370 N.C.—No. 3 Pages 443-589

RULES OF APPELLATE PROCEDURE

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE 12, 2018

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

THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice

MARK D. MARTIN

Associate Justices

PAUL MARTIN NEWBY
ROBIN E. HUDSON
BARBARA A. JACKSON
CHERI BEASLEY
SAMUEL J. ERVIN, IV
MICHAEL R. MORGAN

Former Chief Justices

RHODA B. BILLINGS
JAMES G. EXUM, JR.
BURLEY B. MITCHELL, JR.
HENRY E. FRYE
I. BEVERLY LAKE, JR.
SARAH PARKER

Former Justices

ROBERT R. BROWNING
J. PHIL CARLTON
WILLIS P. WHICHARD
JAMES A. WYNN, JR.
FRANKLIN E. FREEMAN, JR.
G. K. BUTTERFIELD, JR.
ROBERT F. ORR
GEORGE L. WAINWRIGHT, JR.
EDWARD THOMAS BRADY
PATRICIA TIMMONS-GOODSON
ROBERT N. HUNTER, JR.
ROBERT H. EDMUNDS, JR.

Clerk

J. Bryan Boyd[1]
Amy L. Funderburk[2]

Interim Clerk

Christie S. Cameron Roeder[3]

Librarian

Thomas P. Davis

[1] Resigned 13 October 2017.
[2] Sworn in 1 March 2018.
[3] Sworn in 16 October 2017. Resigned 28 February 2018.

ADMINISTRATIVE OFFICE OF THE COURTS

Director

MARION R. WARREN

Assistant Director

DAVID F. HOKE

OFFICE OF APPELLATE DIVISION REPORTER

HARRY JAMES HUTCHESON

KIMBERLY WOODELL SIEREDZKI

JENNIFER C. PETERSON

SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 2 MARCH 2018

ORDERS

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

HEADNOTE INDEX

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

ABRONS FAM. PRAC. & URGENT CARE, PA v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[370 N.C. 443 (2018)]

ABRONS FAMILY PRACTICE AND URGENT CARE, PA; NASH OB-GYN ASSOCIATES, PA; HIGHLAND OBSTETRICAL-GYNECOLOGICAL CLINIC, PA; CHILDREN'S HEALTH OF CAROLINA, PA; CAPITAL NEPHROLOGY ASSOCIATES, PA; HICKORY ALLERGY & ASTHMA CLINIC, PA; HALIFAX MEDICAL SPECIALISTS, PA; AND WESTSIDE OB-GYN CENTER, PA, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES AND COMPUTER SCIENCES CORPORATION

No. 427A16

Filed 2 March 2018

Administrative Law—Medicaid reimbursements—class action—failure to exhaust administrative remedies or demonstrate futility

Where plaintiff medical practices sued the N.C. Department of Health and Human Services (DHHS) and the company that designed DHHS's software system for managing Medicaid reimbursements, alleging that they had not received reimbursement for Medicaid claims, the trial court correctly concluded that plaintiffs had failed to exhaust their administrative remedies and to demonstrate that available administrative remedies were inadequate. After receiving Remittance Statements indicating adverse determinations on Medicaid reimbursement claims, the providers failed to request a reconsideration review or to file a petition for a contested case, instead bypassing administrative procedures and filing a class action complaint in the trial court. In view of the inadequacy of notice, plaintiffs were still entitled to exhaust their available administrative remedies.

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. ___, 792 S.E.2d 528 (2016), reversing an order dated 12 June 2015 by Judge Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases, in Superior Court, Wake County, and remanding for additional proceedings. On 26 January 2017, the Supreme Court allowed both defendants' petitions for discretionary review of additional issues. Heard in the Supreme Court on 12 December 2017.

Williams Mullen, by Camden R. Webb, Elizabeth C. Stone, and Ruth A. Levy, for plaintiff-appellees.

Joshua H. Stein, Attorney General, by Olga Vysotskaya de Brito and Amar Majmundar, Special Deputy Attorneys General, for defendant-appellant North Carolina Department of Health and Human Services.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Charles F. Marshall III and Jennifer K. Van Zant, for defendant-appellant Computer Sciences Corporation.

Parker Poe Adams & Bernstein LLP, by Matthew W. Wolfe, for American Medical Association, North Carolina Academy of Family Physicians, North Carolina Hospital Association, North Carolina Health Care Facilities Association, and North Carolina Medical Society, amici curiae.

Ott Cone & Redpath, P.A., by Matthew Jordan Cochran, Thomas E. Cone, Curtis B. Venable, and Stephen J. White, for Charlotte–Mecklenburg Hospital Authority, Duke University Medical Center, Mission Hospitals, Inc., The Moses H. Cone Memorial Hospital Operating Corporation, North Carolina Baptist Hospital, and WakeMed, amici curiae.

JACKSON, Justice.

In this appeal we consider whether the Court of Appeals correctly held that the trial court erroneously dismissed plaintiffs' action for lack of subject-matter jurisdiction due to plaintiffs' failure to exhaust administrative remedies in seeking damages for denied Medicaid reimbursement claims. Because we conclude that plaintiffs have failed to exhaust their available administrative remedies, we reverse the decision of the Court of Appeals reversing the trial court's order granting defendants' motions to dismiss for lack of subject-matter jurisdiction.

Plaintiffs Abrons Family Practice and Urgent Care, PA; Nash OB-GYN Associates, PA; Highland Obstetrical-Gynecological Clinic, PA; Children's Health of Carolina, PA; Capital Nephrology Associates, PA; Hickory Allergy & Asthma Clinic, PA; Halifax Medical Specialists, PA; and Westside OB-GYN Center, PA are medical practices in North Carolina, all of which provide care to Medicaid-eligible patients pursuant to Medicaid contracts with the State of North Carolina. Defendant North Carolina Department of Health and Human Services (DHHS or

the Department) administers the State's Medicaid plan. Defendant Computer Sciences Corporation (CSC) is a Nevada corporation with its principal office in Falls Church, Virginia. After being required by the federal Centers for Medicare and Medicaid Services (CMS) to replace its Medicaid Management Information System (MMIS), the State of North Carolina awarded a contract to CSC to develop a new MMIS. CSC designed and developed NCTracks, the new system intended to manage reimbursement payments to health care providers for services provided to Medicaid recipients across North Carolina. NCTracks went live on 1 July 2013, and plaintiffs began submitting claims to DHHS for Medicaid reimbursements under the new system. In the first few months of being in operation, NCTracks experienced over 3,200 software errors, resulting in delayed, incorrectly paid, or unpaid reimbursements to plaintiffs.

On 31 January 2014, plaintiffs filed a First Amended Class Action Complaint against defendants. Plaintiffs asserted that NCTracks ultimately proved to be "a disaster, inflicting millions of dollars in damages upon North Carolina's Medicaid providers." Specifically, plaintiffs alleged that CSC was negligent in its design and implementation of NCTracks and that DHHS breached its contracts with each of the plaintiffs by failing to pay Medicaid reimbursements. Plaintiffs also alleged that they had a contractual right to receive payment for reimbursement claims and that this was "a property right that could not be taken without just compensation." As a result of these allegations, plaintiffs sought damages based upon claims of negligence and unfair and deceptive acts against CSC, and claims of breach of contract and violation of Article I, Section 19 of the North Carolina Constitution against DHHS. Additionally, plaintiffs sought a declaratory judgment that the methodology for payment of Medicaid reimbursement claims established by DHHS violated Medicaid reimbursement rules.

Plaintiffs further maintained that, because the available administrative procedures would not compel the State to adhere to Medicaid reimbursement rules or provide recovery of certain damages, plaintiffs were not required to exhaust their administrative remedies before filing their civil action. Additionally, plaintiffs contended that "the administrative procedures [were] futile and inadequate."

On 4 April 2014, defendants filed motions to dismiss pursuant to North Carolina Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6). Defendants argued, *inter alia*, that plaintiffs' complaint failed to establish personal and subject-matter jurisdiction. The trial court concluded that plaintiffs had failed to exhaust their administrative remedies and

had not demonstrated that the available administrative remedies were inadequate. Because the trial court determined that it lacked subject-matter jurisdiction over plaintiffs' claims, it denied as moot defendants' motions to dismiss pursuant to Rules 12(b)(2) and 12(b)(6).

The Court of Appeals majority reversed the trial court's order, holding that the trial court erred by dismissing plaintiffs' complaint for failure to exhaust administrative remedies without resolving "whether DHHS issues final agency decisions in Medicaid claim matters and whether DHHS supplies providers with written notice of its final agency decisions." *Abrons Fam. Prac. & Urgent Care, PA v. N.C. Dep't of Health & Hum. Servs.*, ___ N.C. App. ___, ___, 792 S.E.2d 528, 539 (2016). The Court of Appeals majority also concluded that plaintiffs sufficiently demonstrated that it would be futile to pursue administrative remedies. *Id.* at ___, 792 S.E.2d at 538. Because the Court of Appeals reversed the trial court's order, it did not address plaintiffs' remaining arguments. *See id.* at. ___, 792 S.E.2d at 539.

Judge McCullough dissented, concluding that the trial court's decision should be affirmed because plaintiffs did not exhaust the available administrative remedies or prove that those remedies were inadequate to resolve their claims. *Id.* at ___, 792 S.E.2d at 539-540 (McCullough, J., dissenting). Both defendants appealed based on the dissent and sought discretionary review of additional issues, which this Court allowed.

On appeal to this Court, defendants contend that the Court of Appeals erred by reversing the dismissal of plaintiffs' claims because plaintiffs failed to exhaust their available administrative remedies prior to filing a lawsuit. Defendants also argue that plaintiffs only have speculated that pursuing the available administrative remedies would be futile or inadequate. We agree.

Section 108C-12 explicitly indicates that the Administrative Procedure Act (APA) governs the appeals process for Medicaid providers. N.C.G.S. § 108C-12 (2017). The APA states in relevant part that "any dispute between an agency and another person that involves the person's rights, duties, or privileges . . . should be settled through informal procedures." *Id.* § 150B-22 (2017). If the parties do not resolve the dispute through informal procedures, either party may request a formal administrative proceeding, "at which time the dispute becomes a 'contested case.' " *Id.* "[A] request for a hearing to appeal an adverse determination of the Department [of Health and Human Services] . . . is a contested case subject to the provisions of" the Administrative Procedure Act. N.C.G.S.

§ 108C-12. An "[a]dverse determination" is defined, in relevant part, as "[a] final decision by [DHHS] to deny, terminate, suspend, reduce, or recoup a Medicaid payment." *Id.* § 108C-2(1) (2017). Finally, if a party is aggrieved by the outcome of a contested case hearing and has exhausted all available administrative remedies, the party "is entitled to judicial review of the decision [pursuant to] this Article." *Id.* § 150B-43 (2017).

As authorized by the General Assembly in N.C.G.S. § 108A-54, the Department has promulgated specific rules governing the informal review process. *See generally* 10A NCAC Subchapter 22J (2016). These regulations enumerate the rights of providers to appeal reimbursement rates and challenge the Department's decisions on various claims related to payments. 10A NCAC 22J .0101.

When a provider submits a Medicaid reimbursement claim, the Department responds by sending the provider a "Remittance Statement" that discloses the initial disposition of the claim. At this stage, claims are either paid, denied, or placed in "pending" status. A provider may then request a reconsideration review, but must do so within thirty calendar days "from receipt of final notification of payment, payment denial, disallowances, payment adjustment, notice of program reimbursement and adjustments." *Id.* .0102(a). This "final notification . . . means that all administrative actions necessary to have a claim paid correctly have been taken by the provider and . . . the fiscal agent has issued a final adjudication." *Id.* If the provider fails to request a reconsideration review within the specified time period, the state agency's decision becomes final. *Id.* In the alternative, a provider may resubmit a denied claim to DHHS at any time within eighteen months "after the date of payment or denial of [the] claim." 10A NCAC 22B .0104(b) (2016).

If a provider seeks a reconsideration review and disagrees with the result, the provider may request a contested case hearing before the Office of Administrative Hearings (OAH). *Id.* 22J .0104. Then, as outlined in the statutory framework, once all administrative remedies are exhausted, the provider may seek judicial review. N.C.G.S. § 150B-43. Judicial review "is generally available only to aggrieved persons who have exhausted all administrative remedies made available by statute or agency rule." *Empire Power Co. v. N.C. Dep't of Env't, Health & Nat. Res.*, 337 N.C. 569, 594, 447 S.E.2d 768, 783 (1994) (citing N.C.G.S. § 150B-43 (1991)). A plaintiff's failure to exhaust administrative remedies may result in the dismissal of the complaint for lack of subject-matter jurisdiction. *See Presnell v. Pell*, 298 N.C. 715, 722, 260 S.E.2d 611, 615 (1979); *see also Vass v. Bd. of Trs. of the Teachers' & State Emps.'*

Comprehensive Major Med. Plan, 324 N.C. 402, 408-09, 379 S.E.2d 26, 30 (1989).

Here, after receiving Remittance Statements that indicated an adverse determination on a Medicaid reimbursement claim, the providers failed to request a reconsideration review or file a petition for a contested case. Instead, plaintiffs bypassed the administrative procedures set forth above and filed a class action complaint in the trial court. To justify their failure to exhaust administrative remedies, plaintiffs rely upon 10A NCAC 22J .0102 which indicates that the provider has thirty calendar days "from receipt of final notification of payment [or] payment denial" to request reconsideration review. 10A NCAC 22J .0102(a). Plaintiffs argue that defendants cannot assert the defense of failure to exhaust administrative remedies because defendants failed to provide the required final notification that triggers the administrative review process. Subsection 150B-23(f) mandates that the time limit to file a petition in a contested case commences "when notice is given of the agency decision to all persons aggrieved" and states that the notice "shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition." N.C.G.S. § 150B-23(f) (2017). CSC argued before the trial court that a provider's receipt of the Remittance Statement triggers the *option* to pursue resubmission or administrative remedies. On the other hand, plaintiffs contend that defendants never provided the required final notification. In addition to arguing that defendants failed to provide final notification, plaintiffs also contend that defendants provided defective notice to plaintiffs of their rights to pursue administrative remedies.

