 825 (quoting *Palmer*, 293 N.C. at 640, 239 S.E.2d at 411 (emphasis omitted)).

The indictment at issue in this case alleged that defendant took money "by way of it reasonably appearing to the victim . . . that a dangerous weapon was in the defendant's possession, being used and threatened to be used by communicating that he was armed to her in a note." An allegation that it "reasonably appear[ed] . . . that a dangerous weapon was in the defendant's possession" is simply not equivalent to an allegation that defendant actually possessed a weapon.[4] In the event that the allegation that defendant was "armed" was intended to suggest

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3. As a result of the fact that "[t]he crime of armed robbery defined in [N.C.]G.S. [§] 14-87 includes an assault on the person with a deadly weapon," *State v. Richardson*, 279 N.C. 621, 628, 185 S.E.2d 102, 107 (1971), this case is controlled by *Palmer*. The State does not, in its brief before this Court, question *Palmer*'s validity or suggest that it is not controlling in this case. Instead, the State appears to argue that the allegations contained in the indictment at issue in this case are fully *Palmer*-compliant.

4. The absence of a reference to any weapon differentiates this case from *Marshall*, 188 N.C. App. at 749-50, 656 S.E.2d at 713-14, in which the Court of Appeals determined that, while an allegation that the defendant's action in "keeping his hand in his coat" sufficiently "nam[ed] the weapon," the indictment was still fatally defective because "pretending to possess a dangerous weapon is not a dangerous weapon" and because the indictment "fail[ed] either to state expressly that the weapon was dangerous or to allege facts that necessarily demonstrat[ed] the dangerous nature of the weapon." Instead, the indictment at issue in this case resembles the indictment at issue in *State v. Moses*, 154 N.C. App. 332, 335, 572 S.E.2d 223, 226 (2002), in which the count of the indictment returned for the purpose of charging defendant with assault with a deadly weapon inflicting serious injury alleged that the defendant "assault[ed] Mateo Mendez Jimenez with a deadly weapon" resulting "in the infliction of a serious injury, knocking out his teeth."

that defendant possessed an unidentified weapon, the nature, identity, or deadly character of that unidentified weapon is not described at any point in the indictment. *See State v. Hines*, 166 N.C. App. 202, 207, 600 S.E.2d 891, 895 (2004) (addressing a fatal variance claim, rather than a challenge to the indictment's sufficiency, arising under an indictment describing the weapon used in a robbery as "an unknown blunt force object causing trauma to the head of the victim."). Simply put, the indictment at issue in this case provides no basis for a determination that defendant was "armed" with any implement that was inherently dangerous or used in such a manner as to threaten the infliction of death or serious injury.[5] As a result, since the indictment returned against defendant in this case failed to sufficiently allege that defendant possessed, used, or threatened to use a dangerous weapon,[6] the Court of Appeals correctly held that the indictment returned against defendant in this case for the purpose of charging him with the commission of a robbery with a dangerous weapon was fatally defective.

AFFIRMED.

Justice JACKSON dissenting.

When bank employees resist robbery attempts, tragedy often results. The policy that bank employees should comply with a robber's demands has protected countless lives. Here, because no one resisted defendant's

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5. Although the indictment does allege that it "reasonabl[y] appear[ed]" to Ms. Phillips that "a dangerous weapon was in the defendant's possession," that allegation is not tantamount to an assertion that defendant was, in fact, in possession of a dangerous weapon or that any such weapon was used to threaten Ms. Phillips with death or serious bodily harm. To be sure, this Court has found the evidence sufficient to support a defendant's conviction for robbery with a dangerous weapon based upon a presumption or inference arising from "the defendant's use of what appeared to the victim to be a firearm or other dangerous weapon." *State v. Joyner*, 312 N.C. 779, 786, 324 S.E.2d 841, 846 (1985). Rather than obviating the necessity for proof that the defendant actually possessed or utilized an implement that was, in fact, a dangerous weapon, *Joyner* and similar decisions allow a jury to find the possession or use of such an implement based upon testimony describing what the item reasonably appeared to be. As a result, there is no conflict between *Palmer* and decisions such as *Joyner*, none of which allow a defendant to be convicted of robbery with a dangerous weapon on the basis of a threat divorced from the actual possession or use of a deadly weapon.

6. The State suggests that the indictment identifies the note that defendant allegedly displayed to Ms. Phillips as the required weapon. However, when the relevant portions of the indictment are read in their ordinary sense, the indictment simply asserts that the note was the means by which defendant informed Ms. Phillips that he was "armed."

threat, no one was injured. Law enforcement eventually apprehended defendant, and the grand jury issued an indictment that notified defendant of the charge against him. Based upon this indictment, defendant was able to prepare adequately for trial. The jury considered the evidence and convicted defendant. Now, the majority sets aside the jury's verdict based upon an alleged error in wording. The indictment charging defendant with the offense of robbery with a dangerous weapon was sufficient to confer jurisdiction upon the trial court because the indictment clearly notified defendant of the charge against him, thus allowing him ample opportunity to prepare a defense. Accordingly, I respectfully dissent from the majority opinion.

In this case the indictment alleged that defendant:

> [u]nlawfully, willfully and feloniously did steal, take and carry away another's personal property, U.S. Money from PNC Financial Services Group, Inc. . . . when a bank employee, Stacy Phillips[,] was present. The defendant committed this act by way of it reasonably appearing to the victim[,] Stacy Phillips[,] that a dangerous weapon was in the defendant's possession, being used and threatened to be used by communicating that he was armed to her in a note with demands and instructions for her to complete, whereby the life of Stacy Phillips was threatened and endangered.

The majority holds that the indictment "clearly alleges that defendant unlawfully took the personal property of another while threatening the life of the victim" but is nonetheless "fatally defective because it did not sufficiently allege all of the essential elements of the offense of robbery with a dangerous weapon." Specifically, the majority notes that the indictment fails to "adequately allege[ ] the possession, use or threatened use of firearms or other dangerous weapon, implement or means." In reaching this conclusion, the majority essentially holds that the indictment is only sufficient to support the lesser included offense of common law robbery.

Unlike common law robbery, the offense of robbery with a dangerous weapon requires the use or threatened use of a dangerous weapon. According to section 14-87(a):

> Any person or persons who, having in possession or with the use or *threatened* use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or *threatened*, unlawfully takes or

> attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

N.C.G.S. § 14-87(a) (2015) (emphases added). "The critical and essential difference between" the offense set forth in N.C.G.S. § 14-87—robbery with a dangerous weapon or armed robbery—and common law robbery is that for a jury to find a defendant guilty of armed robbery, "the victim must be endangered or threatened by the use or *threatened use* of a 'firearm or other dangerous weapon, implement or means.' " *State v. Bailey*, 278 N.C. 80, 87, 178 S.E.2d 809, 813 (1971) (emphasis added) (quoting *State v. Covington*, 273 N.C. 690, 700, 161 S.E.2d 140, 147 (1968)). If the threatened use of a dangerous weapon is sufficient to sustain a *conviction* for the offense, then the same allegation must be sufficient to place defendant on *notice* of that same charged offense. To rule otherwise seems to create the classic chicken and egg dilemma. How can the State convict a person of a crime for which he cannot be indicted? Adopting the majority's logic would inhibit, if not outright prohibit, such prosecutions. This cannot be what the legislature intended.

In so doing, the majority also discounts the effect of this threat upon the person subjected to such a threat—an effect specifically contemplated by both the statute and our precedent. Our cases make clear that it is not only the possession of a weapon that meets the threshold for robbery with a dangerous weapon but also the threat resulting from such possession, whether real or merely implied. As we noted in *State v. Williams*, there is a presumption that (1) a defendant has used a firearm or other dangerous weapon when he commits a robbery by the use or threatened use of an implement which *appears to be* a firearm or other dangerous weapon, and (2) such conduct endangered or threated the victim's life. 335 N.C. 518, 520-21, 438 S.E.2d 727, 728 (1994); *see also State v. Thompson*, 297 N.C. 285, 288-89, 254 S.E.2d 526, 528 (1979). The presumption may be rebutted with a showing of "some evidence" that the victim was not endangered or threatened, at which point a permissive inference survives. *Williams*, 335 N.C. at 521, 438 S.E.2d at 729 (emphasis omitted) (quoting *State v. White*, 300 N.C. 494, 507, 268 S.E.2d 481, 489 (1980)).

Our case law addressing the purpose of indictments is both longstanding and clear. As the majority opinion correctly notes, and thoroughly discusses, the fundamental purpose of an indictment is to place

a criminal defendant on notice of the charges being brought against him in order to allow him to prepare an adequate defense. In short, the indictment notifies defendant of the charge against him; the jury determines if the evidence is adequate to support the charge. The information provided in the indictment—including the reference to section 14-87—clearly was sufficient to place defendant on notice that he was being tried for robbery with a dangerous weapon and that the gravamen of his offense was the bank employee's reasonable apprehension based upon the note he showed her stating that he was armed.

The majority cites our previous decision in *State v. Palmer* for the proposition that an indictment alleging the use of a dangerous weapon must "name the weapon." *Palmer*, 293 N.C. 633, 639, 239 S.E.2d 406, 411 (1977). *Palmer* does require an indictment for assault with a deadly weapon to identify a particular weapon; however, I am troubled by the analytical framework set forth in *Palmer* in that it appears to be inconsistent with the long-standing precedents of this Court and places significant reliance upon a case that depended in large part on a legal treatise for the foundation of its legal analysis. *See id.* at 639-40, 239 S.E.2d at 410-11.