In support of these arguments, plaintiffs cite *Davidson County v. City of High Point*, 321 N.C. 252, 362 S.E.2d 553 (1987). The dispute in *Davidson County* centered around the County's issuance of a special use permit to allow renovation of a City-owned sewage treatment plant. *Id.* at 253, 362 S.E.2d at 554. The County argued that the City could not challenge the meaning of one of the prerequisite conditions necessary to receive a permit because the City had failed to pursue the administrative remedies afforded pursuant to the special use permit. *Id.* at 260, 362 S.E.2d at 558. Plaintiffs in the present case contend that in *Davidson County*, the County provided no notice of administrative remedies and that as a result, this Court rejected the County's assertion that the City failed to exhaust administrative remedies. This is an incorrect interpretation of our conclusion in *Davidson County*. Moreover, an administrative appeal that falls outside the framework of the APA does not provide

the best analog for analysis of a dispute that lies squarely within the purview of the APA.

In *Davidson County* this Court determined that "the City was unaware of the County's differing interpretation of" a prerequisite condition to receive a permit and as a result, "could not have known that it should have appealed the issue . . . within thirty days of receiving the permit." *Id.* at 260, 362 S.E.2d at 558. We concluded that "[t]he County cannot now be heard to assert that the City should have pursued administrative remedies for a problem it was unaware existed." *Id.* at 260, 362 S.E.2d at 558. The issue in *Davidson County* turned on whether one party was even aware that a *problem* existed, not whether a party was aware of the available *administrative remedies*. Unlike the plaintiffs in *Davidson County*, plaintiffs in the case *sub judice* were aware not only of the existence of the problem but also of the existence of the available administrative remedies.

In addressing the applicable time limits in which a provider must appeal an adverse determination, the Administrative Code states that a provider may seek reconsideration review after receiving "final notification of payment." 10A NCAC 22J .0102(a). The Code further states that if a provider does not seek such review within thirty days "from receipt of final notification," then the Department's "action shall become final." *Id.* As the Court of Appeals majority highlighted, the central problem here is that the status of the Remittance Statement seems unclear if a "final notification" later becomes "final." *Abrons*, ___ N.C. App. at ___, 792 S.E.2d at 536 (majority opinion). The Administrative Code allows a provider to resubmit a denied claim to DHHS at any time within eighteen months after receiving the Remittance Statement, 10A NCAC 22B .0104(b); yet the previously mentioned provision indicates that if a provider does not seek reconsideration review within the thirty-day window, then that decision becomes final, *id.* 22J .0102.

There does appear to be confusion surrounding the time frame in which a provider must seek reconsideration review, and the State conceded as much in oral argument, acknowledging that there was no statute of limitations running, given the inadequacy of notice. During rebuttal, the State addressed the Court's question originally posed to counsel for the appellee, as to whether Section 150B-23(f) tolls the statute of limitations. Counsel for the State answered, "Of course it does."

Notwithstanding this inadequacy of notice, if a provider was aggrieved by the denial of a reimbursement claim, a reconsideration

review should have been requested, followed by the filing of a petition for a contested case hearing, if necessary. In addition, the APA establishes a process by which a party may commence a contested case by, *inter alia*, showing that an agency has failed to use proper procedure. *See* N.C.G.S. § 150B-23(a) (2017) (providing that a petition for a contested case shall state facts establishing that the agency has, *inter alia*, "[f]ailed to use proper procedure" or "[f]ailed to act as required by law or rule"). The APA also gives an aggrieved party the opportunity to request a declaratory ruling to determine "the validity of a rule" or to resolve a conflict "regarding an interpretation of" a rule. *See id.* § 150B-4(a) (2017). The declaratory ruling has the same effect as a final agency decision and would have provided certainty to plaintiffs in pursuit of their determination of whether the Remittance Statement itself was in fact a final statement by the Department.[1] Although any procedural confusion as to finality and notice does not relieve plaintiffs from the requirement to exhaust their available administrative remedies, here the State has conceded that there is no issue with the statute of limitations running; therefore, plaintiffs remain free to appeal the adverse determinations by initiating contested case hearings at OAH.[2]

This is an essential step in addressing the disputed payments. The requirement to exhaust administrative remedies ensures that "matters of regulation and control are first addressed by commissions or agencies particularly qualified for the purpose." *Presnell*, 298 N.C. at 721, 260 S.E.2d at 615. Although administrative remedies were available to plaintiffs, none of the plaintiffs appear to have invoked these available remedies. Without a single provider having initiated an appeal from a denied reimbursement claim, it cannot be said that plaintiffs have exhausted all available administrative remedies.

As to their claims against CSC, plaintiffs contend that these claims "are independent of [their] claims for reimbursement against DHHS";

---

1. With that certain determination, there also would have been a very clear path for plaintiffs to exhaust their administrative remedies prior to seeking relief in the General Court of Justice.

2. We express no opinion as to what our decision would have been in the absence of the State's concession; however, faced with a statute of limitations that concededly is not a bar to plaintiffs' pursuit of their administrative remedies, we are in the unusual position of allowing them to do so notwithstanding the present action. Our research has disclosed no similar precedent in our law, and we caution that the circumstances in the instant case and magnitude of the current dispute present unique challenges that mandate a resolution which should not be read broadly.

however, their amended complaint reveals how intertwined its claims are against DHHS and CSC. For example, plaintiffs allege that "CSC's contract obligated CSC to design and develop NCTracks so that it provided a common, unified, and flexible system meeting DHHS' business requirements regarding Medicaid." Plaintiffs further allege that "DHHS and CSC have also placed thousands of reimbursement claims in 'limbo' by failing to issue decisions on reimbursement claims." The actual language of these excerpts from the complaint indicate the sheer difficulty in wholly separating the actions of DHHS from the actions of CSC.

In further support of their argument that their claims against CSC are independent of their claims against DHHS, plaintiffs also contend that they are suing CSC for its conduct before it became the State's fiscal agent, which took place on the "go-live" date of 1 July 2013. Again, plaintiffs' amended complaint indicates the close involvement between the acts of DHHS and CSC. The amended complaint alleges that CSC was negligent in that it "failed to exercise due care," *inter alia*, "in the attempts to fix defects found in NCTracks after go-live." Therefore, plaintiffs' amended complaint itself uses language that indicates plaintiffs are suing CSC not only for its conduct *before* it became the State's fiscal agent, but also for its conduct *after* said time. Furthermore, plaintiffs' claims against CSC will be affected by the outcome of their claims against DHHS. If, in fact, the reimbursement claims were denied properly, then plaintiffs' claims against CSC may fail or the damages awarded may not be awarded in full. The record in this case reveals that plaintiffs' claims against DHHS and CSC would be difficult, if not impossible, to wholly disentangle. Similarly, the State's and CSC's defenses are interwoven as well. Therefore, plaintiffs' causes of action against CSC remain viable, too.

Plaintiffs also alleged in their complaint that they are exempt from the requirement to exhaust administrative remedies because doing so would be futile and the remedies would be inadequate. Our courts have not required plaintiffs to exhaust administrative remedies prior to bringing suit, if the pursuit of administrative remedies would be futile. *State ex rel. Utils. Comm'n v. S. Bell Tel. & Tel. Co.*, 93 N.C. App. 260, 268, 377 S.E.2d 772, 776 (1989), *rev'd on other grounds*, 326 N.C. 522, 391 S.E.2d 487 (1990). The party claiming excuse from exhaustion bears the burden of alleging both the inadequacy and the futility of the available administrative remedies. *See Snuggs v. Stanly Cty. Dep't of Pub. Health*, 310 N.C. 739, 740, 314 S.E.2d 528, 529 (1984) (per curiam). Plaintiffs first argue that initiating a dispute with DHHS "is not available to Medicaid providers because of the overwhelming number of reimbursement errors and

because of [the] utter inability [of DHHS] to address providers' issues." Plaintiffs allege that defendants have "placed thousands of reimbursement claims in 'limbo' by failing to issue decisions on reimbursement claims." Not only do plaintiffs fail to provide an exact number of claims at issue, but, given that there are eight plaintiffs, the inadequacy of the administrative procedures cannot be evaluated on the basis of this bare allegation. Furthermore, this Court previously has determined that the breadth of a claim may not create a burden sufficient to relieve a plaintiff of the exhaustion requirement. *See Lloyd v. Babb*, 296 N.C. 416, 426-28, 251 S.E.2d 843, 850-51 (1979) (requiring exhaustion of administrative remedies notwithstanding plaintiffs having to individually challenge the voting rights of between 6,000 and 10,000 people). Here, the sheer number of claims does not satisfy plaintiff's burden.

Plaintiffs also asserted in their complaint that pursuing administrative remedies would be futile because "[n]o procedures exist to recover for damage to the Plaintiffs' businesses, to recover for payment of the $100 re-enrollment fee . . . and to recover damages in the form of time value of money." The reasoning in *Jackson ex. rel. Jackson v. North Carolina Department of Human Resources Division of Mental Health, Developmental Disabilities, & Substance Abuse Services*, 131 N.C. App. 179, 505 S.E.2d 899 (1998), *disc. rev. denied*, 350 N.C. 594, 537 S.E.2d 213, 214 (1999)—that plaintiffs' insertion of a prayer for monetary damages does not relieve them from the necessity for compliance with the exhaustion requirement—is persuasive here. In *Jackson* the Court of Appeals acknowledged that, although the plaintiff sought damages that could not be awarded through administrative procedures, the plaintiff's primary claim—"the provision of mental health care"—was an issue that first should be determined by the agency. *Id.* at 188-89, 505 S.E.2d at 905. Similarly, plaintiffs' claims in the present case stem from the failure of DHHS to pay Medicaid reimbursement claims. The majority of the claims for relief even specifically mention these unpaid reimbursements. Because resolution of the reimbursement claims must come from DHHS, simply inserting a prayer for monetary damages does not automatically demonstrate that pursuing administrative remedies would be futile. Notwithstanding the claims that are outside the relief that can be granted by an administrative law judge, the reimbursement claims "should properly be determined in the first instance by the agenc[y] statutorily charged with administering" the Medicaid program. *Id.* at 188-89, 505 S.E.2d at 905. "Pursuing an administrative remedy is 'futile' when it is useless to do so either as a legal or practical matter." *Bailey v. State*, 330 N.C. 227, 248, 412 S.E.2d 295, 308 (1991) (Mitchell, J., concurring in

part and dissenting in part) (quoting *Honig v. Doe*, 484 U.S. 305, 327, 108 S. Ct. 592, 606, 98 L. Ed. 2d 686, 709 (1988)), *cert. denied*, 504 U.S. 911, 112 S. Ct. 1942, 118 L. Ed. 2d 547 (1992), *disavowed by Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998). Plaintiffs have failed to demonstrate that pursuing reconsideration review or a contested case would be "useless."

Finally, in addressing plaintiffs' allegations regarding business damages, the trial court, in its Amended Opinion and Order on Motions to Dismiss, included the following footnote:

> The Court notes that Plaintiffs did not cite to any authority to support their assertion that the business damages they seek could not be sought through the administrative process, and the Court is unable to find any specific statute, regulation, or case law expressly stating that tort-type damages are unavailable as a remedy at the administrative level in this context.

This conclusion incorrectly interprets the scope of an administrative hearing. The purpose of the APA is to "ensure that the functions of rule making, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process." N.C.G.S. § 150B-1(a) (2017). Furthermore, five specific grounds for alleging an agency's wrongdoing are enumerated in N.C.G.S. § 150B-23(a). By its very nature, the quasi-judicial forum of an administrative hearing precludes the adjudication of claims seeking compensatory damages; however, when any part of the relief sought is provided through an administrative process, a plaintiff must exhaust that process prior to seeking the same or related relief from the judicial system.

In conclusion, the Department's decision to deny plaintiffs' claims would be subject to judicial review only after plaintiffs had exhausted their available administrative remedies or demonstrated that doing so would have been futile. Plaintiffs have not succeeded at either endeavor; however, given the inadequacy of notice, plaintiffs still are entitled to exhaust the available administrative remedies. Nevertheless, because plaintiffs have failed to exhaust their administrative remedies and have failed to demonstrate futility of the available remedies at this time, the Court of Appeals erred by reversing the dismissal of plaintiffs' claims. For the foregoing reasons, we reverse the decision of the Court of Appeals.

REVERSED.

ALLIED SPECTRUM, LLC D/B/A APEX CROWN EXPRESS
v.
GERMAN AUTO CENTER, INC., MOHAMED ALI DARAR, AND REEM TAMIM DARAR

No. 453A16

Filed 2 March 2018

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. ___, 793 S.E.2d 271 (2016), affirming an order for summary judgment entered on 7 July 2015 by Judge Paul G. Gessner in Superior Court, Wake County. Heard in the Supreme Court on 5 February 2018.

Bratcher Adams PLLC, by Brice M. Bratcher and J. Denton Adams, for plaintiff-appellant.

Austin Law Firm, PLLC, by John S. Austin, for defendant-appellees.

PER CURIAM.

AFFIRMED.

DAVIS v. HULSING ENTERS., LLC

[370 N.C. 455 (2018)]

THOMAS A.E. DAVIS, JR., ADMINISTRATOR OF THE ESTATE OF LISA MARY DAVIS
v.
HULSING ENTERPRISES, LLC; HULSING HOTELS NC MANAGEMENT COMPANY; HULSING HOTELS NORTH CAROLINA, INC.; HULSING HOTELS, INC. D/B/A CROWNE PLAZA TENNIS & GOLF RESORT ASHEVILLE AND MULLIGAN'S

No. 160A16

Filed 2 March 2018

Negligence—contributory negligence—dram shop claim

The Court of Appeals erred by determining that plaintiff had stated a valid negligence per se dram shop claim pursuant to N.C.G.S. § 18B-305(a). The factual allegations of plaintiff's complaint established decedent's contributory negligence, and thus, the issue of the first-party dram shop claim was not considered.

Justice HUDSON dissenting.

Justices BEASLEY and MORGAN 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. ___, 783 S.E.2d 765 (2016), reversing an order entered on 25 November 2013 by Judge Richard Boner in Superior Court, Mecklenburg County. On 18 August 2016, the Supreme Court allowed defendants' petition for discretionary review of additional issues. Heard in the Supreme Court on 12 April 2017.

Charles G. Monnett III for plaintiff-appellee.

Northup McConnell & Sizemore, PLLC, by Isaac N. Northup, Jr., for defendant-appellants.

Jordan Price Wall Gray Jones & Carlton, by R. Frank Gray and Lori P. Jones, for North Carolina Restaurant and Lodging Association, amicus curiae.

JACKSON, Justice.

In this case we are asked to consider whether North Carolina recognizes plaintiff's first-party claim for dram shop liability and if so, whether that claim is barred by the contributory negligence of the decedent.

Based upon our conclusion that plaintiff cannot recover because of the decedent's contributory negligence, we do not reach plaintiff's first-party dram shop claim and therefore hold that discretionary review was improvidently allowed on that issue. For the reasons stated below, we reverse the decision of the Court of Appeals.

When evaluating a motion to dismiss pursuant to Rule 12(b)(6), we accept the "factual allegations in a complaint as true." *Turner v. Thomas*, 369 N.C. 419, 424, 794 S.E.2d 439, 444 (2016) (quoting *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 225, 695 S.E.2d 437, 440 (2010)). Here the complaint alleges the following: On 5 October 2012, plaintiff Thomas A.E. Davis, and plaintiff's wife, the decedent Lisa Mary Davis, checked into the Crowne Plaza Tennis & Golf Resort in Asheville, North Carolina, to celebrate their wedding anniversary. Defendants Hulsing Enterprises, LLC and Hulsing Hotels, Inc. own and operate this resort hotel, as well as a restaurant and bar called Mulligan's, which is located within the hotel. Shortly after checking into the hotel, the couple decided to have dinner at Mulligan's. During the course of four and a half hours, the couple ate dinner and ordered twenty-four alcoholic beverages. The decedent consumed at least ten of the drinks and became visibly intoxicated. As the Davises walked down a hallway after leaving Mulligan's, the decedent fell down. She was so intoxicated that an employee of defendants arrived with a wheelchair to transport the decedent to her room. After assisting the decedent into the wheelchair, the employee helped her to her hotel room and onto her bed. When plaintiff awoke the next morning, he found his wife lying on the floor deceased. The cause of death later was determined to be acute ethanol (alcohol) poisoning.

On 15 July 2013, plaintiff, the administrator of the decedent's estate, filed a complaint for wrongful death, alleging the following causes of action: (1) common law dram shop liability; (2) negligent aid, rescue, or assistance; and (3) punitive damages. Plaintiff's dram shop claim alleged that defendants were negligent per se because they violated N.C.G.S. § 18B-305 by knowingly selling and giving alcoholic beverages to the decedent, an intoxicated person. On 13 August 2013, defendants filed a Rule 12(b)(6) motion to dismiss the complaint for failure to state a claim for which relief can be granted under the laws of North Carolina. Defendants filed their answer on 8 November 2013 and raised several affirmative defenses, including contributory negligence. On 25 November 2013, the trial court entered an order dismissing plaintiff's common law dram shop and related punitive damages claims. The parties proceeded to a jury trial on the negligent rescue and remaining punitive damages

claims. On 23 October 2014, the trial court entered a judgment dismissing the action after a jury found that the decedent's death was not proximately caused by the negligence of defendants. Plaintiff appealed to the Court of Appeals. On appeal, plaintiff contested only the dismissal of his common law dram shop claim. *Davis v. Hulsing Enters.*, ___ N.C. App. ___, ___ 783 S.E.2d 765, 768 (2016).

The Court of Appeals determined that plaintiff had stated a valid negligence per se dram shop claim pursuant to N.C.G.S. § 18B-305(a) and therefore reversed the trial court's order dismissing that claim. *Id.* at ___, ___,783 S.E.2d at 772, 773. The majority concluded that defendants breached their duty to not sell or give alcoholic beverages to the decedent and opined that it was reasonable that defendants should have foreseen the injuries caused by their conduct. *Id.* at ___, 783 S.E.2d at 769-70. In reaching these conclusions, the majority ultimately determined that the decedent's death was "the direct and proximate result of" defendants' negligence. *Id.* at ___, 783 S.E.2d at 770. In contrast, the dissenting judge reasoned that, although plaintiff alleged facts sufficient to support a claim of negligence per se, plaintiff also alleged facts that demonstrated that the decedent "acted negligently in proximately causing her own death." *Id.* at ___, 783 S.E.2d at 774 (Dillon, J., dissenting). Defendants appealed the decision of the Court of Appeals to this Court based upon the dissenting opinion. In addition, we allowed discretionary review to address defendants' proposed issue as to whether North Carolina recognizes a first-party cause of action for dram shop liability.

Defendants argue that the factual allegations of plaintiff's complaint establish the decedent's contributory negligence. Because we agree, we do not reach the issue of the first-party dram shop claim.

When evaluating the legal sufficiency of plaintiff's complaint, "the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citing *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E.2d 297 (1976)).

Our opinion in *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 332 N.C. 645, 423 S.E.2d 72 (1992), is both instructive and controlling in this case. Similar to the circumstances in this case, the claim in *Sorrells* was brought by the administrator of the estate of a person who was fatally injured after driving while in a highly intoxicated state. *Id.* at 646, 423 S.E.2d at 72. The representative of the decedent's estate sued a bar for wrongful death, alleging negligence and gross negligence. *Id.* at 647,

423 S.E.2d at 73. The estate alleged in its complaint that the twenty-one-year-old decedent and one or more of his friends were intoxicated, that their waitress was informed on at least three separate occasions by the decedent's friends that he was driving and should not be served more alcohol, and that, nevertheless, the bartender served the decedent more alcohol. *Id.* at 646-47, 423 S.E.2d at 72-73. After consuming his last drink, the decedent proceeded to drive himself—against the advice of his friends—lost control of his vehicle on the interstate highway, and struck a bridge abutment. *Id.* at 647, 423 S.E.2d at 73.

The trial court dismissed the estate's claim based upon the decedent's contributory negligence, and the estate appealed to the Court of Appeals, which reversed the trial court. *Id.* at 647, 423 S.E.2d at 73. On appeal to this Court, the estate argued that the claim should not be dismissed because the bar acted with willful and wanton negligence. *Id.* at 648, 423 S.E.2d at 74. This Court concluded that plaintiff's complaint alleged facts which denied the right to relief and that the trial court properly granted defendant's motion to dismiss. *Id.* at 648-49, 423 S.E.2d at 73-74. Specifically, the Court stated that "defendant's motion to dismiss was properly granted since plaintiff's complaint 'discloses an unconditional affirmative defense which defeats the claim asserted [and] pleads facts which deny the right to any relief on the alleged claim.' " *Id.* at 648, 423 S.E.2d at 73 (alteration in original) (quoting *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 166 (1970)).

Here plaintiff's complaint alleges that defendants were negligent in "serv[ing] at least one and more likely, several additional intoxicating liquor drinks" to the decedent after "her mental and/or physical faculties were appreciably and noticeably impaired." Plaintiff also alleges facts indicating that this negligence was the "direct and proximate" cause of her death. Nonetheless, even if plaintiff's dram shop claim is valid, it is well established that "a plaintiff's contributory negligence is a bar to recovery from a defendant who commits an act of ordinary negligence." *Id.* at 648, 423 S.E.2d at 73-74 (citing *Adams ex rel. Adams v. State Bd. of Educ.*, 248 N.C. 506, 511, 103 S.E.2d 854, 857 (1958)).

Turning to the statute governing the claim raised here—the wrongful death statute—N.C.G.S. § 28A-18-2 provides for survivorship of only those claims that could have been brought by the decedent herself had she lived. C*arver v. Carver*, 310 N.C. 669, 673, 314 S.E.2d 739, 742 (1984). Because this claim is being brought by the administrator of the decedent's estate, this claim is subject to the affirmative defense of contributory negligence. *See generally Sorrells*, 332 N.C. 645, 423 S.E.2d 72.

Plaintiff argues on appeal that because the decedent's death was proximately caused by defendants' gross negligence, only gross contributory negligence on the part of the decedent would bar recovery. As the Court of Appeals majority highlighted, a plaintiff's ordinary contributory negligence is not a bar to recovery when a "defendant's gross negligence, or willful or wanton conduct, is a proximate cause of the plaintiff's injuries." *Yancey v. Lea*, 354 N.C. 48, 51, 550 S.E.2d 155, 157 (2001) (citation omitted); *see also Sorrells*, 332 N.C. at 648, 423 S.E.2d at 73-74. "An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Yancey*, 354 N.C. at 52, 550 S.E.2d at 157 (citations omitted). We conclude here, as we did in *Sorrells*, that the actions of both the decedent and defendants rise to the same level of negligence, thereby barring plaintiff's common law dram shop claim.

The events leading up to the decedent's death are undeniably tragic; however, in this State contributory negligence precludes recovery for a plaintiff when, as here, the complaint alleges facts that demonstrate the plaintiff's decedent exhibited the same level of negligence as the defendant. Accordingly, we conclude here, as we did in *Sorrells*, that the trial court properly granted defendants' motion to dismiss because plaintiff's complaint "discloses an unconditional affirmative defense which defeats the claim asserted [and] pleads facts which deny the right to any relief on the alleged claim." *Sorrells*, 332 N.C. at 648, 423 S.E.2d at 73 (alteration in original) (quoting *Sutton*, 277 N.C. at 102, 176 S.E.2d at 166).

For the foregoing reasons, we reverse the decision of the Court of Appeals that reversed the trial court's 25 November 2013 order dismissing plaintiff's common law dram shop claim for failure to state a claim under Rule 12(b)(6) and further conclude that defendants' petition for discretionary review as to the additional issue was improvidently allowed.

REVERSED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justice HUDSON dissenting.

Here the majority concludes that plaintiff's dram shop claim is barred because the complaint establishes the decedent's contributory negligence as a matter of law, based largely on *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 332 N.C. 645, 423 S.E.2d 72 (1992). The majority also asserts that the actions of the decedent and defendants rise to the same level of negligence, barring plaintiff's claim. I disagree with

the application of *Sorrells* and conclude that the complaint sufficiently alleges gross negligence on the part of defendants; moreover, I see no allegations in the complaint supporting gross contributory negligence on the part of the decedent. As such, I respectfully dissent.

I agree with the majority's recitation of the standard of review regarding a motion to dismiss under Rule 12(b)(6). The relevant inquiry is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted." *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 203 (2005) (quoting *Meyer v. Walls*, 347 N.C. 97, 111, 489 S.E.2d 880, 888 (1997)). Additionally, I generally agree with the majority's discussion of the applicable principles regarding negligence and contributory negligence. As the majority recognizes, "[i]n this state, a plaintiff's contributory negligence is a bar to recovery from a defendant who commits an act of ordinary negligence," *Sorrells*, 332 N.C. at 648, 423 S.E.2d at 73-74 (citing *Adams ex rel. Adams v. State Bd. of Educ.*, 248 N.C. 506, 511, 103 S.E.2d 854, 857 (1958)), but "[c]ontributory negligence is not a bar to a plaintiff's recovery when the defendant's gross negligence, or willful or wanton conduct, is a proximate cause of the plaintiff's injuries," *Yancey v. Lea*, 354 N.C. 48, 51, 550 S.E.2d 155, 157 (2001) (citing *Brewer v. Harris*, 279 N.C. 288, 297, 182 S.E.2d 345, 350 (1971)). This Court has "defined 'gross negligence' as 'wanton conduct done with conscious or reckless disregard for the rights and safety of others.' " *Yancey*, 354 N.C. at 52, 550 S.E.2d at 157 (quoting *Bullins v. Schmidt*, 322 N.C. 580, 583, 369 S.E.2d 601, 603 (1988)); *see also id.* at 53, 550 S.E.2d at 158 ("An act or conduct rises to the level of gross negligence when the act is done purposely and with knowledge that such act is a breach of duty to others, i.e., a *conscious* disregard of the safety of others."). I do not agree with the majority's application of these principles to the complaint here.

For the purposes of Rule 12(b)(6), we take the allegations of the complaint as true. *Newberne*, 359 N.C. at 784, 618 S.E.2d at 203. The majority here does not specify which allegations in the complaint suffice, as a matter of law, to establish the decedent's ordinary contributory negligence, let alone establish that "the actions of both the decedent and defendants rise to the same level of negligence." Nonetheless, assuming *arguendo* that the allegations of the complaint can be taken as conclusively establishing ordinary contributory negligence on the part of the decedent, the allegations of the complaint, in my view, plainly allege gross negligence on the part of defendants, so that contributory negligence does not bar the claim. Specifically, plaintiff alleged in the complaint:

51. The employee(s) or agent(s), such as "1241 Michael," of Defendants' conduct of serving twenty-four (24) alcoholic beverages, of which the Decedent was served at least ten (10) of those drinks, in approximately a four-to-five hour period was an egregious, wrongful act which constitutes gross negligence and was willful or wanton conduct which evidences a reckless disregard for the safety of others.

52. That the employee(s) or agent(s), such as "1241 Michael," of Defendants continued to serve intoxicating liquor drinks to the decedent, Lisa Mary Davis, after Lisa Mary Davis became noticeably or visibly intoxicated was an egregious, wrongful act which constitutes gross negligence and was willful or wanton conduct which evidences a reckless disregard for the safety of others.

53. That the employee(s) or agent(s) of Defendants knew or had reason to know that Lisa Mary Davis was so grossly intoxicated so as to be a danger to herself and knew or had reason to know that the quantities of alcohol she had been served and consumed were potentially lethal . . . .

. . . .

55. That the egregious, willful or wanton conduct of Defendants' employee(s) or agent(s), while in the course and scope of their employment with Defendants as set forth above was a proximate cause of the injuries and damages sustained by Plaintiff.