*Palmer* actually concerned the sufficiency of an indictment for assault with a deadly weapon—a wholly different statute than the one at issue here. Therefore, *Palmer*'s utility in analyzing this case is of limited value. Moreover, there are three additional reasons *Palmer* should not guide our inquiry in this case. First, *Palmer* stated that indictments for crimes involving the use of a deadly weapon must "name the weapon," 293 N.C. at 639, 239 S.E.2d at 411, but, to the extent that this rule applied to statutes other than the one at issue in *Palmer*, that requirement was dictum. In addition, *Palmer* based its rule on a case that relied substantially on an entry from *Corpus Juris Secundum* (C.J.S.). *See id.* at 639, 239 S.E.2d at 410-11 (quoting *State v. Wiggs*, 269 N.C. 507, 513, 153 S.E.2d 84, 89 (1967)). But legal treatise entries are not binding authority on this Court—nor should they be—so the source of *Palmer*'s rule is troubling. Finally, a review of the pertinent C.J.S. entry quoted in *Palmer* fails to support the rule that *Palmer* set forth. That C.J.S. entry suggests only that an indictment must *either* (1) name the weapon (if its dangerous or deadly nature is obvious), (2) assert that a dangerous or deadly weapon was used, or (3) state enough facts to show that the weapon was deadly or dangerous. For all these reasons, we should not extend *Palmer*'s dictum to cover the statute at issue here.

Because *Palmer* is inconsistent with *Williams* and its forebears and progeny, however, *Palmer* has erroneously engrafted a requirement

not included within the plain meaning of the words of the assault with a deadly weapon statute. Therefore, I cannot agree with the majority's determination that it is appropriate to engraft that same requirement on the statute at issue here—namely, robbery with a dangerous weapon—because the plain meaning of *that* statute does not include the requirement.

Simply considering the statutory requirements for a conviction for robbery with a dangerous weapon, I find it impossible to conclude that the majority opinion has reached the correct conclusion in this case. In addition, in practice the majority's holding will place a high burden on law enforcement and prosecutors who prepare indictments to ensure that the dangerous weapon actually utilized during the robbery has been located. This seems to be a quantum shift in the jurisprudence of both this Court and our Court of Appeals.[1] According to our current precedents, a serious crime has been committed, but the majority's analysis will make it far more difficult to prosecute these types of offenses in the absence of the actual weapon utilized in the commission of a crime.

For the foregoing reasons, I dissent.

Chief Justice MARTIN and Justice NEWBY join in this dissenting opinion.

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1. *See, e.g.*, *State v. Waters*, ___ N.C. App. ___, 799 S.E.2d 287, 2017 WL 2118718, at *4 (2017) (unpublished) (holding that a defendant's threat of possessing a bomb, which provoked victim's reasonable belief in the veracity of that threat, was sufficient to overcome the defendant's motion to dismiss a charge of robbery with a dangerous weapon even though police failed to "discover a bomb, evidence of a bomb, or any bomb-making materials"); *State v. Jarrett*, 167 N.C. App. 336, 337, 341, 607 S.E.2d 661, 662, 664 (2004) (holding no error in the defendant's trial and conviction for robbery with a dangerous weapon even though "[a] gun was not found on defendant's body nor in the house from which [law enforcement] saw defendant exit"), *cert. denied*, 359 N.C. 324, 611 S.E.2d 840 (2005); *State v. Coatney*, 164 N.C. App. 599, 596 S.E.2d 472, 2004 WL 1191779, at *1, *3 (2004) (unpublished) (concluding that, on a charge of robbery with a dangerous weapon, "the evidence here entitled the State to a mandatory presumption that defendant used a firearm or dangerous weapon and endangered or threatened the victim's life," while noting that police did not recover a gun).

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| ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA | ) | |
| v. | ) | From Wake County |
| PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; AND THE STATE OF NORTH CAROLINA | ) | |

No. 52PA17-2

ORDER

A three-judge panel of the superior court dismissed plaintiff's complaint because the panel determined that it lacked jurisdiction over the subject matter of plaintiff's claims. Plaintiff now asks this Court to review that determination and to decide whether his claims have merit.

The Constitution of North Carolina vests the superior court with "original general jurisdiction throughout the State." N.C. Const. art. IV, § 12(3). That body is charged with hearing claims in the first instance, even when the issue presented is solely a question of law. By contrast, the Constitution vests this Court with "jurisdiction to review *upon appeal* any decision of the courts below, upon any matter of law or legal inference." *Id.* art. IV, § 12(1) (emphasis added). As we stated in *Greene v. Spivey*: "This is an appellate court. Our function, under the Constitution, is to review alleged errors and rulings of the trial court, and unless and until it is shown that a trial court ruled on a particular question, it is not given for us to make specific rulings thereon." 236 N.C. 435, 442, 73 S.E.2d 488, 493 (1952). As a result, without determining that we lack the authority to reach the merits of plaintiff's claims, we conclude that the proper administration of justice would be best served in the event that we allowed the panel, in the first instance, to address the merits of plaintiff's claims before undertaking to address them ourselves.

Nevertheless, this Court does have the constitutional authority to "issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts" in this state. N.C. Const. art. IV, § 12(1). The Court also has the inherent authority to do what is reasonably necessary to ensure the proper administration of justice during the consideration of a case that is properly before us. In light of the importance of the issues presented by this case and the fact that a municipal election cycle is in progress, we invoke our authority to order:

1. That this case be certified to the panel with instructions for that court to enter a new order within 60 days that (a) explains the basis for its earlier determination that it lacked jurisdiction to reach the merits of the claims advanced in plaintiff's complaint and (b) addresses the issues that plaintiff has raised on the merits.

2. That, immediately following the entry of the panel's new order, this case be certified back to this Court for a final appellate decision.

3. That the order of this Court, dated 20 July 2017, which resolves plaintiff's petition for writ of supersedeas, be amended to add the following paragraph:

   > "4. Until this case is resolved by the Court, any county board of elections with a vacancy reducing its membership to two members—such that the board cannot meet quorum requirements under Sections 7.(h) and 7.(i) of Session Law 2017-6—may meet and conduct business under N.C.G.S. §§ 163-30 and -31 (2015), with a quorum and unanimous assent of two members."

4. That the parties retain the right to petition for the purpose of obtaining any modifications to this order and the prior order of the Court, dated 20 July 2017, that they deem necessary to preserve the status quo and to ensure the orderly and lawful conducting of local and other elections during the consideration of this case by this Court, with any such modification requests to be directed to the panel from the date of the issuance of this order until the panel certifies its new order to this Court in accordance with Paragraph No. 2 above.

By order of the Court in Conference, this the 1st day of September, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of September, 2017.

s/J. Bryan Boyd

J. BRYAN BOYD
Clerk of the Supreme Court

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| MARGARET DICKSON, ET AL. | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| ROBERT RUCHO, ET AL. | ) | |
| | ) | From Wake County |
| NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP, ET AL. | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| THE STATE OF NORTH CAROLINA, ET AL. | ) | |

No. 201PA12-4

AMENDED ORDER

On 30 May 2017, the Supreme Court of the United States granted certiorari and vacated and remanded this Court's judgment in *Dickson v. Rucho*, 368 N.C. 481, 781 S.E.2d 404 (2015), *modified*, 368 N.C. 673, 789 S.E.2d 436 (2016) (order). *Dickson v. Rucho*, 137 S. Ct. 2186, 198 L. Ed. 2d 252 (2017) (mem.). The Supreme Court's instruction to this Court is to review *Dickson* "for further consideration in light of *Cooper v. Harris*, 581 U.S. ___ (2017)." *Id*. at 2186, 198 L. Ed. 2d at 252. Pursuant to the Supreme Court's remand and instruction, and after careful consideration, this Court remands this case to the trial court to determine whether (1) in light of *Cooper v. Harris* and *North Carolina v. Covington*, a controversy exists or if this matter is moot in whole or in part; (2) there are other remaining collateral state and/or federal issues that require resolution; and (3) other relief may be proper. *See Cooper v. Harris*, 581 U.S. ___, 137 S. Ct. 1455, 197 L. Ed. 2d 837 (2017); *North Carolina v. Covington*, 581 U.S. ___, 137 S. Ct. 1624, 198 L. Ed. 2d 110 (2017) (per curiam); *North Carolina v. Covington*, 137 S. Ct. 2211, 198 L. Ed. 2d 655 (2017) (mem.).

By order of the Court in Conference, this the 9th day of October, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of October, 2017.

s/J. Bryan Boyd

J. Bryan Boyd
Clerk of the Supreme Court

**IN RE COLVARD**

[370 N.C. 205 (2017)]

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| IN THE MATTER OF HELEN MAE CASE COOPER WALLS HOUSE, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program | ) | Industrial Commission |
| IN THE MATTER OF RUBY JACQUELINE BROWN DAVIS, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program | ) | Industrial Commission |
| IN THE MATTER OF MARTIN WILLIAM ZIMMERMAN, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program | ) | Industrial Commission |
| IN THE MATTER OF GENEVA MORAGNE WARE, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program | ) | Industrial Commission |
| IN THE MATTER OF MAXINE COLVARD, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program | ) | Industrial Commission |

Nos. 101P16, 146P16, 147P16, 177P16, and 178P16

ORDER

The petitions for discretionary review filed in cases 146P16, 147P16, 177P16, and 178P16 are allowed for the limited purpose of reversing the Court of Appeals' dismissal of claimants' constitutional claims. These cases are remanded to the Court of Appeals for expedited consideration of the constitutional claims on the merits. *See In re Redmond*, ___ N.C. ___, ___, 797 S.E.2d 275, 280 (2017) ("When an appeal lies directly to the Appellate Division from an administrative tribunal, . . . a constitutional challenge may be raised for the first time in the Appellate Division as it is the first destination for the dispute in the General Court of Justice.").