Facially, these allegations assert gross negligence and willful and wanton conduct evidencing a reckless disregard for the safety of others. Taking these allegations as true, I conclude that the majority has improperly applied inferences of ordinary contributory negligence to bar plaintiff's claims for gross negligence and willful and wanton conduct as a matter of law. These allegations contend in part that defendants served a noticeably intoxicated person anywhere between ten and twenty-four liquor drinks over a four to five hour period, with knowledge both of the person's intoxication and that the quantities served were "potentially lethal." In my view, it is for the jury to decide whether the facts as alleged are ultimately shown by evidence to constitute a conscious, or even a reckless, "disregard of the safety of others." *Yancey*, 354 N.C. at 53, 550

S.E.2d at 158; *see also 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.' " (ellipsis in original) (quoting *Presnell v. Pell*, 298 N.C. 715, 719, 260 S.E.2d 611, 613 (1979))).

Moreover, I see no allegations in the complaint that can be construed as establishing, as a matter of law, gross contributory negligence on the part of the decedent, as was the case in *Sorrells*. There, as the majority noted, the plaintiff argued that the allegations in the complaint of the defendant's serving alcohol to the intoxicated decedent, after being requested to refrain from serving him, sufficiently alleged gross negligence, such that the decedent's ordinary contributory negligence would not bar recovery. *Sorrells*, 332 N.C. at 647-48, 423 S.E.2d at 73-74. Yet, the Court noted that the complaint also alleged that the decedent had chosen to drive his vehicle while highly intoxicated—a willful violation of the impaired driving statute. *Id.* at 648, 423 S.E.2d at 74.[1] Accordingly, the Court held that "to the extent the allegations in the complaint establish more than ordinary negligence on the part of defendant, they also establish a similarly high degree of contributory negligence on the part of the decedent." *Id.* at 649, 423 S.E.2d at 74. Although driving while highly intoxicated clearly evinces "a *conscious* disregard of the safety of others," *Yancey*, 354 N.C. at 53, 550 S.E.2d at 158, I am unaware of any decision from this Court holding that drinking to the point of intoxication in a safe location, absent accompanying allegations of impaired driving or other conduct, constitutes gross negligence as a matter of law.

In looking solely at the allegations of the complaint and taking them as true, and expressing no view on the ultimate merits of plaintiff's claim, I conclude that plaintiff has sufficiently alleged gross negligence on the part of defendants. Unlike in *Sorrells*, there are no allegations in the complaint that, as a matter of law, constitute gross contributory negligence on the part of the decedent. As such, I disagree with the majority's

---

1. The Court also noted that it had previously held that "a willful violation of this statute constitutes culpable negligence" and that the decedent's conduct, had his driving while impaired resulted in the death of another, would have amounted to manslaughter. 332 N.C. at 648, 423 S.E.2d at 74 (citing *State v. McGill*, 314 N.C. 633, 637, 336 S.E.2d 90, 92 (1985)); *see also id.* at 648-49, 423 S.E.2d at 74 ("Proof of both a willful violation of the statute and a causal connection between the violation and a death is all that is needed to support a successful prosecution for manslaughter. Plaintiff cannot dispute either of these elements under the facts as alleged in the complaint." (citing *McGill*, 314 N.C. at 636, 336 S.E.2d at 92)).

conclusion that contributory negligence dooms plaintiff's claim at the pleading stage and respectfully dissent from the Court's decision. I would affirm the Court of Appeals on this issue and proceed to address the issue of the first-party dram shop claim.

Justices BEASLEY and MORGAN join in this dissenting opinion.

IN THE MATTER OF D.E.M.

No. 279A17

Filed 2 March 2018

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. ___, 802 S.E.2d 766 (2017), affirming an order entered on 29 September 2016, as amended by an order entered on 10 October 2016, by Judge David V. Byrd in District Court, Wilkes County. Heard in the Supreme Court on 5 February 2018.

Vannoy, Colvard, Triplett & Vannoy, P.L.L.C., by Daniel S. Johnson, for petitioner-appellees.

Robert W. Ewing for respondent-appellant mother.

PER CURIAM.

AFFIRMED.

IN RE J.A.M.

[370 N.C. 464 (2018)]

IN THE MATTER OF J.A.M.

No. 7PA17

Filed 2 March 2018

Child Abuse, Dependency, and Neglect—standard of review—findings

Where, in its order adjudicating minor J.A.M. to be a neglected juvenile, the trial court found that "[t]o date, [respondent-mother] failed to acknowledge her role in the [prior juveniles] entering custody and her rights subsequently being terminated," the Court of Appeals erred by determining that respondent's vague concession to having made "poor decisions" contradicted that finding and by reversing the decision of the trial court. Because the trial court's finding was supported by clear and convincing evidence, it should have been deemed conclusive—even though some evidence would have supported a contrary finding.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 795 S.E.2d 262 (2016), reversing an order entered on 30 March 2016 by Judge Louis A. Trosch in District Court, Mecklenburg County. Heard in the Supreme Court on 9 January 2018.

Matthew D. Wunsche, GAL Appellate Counsel, for appellant Guardian ad Litem; and Marc S. Gentile and Keith S. Smith, Associate County Attorneys, for petitioner-appellant Mecklenburg County Department of Social Services, Youth and Family Services.

Richard Croutharmel for respondent-appellee mother.

PER CURIAM.

It is well settled that "[i]n a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re N.G.*, 186 N.C. App. 1, 4, 650 S.E.2d 45, 47 (2007) (quoting *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997)), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008); *see also In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984) ("Although the question of the *sufficiency* of the evidence to support the findings may be raised on appeal, our appellate courts are bound by

the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." (citations omitted)). Here, in its order adjudicating J.A.M. to be a neglected juvenile, the trial court found that "[t]o date, [respondent-mother] failed to acknowledge her role in the [prior juveniles] entering custody and her rights subsequently being terminated."

The evidence presented at the adjudication phase tended to show that respondent has a long history of violent relationships with the fathers of her previous six children, in which respondent's children "not only witnessed domestic violence, but were caught in the middle of physical altercations." Furthermore, during this time, respondent repeatedly declined services from Mecklenburg County Department of Social Services, Youth and Family Services (YFS), and "continued to deny, minimize and avoid talking about incidences of violence." This resulted in her three oldest children first entering the custody of YFS on 24 February 2010.

The most serious incident occurred in June 2012 when, shortly after respondent represented to the court "that she was through with [E.G., Sr.]" and that "her relationship with [E.G., Sr.] was over" in order to regain custody of her children, she quickly invited E.G., Sr. back into her home. Following another domestic violence incident between herself and E.G., Sr., she "placed [E.G., Jr.] in an incredibly unsafe situation sleeping on the sofa with [E.G., Sr.]" for the night, which resulted in E.G., Jr. suffering severe, life-threatening injuries, including multiple skull fractures, at the hands of E.G., Sr. The next morning, respondent "observed [E.G., Jr.'s] swollen head, his failure to respond, [and] his failure to open his eyes or move his limbs," but did not dial 911 for over two hours. Following this incident, respondent's children re-entered the custody of YFS. Afterwards, she refused to acknowledge E.G., Jr.'s "significant special needs" that resulted from his injuries, claiming "there is nothing wrong with him," and proceeded to have another child with E.G., Sr. in 2013 when he was out on bond for charges of felony child abuse. Respondent's parental rights to her previous six children were terminated on 21 April 2014 largely owing to her failure to take "any steps to change the pattern of domestic violence and lack of stability for the children since 2007."

At the adjudication hearing below, respondent vaguely acknowledged "[m]aking bad decisions" and "bad choices" in the past, without offering specific examples except for "giv[ing] men benefits of the doubts." Shortly after this, respondent testified:

> Q. Why were your rights terminated?
>
> A. Because when my child came back into -- my kids came back into custody, due to my child being physical injury by his father, [E.G., Sr.]. That's --
>
> Q. So your understanding is that your rights to your six other children was -- were terminated because of one child being physically abused?
>
> A. Oh, yes, ma'am.

Regarding her role in that abuse, respondent testified:

> Q. And what role do you think you played in your child getting hurt by that father?
>
> A. I was upstairs sleeping.
>
> Q. Okay.
>
> A. I didn't have -- I didn't have a role into what my child being hurt. I didn't play a role in that.
>
> Q. And so basically, do you feel that your rights to the six other children, your rights were unjustly terminated?
>
> A. Yes, ma'am. I do feel that way.

Plainly, there was clear and convincing evidence to support the trial court's finding of fact that respondent "failed to acknowledge her role" both in her previous six children "entering custody" and in "her rights subsequently being terminated."

The Court of Appeals, however, determined that respondent's vague concession to having made "poor decisions" constituted evidence that "directly contradicts the finding [that respondent failed to acknowledge her role in the children entering custody and her rights subsequently being terminated] and there is no evidence in the record to the contrary." *In re J.A.M.*, ___ N.C. App. ___, ___, 795 S.E.2d 262, 265 (2016). While that evidence potentially "might sustain findings to the contrary," *In re Montgomery*, 311 N.C. at 110-11, 316 S.E.2d at 252-53, the Court of Appeals here misapplied the standard of review in that the trial court's finding was "supported by clear and convincing competent evidence" and is therefore "deemed conclusive," *In re N.G.*, 186 N.C. App. at 4, 650 S.E.2d at 47.

Accordingly, the decision of the Court of Appeals is reversed, and this case is remanded to the Court of Appeals for reconsideration and for proper application of the standard of review.

REVERSED AND REMANDED.

DESIREE KING, BY AND THROUGH HER GUARDIAN AD LITEM, G. ELVIN SMALL, III, AND AMBER M. CLARK, INDIVIDUALLY

v.

ALBEMARLE HOSPITAL AUTHORITY D/B/A ALBEMARLE HEALTH/ ALBEMARLE HOSPITAL, SENTARA ALBEMARLE REGIONAL MEDICAL CENTER, LLC D/B/A SENTARA ALBEMARLE MEDICAL CENTER, NORTHEASTERN OB/GYN, LTD., BARBARA ANN CARTER, M.D., AND ANGELA McWALTER, CNM

No. 382PA16

Filed 2 March 2018

Statutes of Limitation and Repose—medical malpractice—minor—guardian ad litem appointed

The trial court correctly dismissed plaintiff's medical malpractice claims as time barred where the trial court had appointed a guardian ad litem (GAL) on behalf of a minor and specifically tasked him with bringing an action on behalf of the minor. A minor plaintiff who continues under that status until age eighteen has one year to file the claim, but the appointment of a GAL in this case removed plaintiff's disability of minority so that the three-year statute of limitations for medical malpractice actions began running.

Justice BEASLEY dissenting.

Justices HUDSON and MORGAN 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. ___, 791 S.E.2d 662 (2016), reversing an order entered on 27 July 2015 by Judge Cy A. Grant in Superior Court, Pasquotank County, and remanding the case for further proceedings. Heard in the Supreme Court on 8 November 2017.

Hammer Law, PC, by Amberley G. Hammer; and Ashcraft & Gerel, LLC, by Wayne M. Mansulla, pro hac vice, for plaintiff-appellee King.

Harris, Creech, Ward and Blackerby, P.A., by Jay C. Salsman and Charles E. Simpson, Jr., for defendant-appellants Albemarle Hospital Authority and Sentara Albemarle Regional Medical Center, LLC.

Smith Anderson Blount Dorsett Mitchell & Jernigan LLP, by Samuel G. Thompson and Robert E. Desmond, for defendant-appellants Northeastern OB/GYN, Ltd., Barbara Ann Carter, M.D., and Angela McWalter, CNM.

Tin, Fulton, Walker & Owen, by Adam Stein; and Whitley Law Firm, by Ann C. Ochsner, for North Carolina Advocates for Justice, amicus curiae.

NEWBY, Justice.

In this case we decide whether the appointment of a guardian *ad litem* on behalf of a minor removes the disability of minority and starts the running of the statute of limitations. As a minor's legal representative with the authority and directive to act, a guardian *ad litem* advocates for the legal rights of the minor in the minor's stead. The trial court's appointment of a guardian *ad litem* on behalf of a minor therefore removes that minor's disability of minority and starts the running of the statute of limitations. The statute of limitations continues to run even if the guardian *ad litem* files and then dismisses a legal action. Because a court-appointed guardian *ad litem* has the duty to pursue the minor's claim within the statute of limitations, a failure to do so time bars the claim. Accordingly, we reverse the decision of the Court of Appeals.

Plaintiff was born on 4 February 2005. Obstetrician Barbara Ann Carter, M.D. (Carter) and nurse midwife Angela McWalter, CNM (McWalter) managed the birth. Soon after, medical staff discovered plaintiff had sustained a brain injury during delivery. Almost three years later, on 10 January 2008, upon motion the trial court appointed a guardian *ad litem* (GAL), G. Elvin Small, III, for plaintiff for the purpose of bringing a civil action on her behalf. The same day, plaintiff, by and through her GAL, filed an action against Carter and Albemarle Hospital Authority (Hospital Authority) alleging plaintiff's brain injury resulted

from medical negligence. For undisclosed reasons, on 31 October 2008, the GAL voluntarily dismissed the action under Rule of Civil Procedure 41(a)(1).

Over six years later, on 30 January 2015, the trial court again granted a motion to appoint the same GAL to represent plaintiff "for the purpose of commencing a civil action on her behalf." The same day, plaintiff, by and through the GAL, filed the present action, again alleging medical negligence but, in addition to the Hospital Authority and Carter, naming other defendants, including McWalter and the Hospital Authority's successor corporation, Sentara Albemarle Regional Medical Center, LLC. The trial court dismissed plaintiff's claims as time barred on 27 July 2015, applying the three-year statute of limitations for medical malpractice claims.

Plaintiff appealed to the Court of Appeals, arguing that the plain language of N.C.G.S. § 1-17(b) tolled the statute of limitations period until 4 February 2024 when plaintiff reaches the age of nineteen. *See* N.C.G.S. § 1-17(b) (2009) (tolling certain limitations periods if a claim accrues when a plaintiff is under a disability). The Court of Appeals agreed and determined that, despite having had a court-appointed GAL, plaintiff's minority status constituted a disability that triggered the tolling provision of subsection 1-17(b). *King v. Albemarle Hosp. Auth.*, ___ N.C. App. ___, 791 S.E.2d 662, 2016 WL 4608188 (2016) (unpublished). Under the Court of Appeals' interpretation of subsection 1-17(b), the appointment of the GAL did not remove plaintiff's disability of minority, allowing plaintiff the same nineteen-year statute of limitations as a plaintiff for whom the trial court had not appointed a GAL. *King*, 2016 WL 4608188, at *3.[1] We allowed defendants' petition for discretionary review.

The question presented here is whether plaintiff filed the current action within the statute of limitations. Subsection 1-15(c) establishes the standard three-year statute of limitations for medical malpractice actions. N.C.G.S. § 1-15(c) (2017). Once a defendant properly raises a statute of limitations defense, the plaintiff must show that she initiated the action within the applicable time period. *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996) (citation omitted). "We have long recognized that a party must initiate an action

1. The Court of Appeals also held that, even though here plaintiff refiled the suit six years after the first voluntary dismissal under Rule 41 of the Rules of Civil Procedure, well outside of the one-year refiling deadline specified by the Rule, only a second voluntary dismissal under Rule 41 by plaintiff would result in an adjudication on the merits. *Id.* (citing N.C.G.S. § 1A-1, Rule 41(a) (2015)).

within a certain statutorily prescribed period after discovering its injury to avoid dismissal of a claim." *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, ___ N.C. ___, ___, 802 S.E.2d 888, 891 (2017).

"The purpose of a statute of limitations is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time." *Id.* at ___, 802 S.E.2d at 891 (quoting *Shearin v. Lloyd*, 246 N.C. 363, 371, 98 S.E.2d 508, 514 (1957), *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)). "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.' " *Id.* at ___, 802 S.E.2d at 891 (Alterations in original) (quoting *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 ___, 802 S.E.2d at 891-92 (quoting *Estrada*, 316 N.C. at 327, 341 S.E.2d at 544).

Balanced against the disadvantage of stale claims as protected by the statute of limitations is the problem that individuals under certain disabilities are unable to appreciate the nature of potential legal claims and take the appropriate action. Section 1-17 tolls certain statutes of limitation periods while a plaintiff is under a legal disability, such as minority, that impairs her ability to bring a claim in a timely fashion. The version of section 1-17 relevant here provides in part:

> (a) A person entitled to commence an action who is under a disability at the time the cause of action accrued may bring his or her action within the time limited in this Subchapter, after the disability is removed . . . within three years next after the removal of the disability, and at no time thereafter.
>
> . . . .
>
> (b) Notwithstanding the provisions of subsection (a) of this section, an action on behalf of a minor for malpractice arising out of the performance of or failure to perform professional services shall be commenced within the limitations of time specified in G.S. 1-15(c), except that if those time limitations expire before the minor attains the

> full age of 19 years, the action may be brought before the minor attains the full age of 19 years.

N.C.G.S. § 1-17(a), (b) (2009).

Subsection 1-17(a) contains many general provisions which address the applicability of this tolling provision, including the definition of "disability." *See id.* § 1-17(a)(1)-(3). Assuming a person is "under a disability at the time the cause of action accrue[s]," the statute requires the person to bring the cause of action within the time specified "after the disability is removed." *Id.* § 1-17(a). The disability of minority can be removed by the appointment of a GAL or by the passage of time, whichever occurs first. Thus, under subsection 1-17(a), a minor plaintiff who continues under the disability of minority, upon reaching the age of eighteen, has a three-year statute of limitations to bring a claim based on a general tort. *See id.* § 1-17(a)(1).

Whereas the tolling provision of subsection (a) focuses on general torts, the tolling provision of subsection (b) specifically addresses professional negligence claims, including medical malpractice. *Id.* § 1-17(b). As with general torts, when a medical malpractice claim accrues while a plaintiff is a minor, N.C.G.S. § 1-17(b) tolls the standard three-year statute of limitations provided by N.C.G.S. § 1-15(c). *Id.* Section 1-17(b), however, reduces the standard three-year statute of limitations, after a plaintiff reaches the age of majority, to one year by requiring a filing before the age of nineteen.[2] *Id.* Thus, a minor plaintiff who continues under that status until age eighteen has one year to file her claim. *Id.* The

---

2. Effective 1 October 2011, the General Assembly amended this section to reduce the minor's age from nineteen to ten years, *see* Act of June 13, 2011, ch. 400, sec. 9, 2011 N.C. Sess. Laws 1712, 1716 (captioned "An Act to Reform the Laws Relating to Money Judgment Appeal Bonds, Bifurcation of Trials in Civil Cases, and Medical Liability") (codified as amended at N.C.G.S. § 1-17 (2017)), thus further narrowing the time period for a minor to pursue a medical malpractice claim. Currently, section 1-17 of the General Statutes includes the following pertinent language in subsection (c):

> Notwithstanding the provisions of subsection (a) and (b) of this section, an action on behalf of a minor for injuries alleged to have resulted from malpractice arising out of a health care provider's performance of or failure to perform professional services shall be commenced within the limitations of time specified in G.S. 1-15(c), except as follows:
>
> (1) If the time limitations specified in G.S. 1-15(c) expire before the minor attains the full age of 10 years, the action may be brought any time before the minor attains the full age of 10 years.

N.C.G.S. § 1-17(c)(1) (2017).

language of "Notwithstanding the provisions of subsection (a)" refers to this reduced time period to bring an action. *Id.* Like subsection (a), subsection (b) still allows the minor to reach adulthood before requiring her to pursue her medical malpractice claim, assuming her disability is otherwise uninterrupted. *Compare id.* § 1-17(a), *with id.* § 1-17(b). Removal of the disability either by reaching the age of majority or by appointment of a GAL triggers the running of the statute of limitations.

This statutory interpretation comports with our long-standing jurisprudence: When the trial court appoints a GAL for the purpose of pursuing a minor plaintiff's legal claim, it removes the minor's disability and begins the running of the statute of limitations.

> In North Carolina the rule is that the statute of limitations begins to run against an infant . . . who is represented by a [court-appointed] guardian at the time the cause of action accrues. If he has no guardian at that time, then the statute begins to run upon the appointment of a guardian or upon the removal of his disability as provided by G.S. 1-17, whichever shall occur first.

First-Citizens Bank & Tr. v. Willis, 257 N.C. 59, 62, 125 S.E.2d 359, 361 (1962) (citation omitted); *see also Teele v. Kerr*, 261 N.C. 148, 150, 134 S.E.2d 126, 128 (1964) (The appointment of a guardian who acts as a legal representative starts "the statute of limitations . . . as to any action which the guardian could or should bring, at the time the cause of action accrues." (citing *First-Citizens Bank*, 257 N.C. 59, 125 S.E.2d 359)); *Johnson v. Pilot Life Ins. Co.*, 217 N.C. 139, 144, 7 S.E.2d 475, 478 (1940) ("Exposure to a suit by the guardian—one which was within the scope of both his authority and duty—for a sufficient length of time, would constitute a bar to the action of the ward."); *Tate v. Mott*, 96 N.C. 19, 24, 2 S.E. 176, 178 (1887) ("When an infant thus brings his action, the Court has jurisdiction of him, just as if he were an adult plaintiff, and orders, judgments and decrees entered in the course of it are binding and conclusive upon him, while they remain unreversed. And generally, any infant may thus bring his action, if he has good cause . . . ."); *White v. Albertson*, 14 N.C. 241, 242-43 (1831) (differentiating between a valid judgment against a represented minor and an invalid judgment by default against minors not represented). As a result, "ordinarily the failure of the guardian to sue in apt time is the failure of the ward, entailing the same legal consequence with respect to the bar of the statute." *Johnson*, 217 N.C. at 144, 7 S.E.2d at 477-78.

Moreover, once the statute of limitations begins to run, it is not thereafter tolled. *Rowland v. Beauchamp*, 253 N.C. 231, 234-35, 116 S.E.2d 720, 723 (1960) (appointing a new GAL did not restart the statute of limitations, which began to run at the appointment of the first GAL); *id.* at 235, 116 S.E.2d at 723 ("It is well settled that, when the statute of limitations begins to run, nothing stops it." (quoting *Frederick v. Williams*, 103 N.C. 189, 190-91, 9 S.E. 298, 298 (1889))).[3] As such, the court's appointment of a GAL requires the GAL, as the minor's legal representative, to comply with the standard three-year statute of limitations for medical malpractice claims. *See* N.C.G.S. § 1-17(a), (b) (requiring the claim be brought within the time specified by N.C.G.S. § 1-15(c) after the disability is removed). This interpretation of section 1-17 mirrors the codified duty of a GAL to advocate on behalf of the minor as if the minor is under no disability. *Id.* § 1A-1, Rule 17(e) (2017) ("Any guardian ad litem appointed for any party . . . shall file and serve such pleadings as may be required within the times specified by these rules . . . . [T]he court may proceed to final judgment . . . against any party so represented as effectually and in the same manner *as if said party had been under no legal disability* . . . ." (emphasis added)).

Here, on 10 January 2008, the trial court appointed the GAL and specifically tasked him with bringing an action on behalf of the minor plaintiff. Such an appointment provided plaintiff a legal representative and removed plaintiff's disability of minority. Under section 1-17, the removal of the disability eliminates the tolling and starts the running of the applicable three-year statute of limitations for medical malpractice actions. The GAL's subsequent dismissal of the action did not reinstate the tolling. Plaintiff filed this current action after the statute of limitations expired. Accordingly, we reverse the decision of the Court of Appeals and instruct that court to reinstate the trial court's order dismissing plaintiff's claims as time barred.

REVERSED.

---

3. *See also Genesco, Inc. v. Cone Mills Corp.*, 604 F.2d 281, 283 (4th Cir. 1979) ("Unlike most jurisdictions, North Carolina does not suspend the running of the statute of limitations on an infant's cause of action during the period of infancy when the infant has a guardian charged with the duty of bringing the action on his behalf."); *id.* at 285 ("The rationale of the *Rowland* doctrine is that since an infant represented by a guardian has the capacity, despite his infancy, to bring suit through his guardian, there is no need to suspend the running of the statute of limitations."); *Simmons ex rel. Simmons v. Justice*, 87 F. Supp. 2d 524, 530 (W.D.N.C. 2000) (Under state law, "even a parent bringing suit on behalf of their own child will not start the running of the statute of limitations against the infant unless the parent is that child's court appointed guardian.").

Justice BEASLEY dissenting.

The majority engages in judicial interpretation of a clear and unambiguous statute, N.C.G.S. § 1-17(b), to reach a result that is contrary to its plain language. I would hold that the plain language of N.C.G.S. § 1-17(b) dictates that plaintiff's claim is timely, and the unanimous decision of the Court of Appeals below should be upheld. Accordingly, I respectfully dissent.

While the general limitations period applicable to professional negligence claims is three years, N.C.G.S. § 1-15(c) (2017), this case is controlled by the more specific provision addressing the time period within which professional negligence claims "may be brought" "on behalf of a minor," *id.* § 1-17(b) (2017). Subsection 1-17(b) provides, in relevant part:

> *Notwithstanding the provisions of subsection (a) of this section*, . . . an action on behalf of a minor for malpractice arising out of the performance of or failure to perform professional services shall be commenced within the limitations of time specified in [N.C.]G.S. [§] 1-15(c), *except that if those time limitations expire before the minor attains the full age of 19 years*, *the action may be brought before the minor attains the full age of 19 years*.

Id. § 1-17(b) (emphases added).[1] The statute's language could not be more clear. The provision allows a minor plaintiff injured by the professional negligence of another to bring a claim at any time "before the minor attains the full age of 19 years." *Id.* There is no proviso in subsection 1-17(b) allowing for a different result in the event that the minor is appointed a guardian *ad litem* (GAL) or if the minor files suit but elects to take a voluntary dismissal without prejudice under N.C.G.S. § 1A-1, Rule 41(a)(1).

Despite the clear, unambiguous language used by the legislature, the majority concludes—without citation to authority—that "[r]emoval of

1. All parties to this appeal, the Court of Appeals, and the majority agree that the General Assembly's addition of N.C.G.S. § 1-17(c) became effective 1 October 2011 and does not apply to plaintiff's claim because the actions upon which plaintiff's claim is based occurred prior to that date. *See* Act of June 13, 2011, ch. 400, sec. 9, 2011 N.C. Sess. Laws 1712, 1716 (captioned "An Act to Reform the Laws Relating to Money Judgment Appeal Bonds, Bifurcation of Trials in Civil Cases, and Medical Liability") (codified as amended at N.C.G.S. § 1-17 (2017)). However, the majority's interpretation of N.C.G.S. § 1-17(b) would apply with equal force to the amended statute to which the majority refers, N.C.G.S. § 1-17(c)(1) (2017).

the disability [of minority] . . . by appointment of a GAL triggers the running of the statute of limitations," and that subsections 1-17(a) and (b) "requir[e] [that the minor's claim] be brought within the time specified by N.C.G.S. § 1-15(c) after the disability is removed." In doing so, the majority grafts additional terms onto subsection 1-17(b) that stem from provisions of *general applicability*: N.C.G.S. § 1-15(c) and N.C.G.S. § 1-17(a). *See First-Citizens Bank & Tr. v. Willis*, 257 N.C. 59, 62, 125 S.E.2d 359, 361 (1962) (interpreting the general disability tolling provision of N.C.G.S. § 1-17 as it existed at the time); *see also Teele v. Kerr*, 261 N.C. 148, 150, 134 S.E.2d 126, 128 (1964) (same); *Johnson v. Pilot Life Ins. Co.*, 217 N.C. 139, 143-44, 7 S.E.2d 475, 477-78 (1940) (same). The majority's reasoning is sound when applied to a minor's cause of action that does not fall within the scope of N.C.G.S. § 1-17(b). *See Rowland v. Beauchamp*, 253 N.C. 231, 234-35, 116 S.E.2d 720, 722-23 (1960). But the plain language of subsection 1-17(b) is not susceptible to this interpretation.