To prevent manifest injustice, the petition for discretionary review filed in case 101P16 is allowed for the limited purpose of remanding the case to the Court of Appeals for expedited consideration of claimant's constitutional claim on the merits.

By Order of the Court in Conference, this 26th day of September, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 26th day of September, 2017.

s/J. Bryan Boyd

J. BRYAN BOYD
Clerk of the Supreme Court

**STATE v. CHOLON**

[370 N.C. 207 (2017)]

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| STATE OF NORTH CAROLINA | ) | |
| | ) | |
| v. | ) | From Onslow County |
| | ) | |
| DEREK JACK CHOLON | ) | |

No. 87PA17

ORDER

Defendant's petition for discretionary review is allowed for the limited purpose of vacating the decision of the Court of Appeals and remanding to that court with instructions for further remand to the trial court to hold an evidentiary hearing on defendant's motion for appropriate relief in light of *State v. Todd*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2017) (18A14-2) (remanding for determination of whether counsel made a particular strategic decision and if so, whether such decision was reasonable), *State v. Thomas*, 327 N.C. 630, 630, 397 S.E.2d 79, 80 (1990) (remanding to determine whether the "defendant knowingly consented to trial counsel's concessions of guilt to the jury"), and other relevant authority. The trial court shall enter findings of facts and conclusions of law and determine whether defendant is entitled to relief.

By Order of the Court in Conference, this 28th day of September, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 29th day of September, 2017.

J. BRYAN BOYD
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

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| STATE OF NORTH CAROLINA | ) | |
| | ) | |
| v. | ) | From Robeson County |
| | ) | |
| ROCKY KURT WILIAMSON | ) | |

No. 66P17

AMENDED ORDER

State's petition for discretionary review is allowed for the limited purpose of vacating the decision of the Court of Appeals and remanding to that court with instructions for further remand to the trial court to hold an evidentiary hearing on defendant's motion for appropriate relief based on recanted testimony, following the standard set forth in this Court's opinion in *State v. Britt*, 320 N.C. 705, 360 S.E.2d 660 (1987), *superseded in part on other grounds by statute as stated in State v. Defoe*, 364 N.C. 29, 33-38, 691 S.E.2d 1, 4-7 (2010). The trial court shall enter findings of fact and conclusions of law and determine whether defendant is entitled to relief.

By Order of the Court in Conference, this 28th day of September, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 29th day of September, 2017.

J. BRYAN BOYD
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

28 SEPTEMBER 2017

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| 035P17 | State v. Luis Alberto Rodriguez and Matthew L. Gregory, Bail Agent and Financial Casualty & Surety, Surety | Def's (Matthew L. Gregory) PDR Under N.C.G.S. § 7A-31 (COA16-76) | Denied |
| 039P17 | Arthur O. Armstrong v. North Carolina, et al. | 1. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*<br>2. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*<br>3. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*<br>4. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*<br>5. Plt's *Pro Se* Motion for Leave to File a Writ of Mandamus<br>6. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*<br>7. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*<br>8. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*<br>9. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*<br>10. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*<br>11. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*<br>12. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*<br>13. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*<br>14. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*<br>15. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*<br>16. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*<br>17. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*<br>18. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*<br>19. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 1. Denied<br>2. Denied<br>3. Denied<br>4. Denied<br>5. Denied<br>6. Denied<br>7. Denied<br>8. Denied<br>9. Denied<br>10. Denied<br>11. Denied<br>12. Denied<br>13. Denied<br>14. Denied<br>15. Denied<br>16. Denied<br>17. Denied<br>18. Denied<br>19. Denied |

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

28 SEPTEMBER 2017

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| | | 20. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 20. Denied |
| | | 21. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 21. Denied |
| | | 22. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 22. Denied |
| | | 23. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 23. Denied |
| | | 24. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 24. Denied |
| | | 25. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 25. Denied |
| | | 26. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 26. Denied |
| | | 27. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 27. Denied |
| | | 28. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 28. Denied |
| | | 29. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 29. Denied |
| | | 30. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 30. Denied |
| | | 31. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 31. Denied |
| | | 32. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 32. Denied |
| | | 33. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 33. Denied |
| | | 34. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 34. Denied |
| | | 35. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 35. Denied |
| | | 36. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 36. Denied |
| | | 37. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 37. Denied<br>**Ervin, J., recused** |
| 040P17 | Arthur O. Armstrong v. North Carolina, et al. | 1. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 1. Denied |
| | | 2. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 2. Denied |
| | | 3. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 3. Denied |

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

28 SEPTEMBER 2017

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| | 4. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 4. Denied |
| | 5. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 5. Denied |
| | 6. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 6. Denied |
| | 7. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 7. Denied |
| | 8. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 8. Denied |
| | 9. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 9. Denied |
| | 10. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 10. Denied |
| | 11. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 11. Denied |
| | 12. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 12. Denied |
| | 13. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 13. Denied |
| | 14. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 14. Denied |
| | 15. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 15. Denied |
| | 16. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 16. Denied |
| | 17. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 17. Denied |
| | 18. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 18. Denied 1 |
| | 19. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 9. Denied |
| | 20. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 20. Denied |
| | 21. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 21. Denied |
| | 22. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 22. Denied |
| | 23. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 23. Denied |
| | 24. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 24. Denied |
| | 25. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 25. Denied |

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| | | 26. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 26. Denied |
| | | 27. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 27. Denied |
| | | 28. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 28. Denied |
| | | 29. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 29. Denied |
| | | 30. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 30. Denied |
| | | 31. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 31. Denied |
| | | 32. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 32. Denied |
| | | 33. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 33. Denied |
| | | 34. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 34. Denied |
| | | 35. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 35. Denied |
| | | 36. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 36. Denied |
| | | 37. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 37. Denied |
| | | 38. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 38. Denied |
| | | 39. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 39. Denied |
| | | 40. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 40. Denied |
| 041P17 | Arthur O. Armstrong v. North Carolina, et al. | 1. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 1. Denied |
| | | 2. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 2. Denied |
| | | 3. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 3. Denied |
| | | 4. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 4. Denied |
| | | 5. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 5. Denied |
| | | 6. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 6. Denied |
| | | 7. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 7. Denied |

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

28 SEPTEMBER 2017

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| | | 8. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 8. Denied |
| | | 9. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 9. Denied |
| | | 10. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 10. Denied |
| | | 11. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 11. Denied |
| | | 12. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 12. Denied |
| | | 13. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 13. Denied |
| | | 14. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 14. Denied |
| | | 15. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 15. Denied |
| | | 16. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 16. Denied |
| | | 17. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 17. Denied |
| | | 18. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 18. Denied |
| | | 19. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 19. Denied |
| 052PA17-2 | Cooper v. Berger, et al. | State of N.C.'s Consent Petition for Modification of Order Dated 20 July 2017 | Special Order **09/01/2017** |
| 052PA17-2 | Cooper v. Berger, et al. | State's Motion to Amend State's Response to the Court's 17 August 2017 Order | Allowed **08/25/2017** |
| 061P17 | RME Management, LLC v. Chapel H.O.M. Associates, LLC & Chapel Hill Motel Enterprises, Inc. | Plt's PDR Under N.C.G.S. § 7A-31 (COA16-596) | Denied |
| 063P15-3 | State v. Isidro Garcia Hernandez | Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP16-288) | Dismissed **Ervin, J., recused** |

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

28 SEPTEMBER 2017

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| 066P17 | State v. Rocky Kurt Williamson | 1. State's Motion for Temporary Stay (COA16-631)<br><br>2. State's Petition for *Writ of Supersedeas*<br><br>3. State's PDR Under N.C.G.S. § 7A-31<br><br>4. State's Petition for *Writ of Certiorari* to Review Order of COA | 1. Allowed **02/27/2017** Dissolved **09/28/2017**<br><br>2. Denied<br><br>3. Special Order<br><br>4. Dismissed as moot |
| 072P17-3 | Lequan Fox v. State of N.C. | Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* | Denied **09/21/2017** |
| 078P17 | In the Matter of the Foreclosure of a Deed of Trust Executed by Bruce J. Adams Dated December 28, 2004 and Recorded in Book 18194 at Page 265 in the Mecklenburg County Public Registry, North Carolina | 1. Appellant's Motion for Temporary Stay (COA16-653)<br><br>2. Appellant's Petition for *Writ of Supersedeas*<br><br>3. Appellant's PDR Under N.C.G.S. § 7A-31 | 1. Allowed **03/13/2017** Dissolved **09/28/2017**<br><br>2. Denied<br><br>3. Denied |
| 087P17 | State v. Derek Jack Cholon | Def's PDR Under N.C.G.S. § 7A-31 (COA16-4) | Special Order |
| 101P16 | In the Matter of Helen Mae Case Cooper Walls House, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program | Claimant's PDR Under N.C.G.S. § 7A-31 (COA15-879) | Special Order **09/26/2017** |
| 115P17 | State v. Dean Michael Varner | 1. State's Motion for Temporary Stay (COA16-591)<br><br>2. State's Petition for *Writ of Supersedeas*<br><br>3. State's PDR Under N.C.G.S. § 7A-31 | 1. Allowed **04/12/2017**<br><br>2. Allowed<br><br>3. Allowed |
| 120P17 | State v. Shymel D. Jefferson | Def's PDR Under N.C.G.S. § 7A-31 (COA16-745) | Denied |