Subsection 1-17(b) begins by directing the reader to *disregard* the provisions of general applicability from subsection 1-17(a) which would require a minor plaintiff to bring her cause of action within three years "after the removal of the disability." *See* N.C.G.S. § 1-17(b) ("Notwithstanding the provisions of subsection (a) of this section. . . ."); *see also Notwithstanding*, *Black's Law Dictionary* (10th ed. 2014) (defining "[n]otwithstanding" as "Despite; in spite of"). Additionally, N.C.G.S. § 1-15, describing the generally applicable three-year limitations period for professional negligence actions, states that "[c]ivil actions can only be commenced within the periods prescribed in this Chapter, after the cause of action has accrued, *except where in special cases a different limitation is prescribed by statute*." N.C.G.S. § 1-15(a) (2017) (emphasis added). Subsection 1-17(b) prescribes a "different limitation" for the "special cases" of professional negligence actions brought on behalf of minors. "Where the language of a [statute] is clear and unambiguous, there is no room for judicial construction and the courts must give [the statute] its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974) (quoting 7 Strong's North Carolina Index 2d: *Statutes* § 5, at 77 (1968) (footnotes omitted)); *see also* Ernest Bruncken, *Interpretation of the Written Law*, 25 Yale L.J. 129, 130 (1915) ("[T]he actual intention of the legislat[ure] is quite immaterial [to a plain reading construction]; what matters is the way in which [legislators] ha[ve] actually expressed [their] intention. We must look to the wording of the statute, and to that alone."). Further,

> [w]here there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, *the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute*, according to the authorities on the question, unless it appears that the legislature intended to make the general act controlling; and this is true *a fortiori* when the special act is later in point of time, although the rule is applicable without regard to the respective dates of passage.

Nat'l Food Stores v. N. C. Bd. of Alcoholic Control, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966) (emphasis added) (quoting 82 C.J.S. *Statutes* § 369, at 839-43 (1953) (second italics added) (footnotes omitted)). Here, the later enacted, more specific provision of subsection 1-17(b) controls over the general provisions of subsections 1-17(a) and 1-15(c).

According to the plain language of subsection 1-17(b), "the action may be brought before the minor attains the full age of 19 years." N.C.G.S. § 1-17(b). This action was brought before plaintiff's nineteenth birthday. Thus, the decision of the Court of Appeals is correct and should be affirmed.

Justices HUDSON and MORGAN join in this dissenting opinion.

N.C. DEP'T OF TRANSP. v. MISSION BATTLEGROUND PARK, DST

[370 N.C. 477 (2018)]

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION
v.
MISSION BATTLEGROUND PARK, DST; MISSION BATTLEGROUND PARK LEASECO, LLC, Lessee; LASALLE BANK NATIONAL ASSOCIATION, as Trustee for the Registered Holders of CD 2006-CD3 Commercial Mortgage Pass-Through Certificates; and LAT BATTLEGROUND PARK, LLC

No. 361PA16

Filed 2 March 2018

1. Appeal and Error—preservation of issues—exclusion of testimony—not properly preserved

An argument by the Department of Transportation (DOT) that defendants did not properly preserve for appellate review the exclusion of a realtor's fair market value testimony was not properly before the N.C. Supreme Court. DOT's response to defendants' petition for discretionary review did not state any additional issues that DOT sought to present. Even so, defendants' offer of proof regarding the testimony was apparently sufficient to preserve the issue, regardless of whether defendants tried to call the witness to testify about fair market value at trial.

2. Witnesses—real estate broker—expert testimony—fair market value

The trial court erred by prohibiting a real estate broker from giving expert testimony about fair market value based on N.C.G.S. § 93A-83(f). The authority of a real estate broker to prepare an expert report and to testify as an expert in court comes from Rule of Evidence 702, not from Article 6 of Chapter 93A, which distinguishes between licensed brokers and licensed appraisers.

3. Evidence—exclusion of real estate broker's testimony—prejudicial

There was prejudice from the exclusion of a real estate broker's testimony in a case involving the condemnation of land for highway construction where there was a reasonable probability that the trial court would have admitted the broker's fair market value testimony under Rule 702 if the trial court had not excluded that testimony based on subsection 93A-83(f). Moreover, if the broker's testimony about fair market value had been admitted under Rule 702, there was a reasonable probability that his testimony would have affected the jury's verdict.

4. Eminent Domain—condemnation—instructions—fair market value

The North Carolina Supreme Court declined to disturb *Carolina Power & Light Co. v. Creasman*, 262 N.C. 390, in a condemnation case, remanded on other grounds, which included an issue involving a fair market value instruction that was likely to recur.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 791 S.E.2d 478 (2016), finding no error after appeal from a judgment entered on 30 July 2015 and orders entered on 24 September 2015 by Judge Richard S. Gottlieb in Superior Court, Guilford County. Heard in the Supreme Court on 7 November 2017.

Joshua H. Stein, Attorney General, by Hilda Burnett-Baker, Special Deputy Attorney General, and Phyllis A. Turner, Assistant Attorney General, for plaintiff-appellee.

Smith Moore Leatherwood LLP, by Patrick M. Kane, Bruce P. Ashley, Kip D. Nelson, and Matthew Nis Leerberg, for defendant-appellants.

Wilson & Helms LLP, by Lorin J. Lapidus and G. Gray Wilson, for Civitas Institute, amicus curiae.

Bass Dunklin McCullough & Smith, PLLC, by Garth K. Dunklin, for James F. Collins, amicus curiae.

MARTIN, Chief Justice.

In March 2013, the North Carolina Department of Transportation (DOT) condemned 2.193 acres of land in Greensboro, North Carolina, for a highway construction project. This land had previously been part of a 240-unit apartment complex that is now called Landmark at Battleground Park. The defendants in this case are the current and former owners, the lessee, and the mortgage holder of the Landmark apartment complex. In its Declaration of Taking and Notice of Deposit, DOT stated that it had deposited $276,000 with the Superior Court of Guilford County and indicated that defendants could seek disbursement of this money as partial or full compensation for the taking. Defendants argued that $276,000 did not amount to just compensation and demanded a trial to determine the correct amount of damages.

At trial, defendants sought to introduce James Collins, a licensed real estate broker, as an expert witness who would testify about the fair market value of the Landmark apartment complex before and after the taking. In his expert report, Mr. Collins compared the fair market value of the entire tract just before the taking with what the fair market value of the remainder of the tract would be after the construction of the highway. After comparing these two values, Mr. Collins opined that the proper amount of just compensation for the taking was $3.734 million.

After DOT moved in limine to exclude Mr. Collins' expert report and expert testimony, the trial court excluded Mr. Collins' report and prohibited him from testifying about the fair market value of the property in question based on N.C.G.S. § 93A-83, which governs the practice of providing broker price opinions and comparative market analyses. According to the trial court, Mr. Collins could provide a "broker price opinion or comparative market analysis" using his expertise as a broker, but that opinion or analysis would have to focus on the probable selling price of the property rather than on its fair market value. The trial court based its ruling specifically on the language of section 93A-83 and did not analyze any of Mr. Collins' proposed fair-market-value testimony under Rule 702 of the North Carolina Rules of Evidence. The trial court noted its discomfort with its conclusion, questioning whether the General Assembly had intended the result that the trial court reached. But the trial court ultimately stated that what it thought was "the plain reading of the statute" controlled.

The trial proceeded with Mr. Collins' report and fair-market-value testimony excluded. The trial court admitted testimony on fair market value from other experts. Two DOT experts argued that just compensation should be set at $276,050 and $1,271,850, respectively. The trial court allowed defendants to introduce testimony from another expert, who argued for a just compensation figure of $3,169,175. While instructing the jury, the trial court stated that "[f]air market value should not include the diminution in value of the remainder property caused by the acquisition and use of the adjoining lands of others for the same undertaking." The jury ultimately returned a verdict setting just compensation for the taking at $350,000.

Defendants appealed this decision to the Court of Appeals, alleging, among other things, that Mr. Collins' report and his testimony on fair market value should have been admitted as evidence. Defendants also objected to the special jury instruction that we have just quoted. The Court of Appeals found no error and affirmed the trial court's decision.

N.C. Dep't of Transp. v. Mission Battleground Park, DST, ___ N.C. App. ___, ___, 791 S.E.2d 478, 486 (2016). Defendants sought discretionary review of the statutory exclusion of Mr. Collins' testimony about fair market value, as well as of the allegedly improper jury instruction. We allowed discretionary review of these issues.

[1] DOT argues that defendants did not properly preserve the exclusion of Mr. Collins' fair-market-value testimony for appellate review. But this argument is not properly before us, because DOT's response to defendants' petition for discretionary review did not state any additional issues that DOT sought to present. *See* N.C. R. App. P. 15(d). Our scope of review is therefore limited to the issues that defendants have raised.

Even if this issue were properly before us, however, it appears that defendants' offer of proof regarding Mr. Collins' testimony was sufficient to preserve the issue, regardless of whether defendants tried to call him to testify about fair market value at trial. "An offer of proof under Rule 43(c) must be specific and must indicate what testimony the excluded witness would give." *Currence v. Hardin*, 296 N.C. 95, 100, 249 S.E.2d 387, 390 (1978). During the offer of proof, Mr. Collins laid out his credentials in detail, including his thirty-nine years of experience in the apartment complex business, during which he had estimated the fair market values of hundreds of apartment complexes. Mr. Collins also announced his $3.734 million estimate of the damages due to defendants and summarized the calculation that led to that estimate. We do not find any defect in this offer of proof.

[2] We typically review a trial court's ruling on the admission or exclusion of expert testimony for abuse of discretion. *See State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016). In this case, however, the decision to exclude testimony was based specifically on the interpretation of a statute. Because we review questions of statutory interpretation de novo, *In re Foreclosure of Vogler Realty, Inc.*, 365 N.C. 389, 392, 722 S.E.2d 459, 462 (2012), we likewise review any exclusion of evidence based specifically and only on statutory interpretation de novo.

DOT is arguing, in effect, that an expert witness needs to prepare an expert report on a given issue in order to give expert testimony on that issue. We assume, for the sake of argument, that this is true. But, DOT asserts, Mr. Collins could not lawfully prepare an expert report about fair market value because N.C.G.S. § 93A-83(f) forbids him from doing so. DOT thus concludes that Mr. Collins could not give expert testimony about fair market value. Under DOT's argument, then, Mr. Collins' ability to give expert testimony about fair market value depends on his ability

to prepare an expert report on fair market value without violating subsection 93A-83(f). We therefore focus on whether he could prepare the expert report on fair market value that he in fact prepared without violating that subsection.

Subsection 93A-83(f) states:

> **Restrictions.** — Notwithstanding any provisions to the contrary, a person licensed [as a real estate broker] pursuant to this Chapter may not knowingly prepare a broker price opinion or comparative market analysis for any purpose in lieu of an appraisal when an appraisal is required by federal or State law. A broker price opinion or comparative market analysis that estimates the value of or worth [of] a parcel of or interest in real estate rather than sales or leasing price shall be deemed to be an appraisal and may not be prepared by a licensed broker under the authority of this Article, but may only be prepared by a duly licensed or certified appraiser, and shall meet the regulations adopted by the North Carolina Appraisal Board. A broker price opinion or comparative market analysis shall not under any circumstances be referred to as a valuation or appraisal.

These restrictions distinguish between licensed brokers—who are allowed to provide estimates of the "probable selling price or leasing price" of real property under N.C.G.S. §§ 93A-82 and 93A-83(a) and (b)—on the one hand, and licensed or certified *appraisers*—who are allowed to provide estimates of the *value* of real property—on the other. The question, then, is whether this limitation on licensed brokers applies when a licensed broker prepares an expert report in a civil proceeding.

The second sentence of subsection 93A-83(f) may, at first glance, seem to be an impediment to Mr. Collins' preparing an expert report in this case. That sentence indicates that a broker price opinion (BPO) or a comparative market analysis (CMA) that estimates the value of property rather than the price of property will "be deemed to be an appraisal," and that a licensed broker cannot prepare that document "under the authority of this Article." N.C.G.S. § 93A-83(f) (2017). That last, quoted phrase is key to our analysis, though, and both the trial court and the Court of Appeals seem to have overlooked it.

That phrase refers to the authority given to licensed brokers in Article 6 of Chapter 93A—more specifically, to the authority given to licensed brokers in subsections 93A-83(a) and (b), which authorize

brokers to prepare BPOs and CMAs and to collect fees for doing so. But the authority of a broker (or of anyone else) *to testify as an expert in court*, and thus to prepare an expert report, does not come from Article 6 of Chapter 93A in the first place. That authority instead comes from Rule of Evidence 702 and the cases that set out the standard for admission of expert testimony under that rule. Any person who can qualify as an expert under that standard, which is articulated in *State v. McGrady*, 368 N.C. 880, 787 S.E.2d 1, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993), and other pertinent caselaw, can testify without having to invoke any other source of authority. Meeting that standard is both necessary and sufficient.

Subsection 93A-83(f)'s language that a BPO or a CMA that contains an appraisal of value rather than an estimate of probable price "may only be prepared by a duly licensed or certified appraiser" does not change this conclusion. That language must be read in conjunction with the rest of the sentence in which it appears: when a licensed broker mistakenly relies on the authority set forth in Article 6 to prepare what is actually an appraisal—and, it implicitly follows, when a broker therefore *lacks* the authority to prepare that appraisal—the limitation that only an appraiser may prepare an appraisal kicks in. That limitation does not apply when a broker relies on a source of authority outside of Article 6 to prepare an expert report to support his in-court testimony.

In other words, because Mr. Collins did not prepare his expert report "under the authority of" Article 6 of Chapter 93A, and relied on the authority that Rule 702 purportedly gave him instead, his preparation of that report did not violate the second sentence of subsection 93A-83(f). This is true even if we assume what we need not, and do not, decide—namely, that Mr. Collins' expert report would also qualify as a BPO or a CMA under section 93A-82.

The statement in subsection 93A-83(f)'s third sentence—that a BPO or a CMA "shall not under any circumstances be referred to as a valuation or [an] appraisal"—does not present a problem for Mr. Collins' expert report either, for two reasons.

First, this statement simply requires that a BPO or a CMA not be *called* a valuation or an appraisal. Even assuming that his expert report was a BPO or a CMA, Mr. Collins complied with that requirement. He did not refer to his report as a "valuation" or an "appraisal" of the property taken, either in the report itself or elsewhere. He did purport to estimate the "fair market value" of the property in question, but that does not violate the third sentence of subsection (f) at all.