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

28 SEPTEMBER 2017

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| 138P17 | State v. Vinni Vaugier Valentine | Def's PDR Under N.C.G.S. § 7A-31 (COA16-427) | Denied |
| 143P17 | Melissa Lovelace, Administrator of the Estate of Johnny Lee Whitley, Deceased Employee v. B&R Auto Service, Inc., Employer; et al. | Plt's PDR Under N.C.G.S. § 7A-31 (COA16-1045) | Denied |
| 145P17 | In the Matter of A.P. | 1. Petitioners' Motion for Temporary Stay (COA16-1010)<br>2. Petitioners' Petition for *Writ of Supersedeas*<br>3. Petitioners' PDR Under N.C.G.S. § 7A-31 | 1. Allowed **05/09/2017**<br>2. Allowed<br>3. Allowed |
| 146P16 | In the Matter of Ruby Jacqueline Brown Davis, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program | Claimant's PDR Under N.C.G.S. § 7A-31 (COA15-882) | Special Order **09/26/2017** |
| 146P17 | Wayne T. Brackett, Jr. v. Kelly J. Thomas, Commissioner | Respondent's PDR Under N.C.G.S. § 7A-31 (COA16-912) | Allowed |
| 147P16 | In the Matter of Martin William Zimmerman, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program | Claimant's PDR Under N.C.G.S. § 7A-31 (COA15-937) | Special Order **09/26/2017** |
| 156P17 | Christopher DiCesare, James Little, and Johanna MacArthur, Individually and on behalf of all others similarly situated v. The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas HealthCare System | 1. Def's Petition for *Writ of Certiorari* to Review Order of N.C. Business Court<br>2. North Carolina Hospital Association's Motion for Leave to File Amicus Brief | 1. Denied<br>2. Dismissed as moot |

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

28 SEPTEMBER 2017

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| 157A17 | Rexnord Corporation, Zurn Industries, LLC, and Green Turtle Americas, LTD v. Sun Drainage Products, LLC and James R. Bauer | Joint Motion to Dismiss Appeal | Allowed **08/18/2017** |
| 158P06-15 | State v. Derrick D. Boger | 1. Def's *Pro Se* Motion for Tort Claim<br>2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*<br>3. Def's *Pro Se* Motion to Appeal<br>4. Def's *Pro Se* Motion for *Writ of Coram Nobis* | 1. Dismissed<br>2. Allowed<br>3. Dismissed<br>4. Denied |
| 175P17 | In the Matter of T.K. | 1. State's Motion for Temporary Stay (COA16-1047)<br>2. State's Petition for *Writ of Supersedeas*<br>3. State's PDR Under N.C.G.S. § 7A-31 | 1. Allowed **06/05/2017** Dissolved **09/28/2017**<br>2. Denied<br>3. Denied |
| 177P16 | In the Matter of Geneva Moragne Ware, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program | Claimant's PDR Under N.C.G.S. § 7A-31 (COA15-909) | Special Order **09/26/2017** |
| 177P17 | Du Phan d/b/a Good Food Market v. Clinard Oil Company, Inc. | Plt's PDR Under N.C.G.S. § 7A-31 (COA16-1083) | Denied |
| 178P16 | In the Matter of Maxine Colvard, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program | Claimant's PDR Under N.C.G.S. § 7A-31 (COA15-923) | Special Order **09/26/2017** |
| 188P17 | State v. Layton Allen Waters | Def's PDR Under N.C.G.S. § 7A-31 (COA16-985) | Denied |

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

28 SEPTEMBER 2017

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| 192P17 | In the Matter of the Foreclosure of a Deed of Trust Executed by Holly B. Rankin and Darrin L. Rankin (Present Record Owner(s): Mozijah Bailey and Wendy Carolina Lopez) and (Darrin L. Rankin, as to Life Estate Only) in the Original Amount of $307,920.00 Dated October 4, 2006, Recorded in Book 21173, Page 276, Mecklenburg County Registry Substitute Trustee Services, Inc., Substitute Trustee | 1. Respondent's (Mozijah Bailey) Motion for Temporary Stay (COA16-771)<br>2. Respondent's (Mozijah Bailey) Petition for *Writ of Supersedeas*<br>3. Respondent's (Mozijah Bailey) PDR Under N.C.G.S. § 7A-31<br>4. Petitioner's Motion for Sanctions | 1. Allowed **6/16/2017** Dissolved **09/28/2017**<br>2. Denied<br>3. Denied<br>4. Denied |
| 207P17 | State v. Michael Anthony Scaturro, Jr. | 1. State's Motion for Temporary Stay (COA16-1026)<br>2. State's Petition for *Writ of Supersedeas*<br>3. State's PDR Under N.C.G.S. § 7A-31<br>4. Def's Conditional PDR Under N.C.G.S. § 7A-31 | 1. Allowed **06/23/2017** Dissolved **09/28/2017**<br>2. Denied<br>3. Denied<br>4. Dismissed as moot |
| 218P17 | NNN Durham Office Portfolio 1, LLC, et al. v. Grubb & Ellis Company, et al. | 1. Plts' PDR Prior to a Decision of the COA (COA17-607)<br>2. Defs' Conditional PDR Prior to a Decision of the COA | 1. Denied<br>2. Dismissed as moot |
| 219P17 | Courtney NC, LLC d/b/a Oakwood Raleigh at Brier Creek v. Monette Baldwin a/k/a Nell Monette Baldwin | 1. Def's *Pro Se* Motion for Temporary Stay (COAP17-459)<br>2. Def's *Pro Se* Petition for *Writ of Supersedeas*<br>3. Def's *Pro Se* Motion for Notice of Appeal<br>4. Plt's Motion to Dismiss Appeal<br>5. Def's *Pro Se* Motion to Amend Petition for *Writ of Supersedeas* and Motion to Stay<br>6. Def's P*ro Se* Motion to Enlarge Time to Accept Response and Motion to Treat Petition for *Writ of Supersedeas* to Petition for *Certiorari* to Review Order | 1. Denied **07/07/2017**<br>2. Denied<br>3. ---<br>4. Allowed<br>5. Dismissed as moot<br>6. Dismissed as moot |

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

28 SEPTEMBER 2017

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| | | 7. Def's *Pro Se* Revised Motion to Amend Petition for *Writ of Supersedeas* and Motion to Stay | 7. Dismissed as moot |
| | | 8. Def's *Pro Se* Motion for Sanctions | 8. Dismissed as moot |
| | | 9. Def's *Pro Se* Motion for Leave to Add a Supplement to Revised Motion to Amend Petition for *Writ of Supersedeas* and Motion to Stay | 9. Dismissed as moot |
| | | 10. Def's *Pro Se* Motion to Make (Unrevised) Petition for *Writ of Supersedeas*/Motion to Stay Moot | 10. Dismissed as moot |
| | | 11. Def's *Pro Se* Motion for Leave to Supplement Petition for *Writ of Supersedeas*/Motion to Stay | 11. Dismissed as moot |
| | | 12. Def's *Pro Se* Motion for Extraordinary Reasons and in the Interest of Justice, for Leave Out of Time to Renew Application for Stay | 12. Dismissed as moot |
| | | 13. Def's *Pro Se* Motion to Supplement the Application for Extraordinary Reasons and in the Interest of Justice for Leave Out of Time to Review Application for Stay | 13. Dismissed as moot |
| | | 14. Def's *Pro Se* Motion to Supplement Motion for Leave Out of Time to Renew Application for Stay with Motion for Temporary Stay Pending a Motion for Writ of Restitution | 14. Dismissed as moot |
| | | 15. Def's *Pro Se* Motion to Review Appeal to the Right as *Certiorari* Review | 15. Dismissed as moot |
| | | 16. Def's *Pro Se* Motion to Withdraw Appeal to the Right from the COA | 16. Dismissed as moot |
| | | 17. Def's *Pro Se* Revised Motion to Amend Her Petition for a *Writ of Supersedeas* and Motion to Stay with the Attached Amended Petition Corrected to Form in the Alternative to be a Petition for *Writ of Certiorari* | 17. Dismissed as moot |
| | | 18. Def's *Pro Se* Motion for Sanctions and Leave to Speak | 18. Dismissed as moot<br>**Beasley and Morgan, JJ., recused** |
| 220P17 | State v. Alfred Lamont Butler a/k/a Hakeem Ahbad Muhammad | Def's PDR Under N.C.G.S. § 7A-31 (COA16-1255) | Denied |

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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|---|---|---|---|
| 226P17 | State v. Michael Arnold Gillespie | Def's PDR Under N.C.G.S. § 7A-31 (COA16-881) | Denied |
| 228P17 | State v. Corey Montrez McCree | 1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-690)<br>2. Def's PDR Under N.C.G.S. § 7A-31<br>3. State's Motion to Dismiss Appeal | 1. ---<br>2. Denied<br>3. Allowed |
| 233P17 | State v. Curtis Leon Abney | Def's PDR Under N.C.G.S. § 7A-31 (COA16-840) | Denied |
| 238P17 | Kaleb Lee Roberts v. Mars Hill University and Mars Hill University Board of Trustees | Plt's PDR Under N.C.G.S. § 7A-31 (COA16-1093) | Denied |
| 239A17 | State v. Jose Daniel Gonzalez | Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA16-1325) | Dismissed |
| 242P17 | State v. Michael M. Williams | *Def's Pro Se Motion for PDR (COAP17-302)* | Dismissed |
| 246P17 | State v. Jerimy Rashaud Love | 1. Def's *Pro Se* Motion for Appointment of Counsel<br>2. Def's *Pro Se* Motion for Notice of Appeal (COAP17-337)<br>3. Def's *Pro Se* Motion for PDR<br>4. Def's *Pro Se* Petition for *Writ of Certiorar*i to Review Order of Superior Court, Cabarrus County | 1. Dismissed as moot<br>2. Dismissed *ex mero motu*<br>3. Denied<br>4. Denied<br>**Ervin, J., recused** |
| 247P17 | State v. Francis L. DeMaio, Sr. | Def's *Pro Se* Motion for PDR (COAP16-397) | Dismissed |
| 248P17 | State v. Jason Rodger Dubose | Def's PDR Under N.C.G.S. § 7A-31 (COA16-169) | Denied |
| 249P17 | Columbus County Department of Social Services *ex rel.* Tiffanee A. Moore v. Calvin T. Norton | 1. Def's *Pro Se* Motion for Temporary Stay (COA16-735)<br>2. Def's *Pro Se* Petition for *Writ of Supersedeas*<br>3. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question<br>4. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 | 1. Denied **08/02/2017**<br>2. Denied<br>3. Dismissed *ex mero motu*<br>4. Denied |

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|---|---|---|---|
| 253P09-2 | State v. Quintis Travon Spruiell | 1. Def's Motion for Temporary Stay (COA16-639)<br>2. Def's Petition for *Writ of Certiorari* to Review Order of COA<br>3. Def's PDR Under N.C.G.S. § 7A-31<br>4. Def's Petition for *Writ of Certiorari* to Review Order of COA | 1. Denied **01/10/2017**<br>2. Denied<br>3. Denied<br>4. Denied |
| 254P17 | State v. Stephen David Brown | 1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-1044)<br>2. Def's PDR Under N.C.G.S. § 7A-31 | 1. Dismissed *ex mero motu*<br>2. Denied |
| 255A17 | Billy Bruce Justice as Administrator of the Estate of Pamela Jane Justus v. Michael J. Rosner, M.D.; Michael J. Rosner, M.D., P.A.; Fletcher Hospital, Inc., d/b/a Park Ridge Hospital; Adventist Health System; and Adventist Health System Sunbelt Healthcare Corporation | 1. Defs' (Michael J. Rosner, M.D., and Michael J. Rosner, M.D., P.A.) Notice of Appeal Based Upon a Dissent (COA15-1196)<br>2. Defs' (Michael J. Rosner, M.D., and Michael J. Rosner, M.D., P.A.) PDR as to Additional Issues | 1. ---<br>2. Allowed |
| 258P17 | State v. Franklin Thomas Street | Def's PDR Under N.C.G.S. § 7A-31 (COA16-307) | Denied |
| 260P17 | Amy Betts v. Stephen Brett Armstrong, et al. | 1. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Cabarrus County<br>2. Petitioner's *Pro Se* Petition for Writ of Prohibition<br>3. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis*<br>4. Respondents Eric Costine and Edward S. (Ted) Shapack's Motion to Dismiss Petition for *Writ of Certiorari* and Writ of Prohibition | 1. Denied<br>2. Denied<br>3. Allowed<br>4. Dismissed as moot |
| 261P17 | State v. Jairus Tyrone Henley | Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-1171) | Denied |
| 262A17 | Dr. Peter C. Benedith v. Wake Forest Baptist Medical Center | Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA17-284) | Dismissed |

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| 264P17 | State v. Lewis Edward Person | 1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Wake County<br>2. Def's *Pro Se* Motion for Notice of Appeal | 1. Dismissed<br>2. Dismissed |
| 267P17 | Lewis E. Person v. Johnney Hawkins/ Josh Stein | Defs' *Pro Se* Motion for Notice of Appeal (COAP17-489) | Dismissed |
| 269P17 | In the Matter of G.M.C., T.L.C. | Respondent-Mother's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-1257) | Denied |
| 271P17 | Barbara G. O'Neal, By and Through G. Elvin Small, III, Guardian of the Estate of Barbara G. O'Neal v. Pamela Sue O'Neal; Pamela Sue O'Neal, Trustee of Barbara O'Neal Land Trust; Pamela Sue O'Neal, as Trustee of Barbara O'Neal Farm Land Trust; Pamela Sue O'Neal, as Trustee of Barbara O'Neal Barco Land Trust; Barbara O'Neal Land Trust; Barbara O'Neal Farm Land Trust; Barbara O'Neal Barco Land Trust; and Lori Ann Chappell | Defendants' (Pamela Sue O'Neal, Individually and as Trustee) PDR Under N.C.G.S. § 7A-31 (COA16-1299) | Denied |
| 275P17 | State v. Fronta Lamont Gilchrist | 1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Guilford County<br>2. Def's *Pro Se* Motion to Appoint Counsel | 1. Dismissed<br>2. Dismissed as moot |
| 278P17 | State v. John Andrew Maddux | 1. State's Motion for Temporary Stay (COA16-1248)<br>2. State's Petition for *Writ of Supersedeas* | 1. Allowed **08/18/2017**<br>2. |
| 279PA16 | In the Matter of M.A.W. | Guardian Ad Litem's Motion to Amend New Brief | Allowed **08/25/2017** |

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|---|---|---|---|
| 280A17 | State v. James Edward Arrington | 1. State's Motion for Temporary Stay<br><br>2. State's Petition for *Writ of Supersedeas* | 1. Allowed **08/18/2017**<br><br>2. |
| 281P17 | State v. Christopher Scott Ellis | 1. State's Motion for Temporary Stay (COA16-938)<br><br>2. State's Petition for *Writ of Supersedeas* | 1. Allowed **08/18/2017**<br><br>2. |
| 287P17 | John Fitzgerald Moore, Sr. v. Board of Elections of Henderson County | 1. Petitioner's Motion for Temporary Stay (COAP17-594)<br><br>2. Petitioner's Petition for *Writ of Supersedeas*<br><br>3. Petitioner's Petition for Writ of Prohibition<br><br>4. Petitioner's Petition for *Writ of Certiorari* to Review Order of COA | 1. Denied **08/28/2017**<br><br>2.<br><br>3.<br><br>4. |
| 290A17 | State v. Marcus Marcel Smith | 1. State's Motion for Temporary Stay (COA16-1229)<br><br>2. State's Petition for *Writ of Supersedeas* | 1. Allowed **08/28/2017**<br><br>2. |
| 291P17 | State v. Richard W. Williams | 1. Def's *Pro Se* Motion for PDR<br><br>2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* | 1. Dismissed<br><br>2. Allowed<br><br>**Beasley and Morgan, JJ., recused** |
| 292P17 | State v. Walter Columbus Simmons | 1. State's Motion for Temporary Stay<br><br>2. State's Petition for *Writ of Supersedeas* | 1. Allowed **08/29/2017**<br><br>2. |
| 293P17 | Poor Substitute Trustee, LTD., Substitute Trustee v. Guy E. Franklin and Rita Thomas Franklin | 1. Defs' *Pro Se* Motion for Temporary Stay (COAP17-625)<br><br>2. Defs' *Pro Se* Petition for *Writ of Supersedeas* | 1. Dismissed **08/31/2017**<br><br>2. Denied |
| 295P17 | State v. Terry Jerome Wilson | 1. State's Motion for Temporary Stay (COA16-1212)<br><br>2. State's Petition for *Writ of Supersedeas* | 1. Allowed **09/01/2017**<br><br>2. |

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|---|---|---|---|
| 296P17 | In Re Foreclosure of Real Property Under Deed of Trust from Melvin R. Clayton and Jackie B. Clayton, in the original amount of $165,000.00, and dated June 13, 2008 and Recorded on June 18, 2008 in Book 2083 at Page 506, Henderson County Registry Trustee Services of Carolina, LLC, Substitute Trustee | 1. Respondent's (Jackie B. Clayton) PDR Under N.C.G.S. § 7A-31 (COA16-960)<br>2. Respondent's (Jackie B. Clayton) Petition for *Writ of Certiorari* to Review Decision of COA<br>3. Respondent's (Jackie B. Clayton) Petition for *Writ of Supersedeas*<br>4. Motion (Respondent's) for Temporary Stay | 1.<br>2.<br>3.<br>4. Allowed **09/18/2017** |
| 302A14 | State v. Juan Carlos Rodriguez | 1. State's Motion to Strike Def's Supplemental Brief<br>2. State's Motion in the Alternative for Leave to File State's Supplemental Brief | 1.<br>2. Allowed **09/26/2017** |
| 310A16 | Worley, et al. v. Moore, et al. | Plts' Motion to Admit Jerrold J. Ganzfried *Pro Hac Vice* | Allowed **08/24/2017**<br>**Ervin, J., recused** |
| 319A17 | State v. Ahmad Jamil Nicholson | 1. State's Motion for Temporary Stay (COA17-28)<br>2. State's Petition for *Writ of Supersedeas* | 1. Allowed **09/22/2017**<br>2. |
| 320P17 | In the Matter of the Imprisonment of Ryan Lamar Parsons | Def's *Pro Se* Petition for *Writ of Habeas Corpus* | Denied **09/25/2017** |
| 336P16-2 | WidenI77 v. North Carolina DOT, I-77 Mobility Partners LLC and State of North Carolina | 1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA16-818)<br>2. Plt's PDR Under N.C.G.S. § 7A-31<br>3. Defs' (N.C. Dept of Transportation and State of N.C.) Motion to Dismiss Appeal<br>4. Defs' (I-77 Mobility Partners, LLC) Motion to Dismiss Appeal | 1. ---<br>2. Denied<br>3. Allowed<br>4. Allowed |
| 404P16-2 | State v. Samson Jamarco Coleman | Def's *Pro Se* Motion for PDR (COAP16-719) | Denied **09/25/2017** |

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| 450P16 | Arthur O. Armstrong v. North Carolina, et al. | 1. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 1. Denied |
| | | 2. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 2. Denied |
| | | 3. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 3. Denied |
| | | 4. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 4. Denied |
| | | 5. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 5. Denied |
| | | 6. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 6. Denied |
| | | 7. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 7. Denied |
| | | 8. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 8. Denied |
| | | 9. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 9. Denied |
| | | 10. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 10. Denied |
| | | 11. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 11. Denied |
| | | 12. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 12. Denied |
| | | 13. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 13. Denied |
| | | 14. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 14. Denied |
| | | 15. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 15. Denied |
| | | 16. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 16. Denied |
| | | 17.Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 17. Denied |
| | | 18. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 18. Denied |
| | | 19. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 19. Denied |
| | | 20. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 20. Denied |
| | | 21. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 21. Denied |
| | | 22. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 22. Denied |