Second and more importantly, though, subsection (f)'s third sentence must be interpreted holistically with the rest of the statute. "Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012). Subsection (f) is labelled "Restrictions." Read in the context of section 93A-83 as a whole, this subsection's effect is to restrict—or, at least, to clarify the limits of—the authority that subsections 93A-83(a) and (b) grant to licensed brokers to issue BPOs and CMAs. The first sentence of subsection (f) indicates that a broker cannot prepare a BPO or a CMA in lieu of an appraisal when an appraisal is required by law; the second sentence of subsection (f) indicates that a broker cannot prepare what is, in substance, an appraisal but call it a BPO or a CMA. The restriction in the third sentence of subsection (f) is basically the inverse of the restriction in the second sentence; it indicates that a broker cannot prepare what is, in substance, a BPO or a CMA but call it an appraisal or a valuation.

Subsection (f), then, is not a freestanding provision that applies to anything that in theory falls within the statutory definition of a BPO or a CMA. It simply limits, or clarifies preexisting limitations on, the authority granted in subsections 93A-83(a) and (b). Once again, Mr. Collins derived his purported authority to submit an expert report in this case from Rule 702, not from section 93A-83. We have already discussed why that fact makes the second sentence of subsection 93A-83(f) inapplicable here, and it makes the third sentence inapplicable here too.

It is worth noting that, under DOT's reading of the statute, subsection 93A-83(f) would bar a licensed broker from testifying about fair market value simply because he holds a broker's license—even when an intelligent layperson, without any license, *could* potentially testify about fair market value. Subsection (f) says nothing about whether an appraisal of property value can be done by a layperson, after all. But professional licenses grant an individual the right to legitimately engage in certain activities; they do not revoke capacities that the individual previously had. So, in addition to running afoul of the statute's meaning, DOT's reading of the statute would lead to absurd results.

[3] Having established that the trial court erroneously invoked subsection 93A-83(f) to exclude Mr. Collins' expert testimony, we turn to the question of whether that error was prejudicial or harmless. "In civil cases, '[t]he burden is on the appellant not only to show error but to enable the court to see that he was prejudiced or the verdict of the jury

probably influenced thereby.' " *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 589, 403 S.E.2d 483, 490 (1991) (alteration in original) (quoting *Wilson Cty. Bd. of Educ. v. Lamm*, 276 N.C. 487, 492, 173 S.E.2d 281, 285 (1970)). In other words, defendants must show a "reasonable probability" that the jury would have reached a more favorable verdict had the trial court not excluded Mr. Collins' testimony about fair market value on erroneous statutory grounds. *See id.* (citing, inter alia, *Gregory v. Lynch*, 271 N.C. 198, 203, 155 S.E.2d 488, 492 (1967)).

To begin with, there is a reasonable probability that the trial court would have admitted Mr. Collins' fair-market-value testimony under Rule 702 if the trial court had not excluded that testimony based on subsection 93A-83(f). The trial court would have permitted Mr. Collins to testify about probable selling price if defendants had called him as an expert witness at trial and laid a proper foundation for his testimony. The trial court also expressed misgivings about the result that it reached under subsection (f) but incorrectly thought that subsection (f) "constrained" it to exclude Mr. Collins' testimony about fair market value.

And if Mr. Collins' testimony about fair market value had been admitted under Rule 702, there is a reasonable probability that his testimony would have affected the jury's verdict. The amount of money due to defendants was the only issue for the jury to decide. Any probable effect on the dollar figure decided on by the jury would therefore be enough to establish prejudice. While Mr. Collins' testimony may not have resulted in defendants' receiving all of the compensation that they wanted, it almost certainly would have changed the jury's analysis, and therefore would have changed the final dollar figure announced in the verdict. Standing alone, the approximately $3.17 million value estimate that defendants' sole expert introduced may have seemed like an outlier to the jury. But an additional, even higher estimate could have changed that perception.

Mr. Collins' $3.734 million calculation of just compensation, moreover, was significantly higher than any of the three figures to which the other experts actually testified at trial, and was over half a million dollars higher than even the figure to which defendants' other expert testified. The jury did not adopt any expert's figure exactly in its verdict, but it did reach a figure that was closer to those of DOT's two experts than to that of defendants' one expert. In light of these facts, it would have been improbable for the introduction of Mr. Collins' fair-market-value testimony *not* to have affected the jury's conclusions.

DOT is correct that the trial court would have allowed Mr. Collins to testify about the probable selling price of the property. That is not an

adequate substitute for testimony about the property's fair market value, however. N.C.G.S. § 136-112(1) explicitly states that, when only part of a tract of land is taken, damages are determined by calculating the difference between the *fair market value* of the entire tract of land before the taking and the *fair market value* of the remaining tract of land after the taking. If Mr. Collins had testified only about probable selling price, DOT could have easily attacked his testimony as not relevant to this determination, or at a minimum as less relevant than the testimony of the other experts.

Fair market value, after all, is defined as "the price to which a *willing* buyer and a *willing* seller would agree." *Dep't of Transp. v. Adams Outdoor Advert. of Charlotte Ltd. P'ship*, ___ N.C. ___, ___, 804 S.E.2d 486, 493 (2017) (emphases added). An analysis of probable selling price could take into account things that would not factor into an analysis of fair market value, though, such as individual motivations or hardships that might force either a buyer or a seller to accept a worse deal than he or she would if approaching the transaction willingly. In other words, fair market value and probable selling price are conceptually distinct, and an estimate of one cannot appropriately substitute for an estimate of the other. Indeed, DOT's main argument for excluding Mr. Collins' testimony is based entirely on the fact that subsection 93A-83(f) allows licensed brokers to estimate one but not the other in their BPOs and their CMAs.

We conclude that N.C.G.S. § 93A-83(f) did not prohibit Mr. Collins from preparing his expert report on fair market value in this case, and that the trial court's erroneous exclusion of Mr. Collins' testimony about fair market value on that basis prejudiced defendants. We therefore reverse the Court of Appeals on that issue and remand this case to the Court of Appeals with instructions to remand the case to the superior court for a new trial. We take no position on whether Mr. Collins was qualified under Rule 702 of the North Carolina Rules of Evidence to give the expert testimony that he intended to give. Assuming that defendants tender Mr. Collins as an expert again, the superior court should decide in the first instance whether his testimony about fair market value is admissible under Rule 702.

[4] Because we hold that a new trial is warranted based on the improper statutory exclusion of Mr. Collins' testimony, we do not need to reach defendants' argument concerning the allegedly improper special jury instruction given at trial. There is a good chance that the same issue will arise on retrial, however, so it is worthwhile to address the issue here. As we have said, the trial court instructed the jury that "[f]air market

value should not include the diminution in value of the remainder property caused by the acquisition and use of the adjoining lands of others for the same undertaking." This instruction was taken almost verbatim from this Court's opinion in *Carolina Power & Light Co. v. Creasman*, 262 N.C. 390, 137 S.E.2d 497 (1964). The pertinent language in that opinion was, in turn, quoting from an opinion of the Supreme Court of the United States. *See Campbell v. United States*, 266 U.S. 368, 372, 45 S. Ct. 115, 117 (1924). We see no reason to disturb *Creasman* and therefore affirm the decision of the Court of Appeals on this issue.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY
v.
LILLIAN DIANNE HULL AND ANNITTA B. CROOK

No. 45A17

Filed 2 March 2018

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. ___, 795 S.E.2d 420 (2016), affirming an order entered on 23 February 2016 by Judge Mark E. Klass in Superior Court, Davidson County. Heard in the Supreme Court on 6 February 2018.

Caudle & Spears, P.A., by Harold C. Spears and Christopher P. Raab, for plaintiff-appellant.

Doran Law Offices, by Michael Doran, for defendant-appellees.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed. This matter is remanded to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

STATE v. CANNON

[370 N.C. 487 (2018)]

STATE OF NORTH CAROLINA
v.
GARY WILLIAM CANNON

No. 276A17

Filed 2 March 2018

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. ___, 804 S.E.2d 199 (2017), affirming in part and vacating in part a judgment entered on 13 May 2016 by Judge Daniel A. Kuehnert in Superior Court, Lincoln County, and remanding for a new sentencing hearing. Heard in the Supreme Court on 6 February 2018.

Joshua H. Stein, Attorney General, by Thomas J. Campbell, Special Deputy Attorney General, for the State.

William D. Spence for defendant-appellant.

PER CURIAM.

The decision of the Court of Appeals is affirmed. However, we specifically disavow that court's taking of judicial notice of the prevalence of Wal-Mart stores in Gastonia and in the area between Gastonia and Denver, as well as of the "ubiquitous nature of Wal-Mart stores." *State v. Cannon*, ___ N.C. App. ___, ___, 804 S.E.2d 199, 202 (2017).

AFFIRMED.

STATE OF NORTH CAROLINA
v.
LINDA BETH CHEKANOW AND ROBERT DAVID BISHOP

No. 390PA16

Filed 2 March 2018

Drugs—marijuana—constructive possession—plants growing on property

The trial court properly denied defendants' motions to dismiss for insufficient evidence charges of constructive possession of marijuana plants found growing on their property where a jury could reasonably infer from the evidence that defendants knowingly possessed the marijuana plants.

Justice NEWBY concurring in the result only.

Chief Justice MARTIN and Justice JACKSON join in this concurring 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. ___, 791 S.E.2d 872 (2016), reversing and remanding judgments entered on 5 August 2015 by Judge R. Stuart Albright in Superior Court, Alleghany County. Heard in the Supreme Court on 9 October 2017.

Joshua H. Stein, Attorney General, by Adrian W. Dellinger, Assistant Attorney General, for the State-appellant.

J. Clark Fischer for defendant-appellees.

BEASLEY, Justice.

In this appeal we consider whether evidence was sufficient to permit a jury to find defendants were aware of, and exercised control over, the twenty-two marijuana plants found growing on their property. The Court of Appeals concluded that defendants did not have exclusive possession of the portion of the property where the plants were found, and therefore, the State was required to show evidence of other incriminating circumstances to survive defendants' motion to dismiss. Because the Court of Appeals held the State failed to show other incriminating

circumstances that would permit a jury to find defendants were aware of, and exercised control over, the marijuana plants, the unanimous panel reversed the trial court's judgments, and remanded the matter to the trial court for entry of an order granting defendants' motions to dismiss. We hold that despite defendants' nonexclusive control, the State presented sufficient evidence of other incriminating circumstances to allow the case to go to the jury. Accordingly, we reverse the decision of the Court of Appeals.

Defendants were charged with manufacturing marijuana, possession with intent to manufacture, sell, or deliver marijuana, and felony possession of marijuana and were tried during the 3 August 2015 criminal session of Superior Court in Alleghany County.[1]

At trial, the State's evidence tended to show that on 21 August 2014, law enforcement agencies, while conducting marijuana eradication operations by helicopter, observed marijuana plants growing on a three-acre parcel of land owned by defendants. The officers were initially alerted to defendants' property because they observed defendant Chekanow standing on the front porch of her home making an obscene gesture ("shooting the bird") at the helicopter. When officers arrived at the property, they found defendant Chekanow attempting to leave her house in a vehicle. The officers directed her back to her home and she complied. Chekanow was the only person present at the residence, and she consented to a search of the area where the plants were located, the outbuildings, and her home.

Officers on the ground located twenty-two marijuana plants growing on a fenced-in, one-half acre portion of defendants' property. This area was bordered by a woven wire fence and contained a chicken coop, defendants' chickens, and fruit trees. Officers testified the fence was approximately four feet high and not easy to climb over. In addition, officers testified the single gate to the fence was located adjacent to defendants' yard. One officer testified that to access the fenced-in area, one would have to be "right there in front of the house, at the front yard," and there were no other designated access points from the public roadway. As the officers walked to the location where the plants were growing, one observed that the grass along the fence line was not as high as elsewhere; instead, it had been "cut down, mowed, trampled on." Also, inside the fenced-in area was a "cleared-out area . . . maybe weed-eated, mowed, where the chicken house was." Further, an officer in the

1. Defendants waived any conflict of interest, were represented by the same defense attorney, and were tried jointly.

helicopter testified that a trail leading from the house to the plants was visible from the air. The path of the trail appeared to be "smashed down" as if it had been used regularly.

The marijuana plants were located sixty to seventy yards beyond the gate; fifty to seventy-five yards, or approximately two hundred feet, from defendants' house; and ten to twenty yards from a mowed and maintained area with a trampoline. The plants were "well taken care of," growing in a row in a cleared area behind some high weeds, and were placed in a location that allowed them to blend in with the weeds. Officers on the ground testified they could not see the marijuana plants until they were "right on top of [them]" or about five to ten feet away from the plants. The plants were approximately three to five feet in height, and the ground at the base of the plants had been tilled. One officer testified that it appeared the plants were started individually in a pot and then transferred into the ground.

During the search, no marijuana or related paraphernalia was found in the home or outbuildings; however, officers did locate small and large pots, shovels, trowels, and other gardening equipment. One officer testified to finding a "small starter kit" consisting of a very small cardboard cup:

> Through my experience, we have seen that multiple times . . . . they will plant the seeds—marijuana seeds into a starter kit, which are the small cups that are cardboard. And then they grow [the marijuana plants] to a certain height or maturity; then they transplant them from there to a bigger bucket or a planter until they reach another maturity level. And then once a fuller maturity level is reached, then they will take those and plant them into dirt . . . .

The officer further testified that the gardening equipment could have been used for growing marijuana or for legitimate gardening purposes because defendants had a garden and potted plants on the property in addition to the marijuana plants. One of the shovels was covered in dirt that was similar to the dirt at the base of the marijuana plants, whereas the dirt in the garden was brown.

The evidence was uncontroverted that defendants had owned and occupied the property on which the marijuana plants were found for about nine years. Defendants' nine-year old son also lived in the home. Defendants testified that another individual—who lived nearby and possessed a key to defendants' house—had been on their property frequently

to perform yard work, maintenance, and take care of the house and animals while defendants were out of town. Defendants maintained they had no knowledge of the marijuana plants.