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| | 23. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 23. Denied |
| | 24. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 24. Denied |
| | 25. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 25. Denied |
| | 26. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 26. Denied |
| | 27. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 27. Denied |
| | 28. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 28. Denied |
| | 29. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 29. Denied |
| | 30. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 30. Denied |
| | 31. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 31. Denied |
| | 32. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 32. Denied |
| | 33. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 33. Denied |
| | 34. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 34. Denied |
| | 35. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 35. Denied |
| | 36. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 36. Denied |
| | 37. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 37. Denied |
| | 38. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 38. Denied |
| | 39. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 39. Denied |
| | 40. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 40. Denied |
| | 41. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 41. Denied |
| | 42. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 42. Denied |
| | 43. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 43. Denied |
| | 44. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 44. Denied |

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| | 45. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 45. Denied |
| | 46. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 46. Denied |
| | 47. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 47. Denied |
| | 48. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 48. Denied |
| | 49. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 49. Denied |
| | 50. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 50. Denied |
| | 51. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 51. Denied |
| | 52. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 52. Denied |
| | 53. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 53. Denied |
| | 54. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 54. Denied |
| | 55. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 55. Denied |
| | 56. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 56. Denied |
| | 57. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 57. Denied |
| | 58. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 58. Denied |
| | 59. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 59. Denied |
| | 60. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 60. Denied |
| | 61. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 61. Denied |
| | 62. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 62. Denied |
| | 63. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 63. Denied |
| | 64. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 64. Denied |
| | 65. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 65. Denied |
| | 66. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 66. Denied |

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| | 67. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 67. Denied |
| | 68. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 68. Denied |
| | 69. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 69. Denied |
| | 70. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 70. Denied |
| | 71. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 71. Denied |
| | 72. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 72. Denied |
| | 73. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 73. Denied |
| | 74. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 74. Denied |
| | 75. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 75. Denied |
| | 76. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 76. Denied |
| | 77. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 77. Denied |
| | 78. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 78. Denied |
| | 79. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 79. Denied |
| | 80. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 80. Denied |
| | 81. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 81. Denied |
| | 82. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 82. Denied |
| | 83. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 83. Denied |
| | 84. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 84. Denied |
| | 85. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 85. Denied |
| | 86. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 86. Denied |
| | 87. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 87. Denied |
| | 88. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 88. Denied |

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| | 89. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 89. Denied |
| | 90. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 90. Denied |
| | 91. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 91. Denied |
| | 92. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 92. Denied |
| | 93. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 93. Denied |
| | 94. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 94. Denied |
| | 95. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 95. Denied |
| | 96. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 96. Denied |
| | 97. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 97. Denied |
| | 98. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 98. Denied |
| | 99. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 99. Denied |
| | 100. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 100. Denied |
| | 101. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 101. Denied |
| | 102. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 102. Denied |
| | 103. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 103. Denied |
| | 104. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 104. Denied |
| | 105. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 105. Denied |
| | 106. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 106. Denied |
| | 107. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 107. Denied |
| | 108. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 108. Denied |
| | 109. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 109. Denied |
| | 110. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 110. Denied |

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| | 111. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 111. Denied |
| | 112. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 112. Denied |
| | 113. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 113. Denied |
| | 114. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 114. Denied |
| | 115. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 115. Denied |
| | 116. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 116. Denied |
| | 117. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 117. Denied |
| | 118. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 118. Denied |
| | 119. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 119. Denied |
| | 120. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 120. Denied |
| | 121. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 121. Denied |
| | 122.Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 122. Denied |
| | 123. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 123. Denied |
| | 124. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 124. Denied |
| | 125. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 125. Denied |
| | 126.Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 126. Denied |
| | 127.Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 127. Denied |
| | 128. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 128. Denied |
| | 129. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* s | 129. Denied |
| | 130. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 130. Denied |
| | 131. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 131. Denied |
| | 132. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 132. Denied |

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| | 133. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 133. Denied |
| | 134. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 134. Denied |
| | 135.Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 135. Denied |
| | 136. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 136. Denied |
| | 137. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 137. Denied |
| | 138.Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 138. Denied |
| | 139. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 139. Denied |
| | 140. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 140. Denied |
| | 141. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 141. Denied |
| | 142. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 142. Denied |
| | 143. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 143. Denied |
| | 144. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 144. Denied |
| | 145.Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 145. Denied |
| | 146.Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 146. Denied |
| | 147. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 147. Denied |
| | 148.Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 148. Denied |
| | 149. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 149. Denied |
| | 150. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 150. Denied |
| | 151.Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 151. Denied |
| | 152.Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 152. Denied |
| | 153. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 153. Denied |
| | 154. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 154. Denied |

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| | 155. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 155. Denied |
| | 156. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 156. Denied |
| | 157.Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 157. Denied |
| | 158. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 158. Denied |
| | 159. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 159. Denied |
| | 160. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 160. Denied |
| | 161. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 161. Denied |
| | 162. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 162. Denied |
| | 163. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 163. Denied |
| | 164. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 164. Denied |
| | 165. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 165. Denied |
| | 166. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 166. Denied |
| | 167. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 167. Denied |
| | 168. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 168. Denied |
| | 169. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 169. Denied |
| | 170. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 170. Denied |
| | 171. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 171. Denied |
| | 172. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 172. Denied |
| | 173. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 173. Denied |
| | 174. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 174. Denied |
| | 175. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 175. Denied |
| | 176. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 176. Denied |

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| | 177. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 177. Denied |
| | 178. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 178. Denied |
| | 179. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 179. Denied |
| | 180. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 180. Denied |
| | 181. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 181. Denied |
| | 182. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 182. Denied |
| | 183. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 183. Denied |
| | 184. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 184. Denied |
| | 185. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 185. Denied |
| | 186. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 186. Denied |
| | 187. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 187. Denied |
| | 188. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 188. Denied |
| | 189. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 189. Denied |
| | 190. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 190. Denied |
| | 191. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 191. Denied |
| | 192. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 192. Denied |
| | 193. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 193. Denied |
| | 194. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 194. Denied |
| | 195. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 195. Denied |
| | 196. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 196. Denied |
| | 197. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 197. Denied |
| | 198. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 198. Denied |

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| | 199. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 199. Denied |
| | 200. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 200. Denied |
| | 201. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 201. Denied |
| | 202. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 202. Denied |
| | 203. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 203. Denied |
| | 204. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 204. Denied |
| | 205. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 205. Denied |
| | 206. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 206. Denied |
| | 207. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 207. Denied |
| | 208. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 208. Denied |
| | 209. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 209. Denied |
| | 210. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 210. Denied |
| | 211. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 211. Denied |
| | 212. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 212. Denied |
| | 213. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 213. Denied |
| | 214. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 214. Denied |
| | 215. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 215. Denied |
| | 216. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 216. Denied |
| | 217. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 217. Denied |
| | 218. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 218. Denied |
| | 219.Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 219. Denied |
| | 220. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 220. Denied |

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| | 221. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 221. Denied |
| | 222. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 222. Denied |
| | 223. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 223. Denied |
| | 224. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 224. Denied |
| | 225. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 225. Denied |
| | 226. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 226. Denied |
| | 227. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 227. Denied |
| | 228.Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 228. Denied |
| | 229. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 229. Denied |
| | 230. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 230. Denied |
| | 231. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 231. Denied |
| | 232. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 232. Denied |
| | 233. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 233. Denied |
| | 234. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 234. Denied |
| | 235. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* | 235. Denied |

## AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 21, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability of attorneys, as particularly set forth in 27 N.C.A.C. 1B, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

**27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys**

**.0115 Proceedings Before the Disciplinary Hearing Commission: Pleadings and Prehearing Procedure**

(a) Complaint and Service - ...

(i) Settlement - The parties may meet by mutual consent prior to the hearing to discuss the possibility of settlement of the case or the stipulation of any issues, facts, or matters of law. Any proposed settlement of the case will be subject to the approval of the hearing panel. The hearing panel may reject a proposed settlement agreement but only after conducting a conference with the parties. The chairperson of the hearing panel will notify the counsel and the defendant of the date, time, and venue (e.g., in person, telephone, videoconference) of the conference. If, after the conference, the first hearing panel rejects a proposed settlement, another hearing panel must be empanelled to try the case, unless all parties consent to proceed with the original hearing panel. The parties may submit a proposed settlement to a second hearing panel and may, upon the agreement of both parties, request a conference with the panel, but the parties shall not have the right to request a third hearing panel if the proposed settlement is rejected by the second hearing panel. The second hearing panel shall either accept the settlement proposal or hold a hearing upon the allegations of the complaint.

(j) Settlement Conference - ...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 24, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 2017.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 28th day of September, 2017.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 28th day of September, 2017.

s/Michael R. Morgan
For the Court

## AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CERTIFICATION OF PARALEGALS

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 21, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning certification of paralegals, as particularly set forth in 27 N.C.A.C. 1G Section .0100, be amended by adding the following new rule:

**27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals**

**.0124 Retired Certified Paralegal Status**

(a) Petition for Status Change - The board shall transfer a certified paralegal to Retired Certified Paralegal status upon receipt of a petition, on a form approved by the board, demonstrating that the petitioner has satisfied the following conditions:

(1) Certified for five years or more;

(2) At least 55 years of age or older;

(3) Discontinued all work as a paralegal;

(4) Paid all fees owed to the board at the time of filing the petition; and

(5) The prohibitions on certification specified in Rule .0119(c) of this subchapter are not applicable to or formally alleged against the petitioner.

(b) Designation During Retired Status - During a period of retired status, the certified paralegal may represent that he or she is a "North Carolina State Bar Retired Certified Paralegal" or an appropriate variation thereof.

(c) No Annual Requirements - During a period of retired status, the paralegal shall not be required to file an annual renewal application pursuant to Rule .0120 of this subchapter, to pay an annual renewal fee, or to satisfy the annual continuing education requirements set forth in Rule .0120.

(d) Termination of Status - Retired certified paralegal status may continue for a period of time not to exceed a total of five years (or 60 months). At the end of five years (or 60 months) of retired status, certification will lapse and, to become a certified paralegal, the paralegal must

satisfy all requirements for initial certification set forth in Rule .0119(a). A certified paralegal's status may be changed from active to retired multiple times provided the five-year (60 months) period of retired status is not exceeded.

(e) Return to Active Status - A retired certified paralegal may return to active status at any time during the five-year period set forth in paragraph (d). To reactivate the "certified paralegal" credential, the certified paralegal shall file a petition with the board, on a form approved by the board, and shall pay a reactivation fee of $50. Upon transfer to active status by the board, the certified paralegal may hold herself or himself out as a "North Carolina State Bar Certified Paralegal" or an appropriate variation thereof. Thereafter, the certified paralegal shall complete continuing education and file annual renewal applications as required by Rule .0120 of this subchapter.

(f) Return to Work as Paralegal - A retired certified paralegal must file a petition for return to active status within 30 days of returning to work as a paralegal. Failure to do so will result in revocation of certification.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 21, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 2017.

s/L. Thomas Lunsford II
L. Thomas Lunsford II, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 28th day of September, 2017.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 28th day of September, 2017.

s/Michael R. Morgan
For the Court

## AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE IOLTA PROGRAM

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 21, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the IOLTA program, as particularly set forth in 27 N.C.A.C. 1D, Section .1300, be amended as follows (additions are underlined, deletions are interlined):

**27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar**

**Section .1300, Rules Governing the Administration of the Plan for Interest on Lawyers' Trust Accounts**

**Rule .1313 Fiscal Responsibility**

All funds of the board shall be considered funds of the North Carolina State Bar, with the beneficial interest in those funds being vested in the board for grants to qualified applicants in the public interest, less administrative costs. These funds shall be administered and disbursed by the board in accordance with rules or policies developed by the North Carolina State Bar and approved by the North Carolina Supreme Court. The funds shall be used only to pay the administrative costs of the IOLTA program and to fund grants approved by the board under

the four categories approved by the North Carolina Supreme Court as outlined above.

(a) Maintenance of Accounts: Audit - ...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 21, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 2017.

s/ L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 28th day of September, 2017.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 28th day of September, 2017.

s/Michael R. Morgan
For the Court

## AMENDMENT TO THE RULES AND REGULATIONS CONCERNING THE CLIENT SECURITY FUND OF THE NORTH CAROLINA STATE BAR

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 21, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the Client Security Fund, as particularly set forth in 27 N.C.A.C. 1D, Section .1400 be amended as follows (additions are underlined, deletions are interlined):

**27 N.C.A.C. 1D, Section .1400, Rules Governing the Administration of the Client Security Fund of the North Carolina State Bar**

**.1416 Appropriate Uses of the Client Security Fund**

(a) The board may use or employ the Fund for any of only the following purposes within the scope of the board's objectives as heretofore outlined:

(1) to make reimbursements on approved applications as herein provided;

(2) to purchase insurance to cover such losses in whole or in part as is deemed appropriate;

(3) to invest such portions of the Fund as may not be needed currently to reimburse losses, in such investments as are permitted to fiduciaries by the General Statutes of North Carolina;

(4) to pay the administrative expenses of the board, including employment of counsel to prosecute subrogation claims.

(b) ...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 21, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 2017.

s/ L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 28th day of September, 2017.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 28th day of September, 2017.

s/Michael R. Morgan
For the Court

## AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 28, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D Section .1700, be amended as follows (additions are underlined, deletions are interlined):

**27 N.C.A.C. 1D, Section .1700, The Plan for Legal Specialization**

**.1714 Meetings**

The annual meeting of the board shall be held in the spring ~~October~~ of each year ~~in connection with the annual meeting of the North Carolina State Bar~~. The board by resolution may set the annual meeting date and regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice-chairperson or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission, or telephone. A quorum of the board for conducting its official business shall be four or more of the members serving at the time of the meeting.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 28, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 2017.

s/L. Thomas Lunsford II
L. Thomas Lunsford II, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council

of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 28th day of September, 2017.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 28th day of September, 2017.

s/Michael R. Morgan
For the Court

## AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 21, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D Section .1700, be amended by adding the following new rule:

### 27 N.C.A.C. 1D, Section .1700, The Plan of Legal Specialization

### .1727 Inactive Status

(a) Petition for Inactive Status. The board may transfer a certified specialist to inactive status upon receipt of a petition, on a form approved by the board, demonstrating that the petitioner satisfies the following conditions:

(1) Certified for five years or more;

(2) Special circumstances unique to the specialist constituting undue hardship or other reasonable basis for exempting the specialist from the substantial involvement standard for continued certification; including, but not limited to, marriage to active-duty military personnel requiring frequent relocation, active duty in the military reserves, disability lasting a total of six months or more over a 12-month period of time, and illness of an immediate family member requiring leaves of absence from work in excess of six months or more over a 12-month period of time; and

(3) Discontinuation of all representations of specialist certification in all communications about the lawyer's practice.

(b) Duration of Inactive Status. If the petitioner qualifies, inactive status shall be granted by the board for a period of not more than one year at a time. No more than three years of inactive status, whether consecutive or periodic, shall be granted to any certified specialist.

(c) Designation During Inactive Status. During the period of inactive status, the certified specialist shall be listed in the board's records as inactive. An inactive specialist shall not represent that he or she is certified during any period of inactive status; however, an inactive specialist may advertise or communicate prior dates of certification (e.g., Board Certified Specialist in Family Law 1987-2003).

(d) Annual Requirements. During the period of inactive status, the specialist shall not be required to satisfy the substantial involvement standard for continued certification in the specialty or to pay any fees; however, the specialist shall be required to satisfy the continuing legal education (CLE) standard for continued certification in the specialty. If a five-year period of certification ends during a year of inactive status, application for continued certification pursuant to Rule .1721 of this subchapter shall be deferred until return to active status.

(e) Return to Active Status. To return to active status as a certified specialist, an inactive specialist shall petition the board on a form approved by the board. The inactive specialist shall be reinstated to active status upon demonstration that he or she satisfied the CLE standard for continued certification in the specialty and the recommendation of the specialty committee. Passage of a written examination in the specialty shall not be required unless the inactive specialist failed to satisfy the CLE standard for continued certification during the period of inactivity.

(f) The right to petition for inactive status pursuant to this rule is in addition to the right to request a waiver of substantial involvement allowed by Rule .1721(c) of this subchapter.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 21, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 2017.

s/ L. Thomas Lunsford II
L. Thomas Lunsford II, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 28th day of September, 2017.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 28th day of September, 2017.

s/Michael R. Morgan
For the Court

## AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PLAN OF LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 21, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the Plan of Legal Specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .3300, be amended as follows (additions are underlined, deletions are interlined):

### 27 N.C.A.C. 1D, Section .3300 Certification Standards for the Privacy and information Security Law Specialty (New Rule)

### .3301 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates privacy and information security law as a specialty for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

### .3302 Definition of Specialty

The specialty of privacy and information security law encompasses the laws that regulate the collection, storage, sharing, monetization, security, disposal, and permissible uses of personal or confidential information about individuals, businesses, and organizations, and the security of information regarding individuals and the information systems of businesses and organizations. The specialty also includes legal requirements and risks related to cyber incidents, such as external intrusions into

computer systems, and cyber threats, such as governmental information sharing programs.

**.3303 Recognition as a Specialist in Privacy and Information Security Law**

If a lawyer qualifies as a specialist in privacy and information security law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Privacy and Information Security Law."

**.3304 Applicability of Provisions of the North Carolina Plan of Legal Specialization**

Certification and continued certification of specialists in privacy and information security law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

**.3305 Standards for Certification as a Specialist in Privacy and Information Security Law**

Each applicant for certification as a specialist in privacy and information security law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet following standards for certification in privacy and information security law:

(a) Licensure and Practice - An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement - An applicant shall affirm to the board that the applicant has experience through substantial involvement in privacy and information security law.

(1) Substantial involvement shall mean that during the five years immediately preceding the application, the applicant devoted an average of at least 400 hours a year to the practice of privacy and information security law but not less than 300 hours in any one year.

(2) Practice shall mean substantive legal work in privacy and information security law done primarily for the purpose of providing legal advice or representation, including the activities described in paragraph (3), or a practice equivalent as described in paragraph (4).

(3) Substantive legal work in privacy and information security law includes, but is not limited to, representation on compliance, transactions and litigation relative to the laws that regulate the collection, storage, sharing, monetization, security, disposal, and permissible uses of

personal or confidential information about individuals, businesses, and organizations. Practice in this specialty requires the application of information technology principles including current data security concepts and best practices. Legal work in the specialty includes, but is not limited to, knowledge and application of the following: data breach response laws, data security laws, and data disposal laws; unauthorized access to information systems, such as password theft, hacking, and wiretapping, including the Stored Communications Act, the Wiretap Act, and other anti-interception laws; cyber security mandates; website privacy policies and practices, including the Children's Online Privacy Protection Act (COPPA); electronic signatures and records, including the Electronic Signatures in Global and National Commerce Act (E-SIGN Act) and the Uniform Electronic Transactions Act (UETA); e-commerce laws and contractual legal frameworks related to privacy and data security such as Payment Card Industry Data Security Standards (PCI-DSS) and the NACHA rules; direct marketing, including the CAN-SPAM Act, Do-Not-Call, and Do-Not-Fax laws; international privacy compliance, including the European Union data protection requirements; social media policies and regulatory enforcement of privacy-related concerns pertaining to the same; financial privacy, including the Gramm-Leach-Bliley Act, the Financial Privacy Act, the Bank Secrecy Act, and other federal and state financial laws, and the regulations of the federal financial regulators including the SEC, CFPB, and FinCEN; unauthorized transaction and fraudulent funds transfer laws, including the Electronic Funds Transfer Act and Regulation E, as well as the Uniform Commercial Code; credit reporting laws and other "background check" laws, including the Fair Credit Reporting Act; identity theft laws, including the North Carolina Identity Theft Protection Act and the Federal Trade Commission's "Red Flags" regulations; health information privacy, including the Health Information Portability and Accountability Act (HIPAA); educational privacy, including the Family Educational Rights and Privacy Act (FERPA) and state laws governing student privacy and education technology; employment privacy law; and privacy torts.

(4) "Practice equivalent" shall mean:

(a) Full-time employment as a compliance officer for a business or organization for one year or more during the five years prior to application may be substituted for an equivalent number of the years of experience necessary to meet the five-year requirement set forth in Rule .3305(b)(1) if at least 25% of the applicant's work was devoted to privacy and information security implementation.

(b) Service as a law professor concentrating in the teaching of privacy and information security law for one year or more during the five years prior to application may be substituted for an equivalent number of

years of experience necessary to meet the five-year requirement set forth in Rule .3305(b)(1);

(c) Continuing Legal Education - To be certified as a specialist in privacy and information security law, an applicant must have earned no less than 36 hours of accredited continuing legal education credits in privacy and information security law and related fields during the three years preceding application. The 36 hours must include at least 18 hours in privacy and information security law; the remaining 18 hours may be in related-field CLE or technical (non-legal) continuing education (CE). At least six credits each year must be earned in privacy and information security law. Privacy and information security law CLE includes but is not limited to courses on the subjects identified in Rule .3302 and Rule .3305(b)(3) of this subchapter. A list of the topics that qualify as related-field CLE and technical CE shall be maintained by the board on its official website.

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field to serve as references for the applicant. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice law in North Carolina or another jurisdiction in the United States; however, no more than five references may be licensed in another jurisdiction. References with legal or judicial experience in privacy and information security law are preferred. An applicant consents to confidential inquiry by the board or the specialty committee to the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a colleague at the applicant's place of employment at the time of the application. A lawyer who is in-house counsel for an entity that is the applicant's client may serve as a reference.

(2) Peer review shall be given on standardized forms mailed by the board to each reference. These forms shall be returned to the board and forwarded by the board to the specialty committee.

(e) Examination - An applicant must pass a written examination designed to demonstrate sufficient knowledge, skills, and proficiency in the field of privacy and information security law to justify the representation of special competence to the legal profession and the public.

(1) Terms - The examination shall be given at least once a year in written form and shall be administered and graded uniformly by the specialty

committee or by an organization determined by the board to be qualified to test applicants in privacy and information security law.

(2) Subject Matter - The examination shall test the applicant's knowledge and application of privacy and information security law.

**.3306 Standards for Continued Certification as a Specialist**

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .3306(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that, for each of the five years preceding application for continuing certification, he or she has had substantial involvement in the specialty as defined in Rule .3305(b) of this subchapter.

(b) Continuing Legal Education - The specialist must earn no less than 60 hours of accredited CLE credits in privacy and information security law and related fields during the five years preceding application for continuing certification. Of the 60 hours of CLE, at least 30 hours shall be in privacy and information security law, and the balance of 30 hours may be in related field CLE or technical (non-legal) CE. At least six credits each year must be earned in privacy and information security law. A list of the topics that qualify as related-field CLE and technical CE shall be maintained by the board on its official website.

(c) Peer Review - The specialist must comply with the requirements of Rule .3305(d) of this subchapter.

(d) Time for Application - Application for continued certification shall be made not more than 180 days, nor less than 90 days, prior to the expiration of the prior period of certification.

(e) Lapse of Certification - Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such a lapse, recertification will require compliance with all requirements of Rule .3305 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification - If an applicant's certification was suspended or revoked during a period of certification, the application shall be treated as if it were for initial certification under Rule .3305 of this subchapter.

**.3307 Applicability of Other Requirements**

The specific standards set forth herein for certification of specialists in privacy and information security law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 21, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 2017.

s/ L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 28th day of September, 2017.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 28th day of September, 2017.

s/Michael R. Morgan
For the Court

## AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 21, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct of the North Carolina State Bar, as particularly set forth in 27 N.C.A.C. 2, be amended as follows (additions are underlined, deletions are interlined except where noted):

**27 N.C.A.C. 2, Rules of Professional Conduct**

**Rule 1.3 Diligence**

A lawyer shall act with reasonable diligence and promptness in representing a client.

**Comment**

[1] ...

...

*Distinguishing Professional Negligence*

[6] ...

[7] Conduct ~~sufficient to warrant the imposition of~~ warranting the imposition of professional discipline under the rule is ~~typically~~ characterized by the element of intent ~~or scienter~~ manifested when a lawyer knowingly or recklessly disregards his or her obligations. Breach of the duty of diligence sufficient to warrant professional discipline occurs when a lawyer consistently fails to carry out the obligations that the lawyer has assumed for his or her clients. A pattern of delay, procrastination, carelessness, and forgetfulness regarding client matters indicates a knowing or reckless disregard for the lawyer's professional duties. For example, a lawyer who habitually misses filing deadlines and court dates is not taking his or her professional responsibilities seriously. A pattern of negligent conduct is not excused by a burdensome case load or inadequate office procedures.

**Rule 7.2 Advertising**

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) ...

**Comment**

[1] ...

[5] "Electronic communication(s)," as used in Section 7 of the Rules of Professional Conduct, refers to the transfer of writing, signals, data, sounds, images, signs or intelligence via an electronic device or over any electronic medium. Examples of electric communications include, but are not limited to, websites, email, text messages, social media messaging and image sharing. A lawyer who sends electronic communications to advertise or market the lawyer's professional services must comply with these Rules and with any state or federal restrictions on such communications. *See, e.g.*, N.C. Gen. Stat. §75-104; Telephone Consumer Protection Act, 47 U.S.C. §227; and 47 CFR 64.

~~[5]~~ [6] ...

[Renumbering remaining paragraphs.]

**Rule 7.3 Direct Contact With Potential Clients**

(a) A lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment from a potential client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) ...

(c) Targeted Communications. Unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), every written, recorded, or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the statement, in capital letters, "THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES" (the advertising notice), which shall be conspicuous and subject to the following requirements:

(1) Written Communications. ...

(2) Electronic Communications. The advertising notice shall appear in the "in reference" or subject box of the address or header section of the communication. No other statement shall appear in this block. The advertising notice shall also appear at the beginning and ending of

the electronic communication, in a font as large as or larger than any other printing in the body of the communication or in any masthead on the communication. If more than one color or type of font is used in the electronic communication, then the font of the advertising notice shall match in color, type, and size the largest and widest of the fonts. Nothing in the electronic communication shall be more conspicuous than the advertising notice.

(3) Recorded Communications. ...

(d) ...

**Comment**

[1] ...

[9] See Rule 7.2, cmt. [5] for the definition of "electronic communication(s)" as used in paragraph (c)(2) of this rule. A lawyer may not send electronic or recorded communications if prohibited by law. *See, e.g.*, N.C. Gen. Stat. §75-104; Telephone Consumer Protection Act 47 U.S.C. §227; and 47 CFR 64. "Real-time electronic contact" as used in paragraph (a) of this rule is distinct from the types of electronic communication identified in Rule 7.2, cmt. [5]. Real-time electronic contact includes, for example, video telephony (e.g., FaceTime) during which a potential client cannot ignore or delay responding to a communication from a lawyer.

~~[9]~~ [10] ...

**Rule 8.4 Misconduct**

It is professional misconduct for a lawyer to:

(a) ...

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness as a lawyer;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) ...

**Comment**

[1] ...

[2] ...A lawyer's dishonesty, fraud, deceit, or misrepresentation is not mitigated by virtue of the fact that the victim may be the lawyer's partner or law firm. A lawyer who steals funds, for instance, is guilty of ~~the most~~ **a** serious disciplinary violation regardless of whether the victim is the lawyer's employer, partner, law firm, client, or a third party.

[3] ...

[4] A showing of actual prejudice to the administration of justice is not required to establish a violation of paragraph (d). Rather, it must only be shown that the act had a reasonable likelihood of prejudicing the administration of justice. For example, in *State Bar v. DuMont*, 52 N.C. App. 1, 277 S.E.2d 827 (1981), modified on other grounds, 304 N.C. 627, 286 S.E.2d 89 (1982), the defendant was disciplined for advising a witness to give false testimony in a deposition even though the witness corrected his statement prior to trial. Conduct warranting the imposition of professional discipline under paragraph (d) is characterized by the element of intent or some other aggravating circumstance. The phrase "conduct prejudicial to the administration of justice" in paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings. In *State Bar v. Jerry Wilson*, 82 DHC 1, for example, a lawyer was disciplined for conduct prejudicial to the administration of justice after forging another individual's name to a guarantee agreement, inducing his wife to notarize the forged agreement, and using the agreement to obtain funds.

[5] ...

NORTH CAROLINA
WAKE COUNTY

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s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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This the 28th day of September, 2017.

s/Mark Martin
Mark D. Martin, Chief Justice

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This the 28th day of September, 2017.

s/Michael R. Morgan
For the Court

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