Because the State could not prove actual possession of the marijuana plants, the State proceeded on the theory of constructive possession based on the foregoing evidence. At the close of the State's evidence and again at the close of all the evidence, defendants moved to dismiss the charges for insufficient evidence. The trial court denied both motions. On 5 August 2015, a jury found both defendants guilty of all charges against them, and the trial court sentenced defendants to six to seventeen months of imprisonment, suspended for eighteen months subject to supervised probation.

Defendants appealed their convictions to the Court of Appeals, arguing the trial court erred in denying their motions to dismiss because the State presented insufficient evidence to establish that they were in constructive possession of the plants.[2] The Court of Appeals agreed with defendants, holding that though defendants' ownership and occupation of the property created an "inference of constructive possession," the defendants' possession of the property was not exclusive and the State "failed to show other incriminating circumstances" which would permit a jury to find defendants were aware of, and exercised control over, the marijuana plants. *State v. Chekanow*, ___ N.C. App. ___, 791 S.E.2d 872, 2016 WL 5746386, at *4 (2016) (unpublished). The court reversed the trial court's judgments, and remanded the matter to the trial court for entry of an order granting defendants' motions to dismiss. *Id.* This Court granted the State's petition for discretionary review of the sufficiency issue.

In this case, we review a unique application of the constructive possession doctrine. The doctrine is typically applied in cases when a defendant does not have actual possession of the contraband, but the contraband is found in a home or in a vehicle associated with the defendant; however, in this case we examine the doctrine as applied to marijuana plants found growing on a remote part of the property defendants owned and occupied. The sole issue presented in this appeal is whether the trial court properly denied defendants' motions to dismiss, in which defendants argued the State presented insufficient evidence showing

2. The Court of Appeals noted the defendants raised three proposed issues on appeal, but only addressed one in their brief. The court did not address the other two issues and deemed them to be abandoned, pursuant to N.C. Rule of Appellate Procedure 28(b).

defendants were aware of, and exercised control over, the twenty-two marijuana plants growing on their property.

"In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (quoting *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002)). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* at 301, 560 S.E.2d at 781 (citation omitted).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). "[T]he trial court is concerned only with the sufficiency of the evidence to take the case to the jury and not with its weight," and "[t]he test of the sufficiency of the evidence to withstand the motion is the same whether the evidence is direct, circumstantial or both." *State v. Malloy*, 309 N.C. 176, 178-79, 305 S.E.2d 718, 720 (1983). "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 913, 919 (1993) (quoting *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988))), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then 'it is for the jury to decide whether the facts . . . satisfy [the jury] beyond a reasonable doubt that the defendant is actually guilty.' " *Id.* at 379, 526 S.E.2d at 455 (quoting *Barnes*, 334 N.C. at 75-76, 430 S.E.2d at 919). But if "the evidence is . . . sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed." *Malloy*, 309 N.C. at 179, 305 S.E.2d at 720 (citing *State v. Poole*, 285 N.C. 108, 119, 203 S.E.2d 786, 793 (1974)). "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016) (citing *State v. Cox*, 367 N.C. 147, 150-51, 749 S.E.2d 271, 274-75 (2013)).

To survive a motion to dismiss when a defendant has been charged with manufacturing marijuana, possession with intent to manufacture, sell, or deliver marijuana, and felony possession of marijuana, the State must provide substantial evidence that the defendant knowingly possessed the marijuana. N.C.G.S. § 90-95(a)(1), (a)(3), (d)(4) (2015). Possession of contraband may be actual or constructive. *State v. Minor*, 290 N.C. 68, 73, 224 S.E.2d 180, 184 (1976).

In this case the State proceeded on a theory that defendants constructively possessed the marijuana plants. A defendant constructively possesses contraband when he or she does not have actual possession of the contraband but has " 'the intent and capability to maintain control and dominion over' it." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (quoting *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986)). A finding of constructive possession requires a totality of the circumstances analysis. *See Miller*, 363 N.C. at 99, 678 S.E.2d at 594; *see also State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986) ("As the terms 'intent' and 'capability' suggest, constructive possession depends on the totality of circumstances in each case."). "The defendant may have the power to control either alone or jointly with others." *Miller*, 363 N.C. at 99, 678 S.E.2d at 594 (citing *State v. Fuqua*, 234 N.C. 168, 170-71, 66 S.E.2d 667, 668 (1951)).

When contraband is "found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270-71 (2001) (quoting *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972)) (emphasis added). "However, unless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred." *Id.* at 552, 556 S.E.2d at 271 (quoting *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d, 187 190 (1989)).

In our jurisprudence, cases relying on a defendant's exclusive possession of the place the contraband is found have been limited to the specific factual circumstances when contraband was discovered inside a contained area such as a home or vehicle of which the defendant was the *sole* owner, resident, or occupant at the time the contraband was discovered. *See Harvey*, 281 N.C. at 12-13, 187 S.E.2d at 714 (The evidence supported a reasonable inference that the marijuana was in the defendant's possession when marijuana was found in the defendant's home, within three or four feet from him, and the defendant was the sole

occupant of the room in which it was found.); *see also* Jessica Smith, *North Carolina Crimes* 702 (7th ed. 2012) (comparing two hypotheticals to explain the concept of exclusive possession: "[I]f drugs are found in a closet in the defendant's home and the defendant is the *sole* resident of the home, the evidence of constructive possession is sufficient to take the issue to the jury." But if drugs are found "in a vehicle driven by one person and carrying several others as passengers," the defendant is not in exclusive possession and other incriminating circumstances must be shown. (emphasis added)); *cf. Davis*, 325 N.C. at 695-97, 386 S.E.2d at 188-190 (requiring the State, despite the defendant's ownership of the mobile home, to prove other incriminating circumstances when seven individuals were present in the mobile home at the time the contraband was discovered). Unlike *Harvey*, the evidence in this case established that both defendants lived in the home with their son, and defendants allowed another individual regular access to their property to help with maintenance and to care for their property while defendants were away on vacation.

Further, this case involves consideration of a more sprawling area of real property that included a remote section where the marijuana was growing and to which others could potentially gain access. In *State v. Spencer*, an opinion issued on the *same day* as *Harvey*, this Court did not rely on ownership and occupation of the premises alone to determine the evidence was sufficient to show the defendant constructively possessed marijuana discovered in a pig shed approximately twenty yards behind his home and marijuana growing in a cornfield fifty-five yards beyond the pig pen. 281 N.C. 121, 129-30, 187 S.E.2d 779, 784-85 (1972). Rather, the Court also considered that the defendant had been seen in and around the shed, that marijuana seeds were found in his bedroom, and that a path linked the pig shed to the cornfield when holding that the evidence in that case raised a reasonable inference that the defendant exercised control over the pig shed, the cornfield, and their contents. *Id.* at 129-30, 187 S.E.2d at 784-85. The Court in *Spencer* did not mention, much less apply, the standard it issued in *Harvey* and relied instead on other incriminating circumstances, indicating there is a meaningful distinction in one's ability to control a contained space such as a home and vehicle versus sprawling property.

Thus, for evidence of constructive possession to be sufficient, if the defendant owns the premises on which the contraband is found, (1) he must also have exclusive possession of the premises on which the contraband is found, or (2) the State must show additional incriminating circumstances demonstrating the defendant has dominion or

control over the contraband.[3] *See Matias*, 354 N.C. at 552, 556 S.E.2d at 270-71 (synthesizing the law of constructive possession); *Davis*, 325 N.C. at 697-98, 386 S.E.2d at 190 (same). Reiterating that this is an inquiry that considers all the circumstances of the individual case, when there is evidence that others have had access to the premises where the contraband is discovered, whether they are other occupants or invitees, or the nature of the premises is such that imputing exclusive possession would otherwise be unjust, it is appropriate to look to circumstances beyond a defendant's ownership and occupation of the premises. As stated by two federal courts of appeals, " 'when there is joint occupancy of a residence, dominion over the premises by itself is insufficient to establish constructive possession. In joint occupancy cases, there must be some additional nexus linking the defendant to the contraband." *United States v. Wright*, 739 F.3d 1160, 1168 (8th Cir. 2014) (citations omitted), *quoted in United States v. Blue*, 808 F.3d 226, 232 (4th Cir. 2015); *accord State v. Thorpe*, 326 N.C. 451, 455-56, 390 S.E.2d 311, 314 (1990) (looking beyond the defendant's ownership and occupation of the bar and pool room to consider other incriminating circumstances).[4]

---

3. In a nonexclusive possession context, ownership of property is insufficient on its own to withstand a motion to dismiss. *Contra State v. Tate*, 105 N.C. App. 175, 179, 412 S.E.2d 368, 370-71 (1992) (stating that "[i]n North Carolina, an inference of constructive possession arises against an owner or lessee who occupies the premises where contraband is found, regardless of whether the owner or lessee has exclusive or nonexclusive control of the premises").

4. The State cites *State v. Thorpe* as a case relying on *Harvey*'s standard for ownership and occupation being sufficient to take a constructive possession case to the jury. To be sure, *Thorpe* did include language from *Harvey* in its analysis. *See State v. Thorpe*, 326 N.C. 451, 455, 390 S.E.2d 311, 314 (1990). However, *Thorpe* did not merely rely on *Harvey* because *Thorpe* was not an exclusive possession scenario. *See id.* at 455, 390 S.E.2d at 314. In *Thorpe*, the defendant did not have exclusive possession over the bar he owned because others had access to the bar and pool room. *See id.* at 455, 390 S.E.2d at 314. Thus, in its sufficiency analysis, the Court considered, in addition to the defendant's property ownership (which was "strong evidence of control") and his physical presence on the premises, the defendant's ability to personally control who entered the premises by use of a key, an officer's observation of defendant alone in the game room or behind the bar on more than one occasion, and the defendant's participation in the sale of controlled substances by knowing the undercover officer's errand and directing her inside. *Id.* at 455-56, 390 S.E.2d at 314. Rather than rely on ownership and occupation alone, the Court in *Thorpe* applied a totality of the circumstances test with property ownership being a weighty, but not dispositive, factor. *See id.* at 455, 390 S.E.2d at 314 ("We hold that, considered as a whole, as required, the circumstantial evidence of defendant's power and intent to control the sale of dilaudid on both dates listed in the indictments was sufficient to support an inference of both his possession with an intent to sell or deliver that controlled substance and his participation in the transfer transactions themselves.").

Considering the circumstances of this case, neither defendant was in sole occupation of the premises on which the contraband was found, defendants allowed another individual regular access to the property, and the nature of the sprawling property on which contraband was found was such that imputing exclusive control of the premises would be unjust.[5] Therefore, we must analyze the additional incriminating circumstances present in this case.

If the defendant is not in exclusive possession of the place where contraband is found, to survive a motion to dismiss the State must show other incriminating circumstances linking the defendant to the contraband. *Miller*, 363 N.C. at 99, 678 S.E.2d at 594 (citing *Matias*, 354 N.C. at 552, 556 S.E.2d at 271). Whether incriminating circumstances exist to support a finding of constructive possession is a fact-specific inquiry. *Id.* at 99-100, 678 S.E.2d at 594-95. In determining whether sufficient incriminating circumstances exist to support a finding of constructive possession, a review of this Court's cases reveals that we have considered the following factors: (1) the defendant's ownership and occupation of the property (as previously discussed); (2) the defendant's proximity to the contraband; (3) indicia of the defendant's control over the place where the contraband is found; (4) the defendant's suspicious behavior at or near the time of the contraband's discovery; and (5) other evidence found in the defendant's possession that links the defendant to the contraband. *See id.* at 99-100, 678 S.E.2d at 594-95 (explaining that proximity and indicia of control are two factors frequently considered in this analysis); *see State v. Butler*, 356 N.C. 141, 147-48, 567 S.E.2d 137, 141 (2002) (considering the defendant's suspicious actions among the sufficient "additional incriminating circumstances"); *State v. Brown*, 310 N.C. 563, 569-70, 313 S.E.2d 585, 588-89 (1984) (considering the defendant's possession of over $1,700 in cash on his person among the sufficient "other incriminating circumstances"). No one factor controls, and courts must consider the totality of the circumstances. *See Miller*, 363 N.C. at 99-101, 678 S.E.2d at 594-95 ("Our cases addressing constructive possession have tended to turn on the specific facts presented."); *State v. Butler*, 147 N.C. App. 1, 11, 556 S.E.2d 304, 311 (2001) ("[C]onstructive possession depends on the totality of the circumstances in each case.") (quoting *State v. Jackson*, 103 N.C. App. 239, 243, 405 S.E.2d 354, 357 (1991), *aff'd per curiam*, 331 N.C. 113, 413 S.E.2d 798 (1992))), *aff'd*, 356

5. The circumstances of this case raise several practical considerations cautioning against the creation of bright line rules which could serve to implicate other innocent property owners in constructive possession cases.

N.C. 141, 567 S.E.2d 137 (2002). However, we reiterate, as this Court did in *Thorpe*, that ownership of the premises on which the contraband is found is "strong evidence of control," and thus, should be considered as a weighty factor in the analysis. *See Thorpe*, 326 N.C. at 455, 390 S.E.2d at 314.

First, in addressing a defendant's proximity to the contraband, this Court considers proximity in terms of space and time. For example, in *Miller* evidence was sufficient when, *inter alia*, contraband was found within the defendant's reach. 363 N.C. at 100, 678 S.E.2d at 595. In *State v. Bradshaw*, we considered evidence that the defendant had recently occupied the location where the contraband was found. 366 N.C. 90, 96-97, 728 S.E.2d 345, 349-50 (2012). Specifically, in *Bradshaw*, evidence was sufficient when, *inter alia*, the defendant had been present in the place where the contraband was found approximately two days later, *id.* at 96-97, 728 S.E.2d at 349-50, while in *State v. Finney* evidence of the defendant's prior presence in the location where the contraband was found some forty-four days later was held to be insufficient to support a finding of constructive possession, 290 N.C. 755, 760-61, 228 S.E.2d 433, 436 (1976).

Here, the State's evidence shows that defendants' residence was approximately two hundred feet from the plants. The plants were also growing thirty to sixty feet from a mowed and maintained portion of the property that contained a trampoline. Addressing temporal proximity, there is evidence that the ground at the base of the plants had been recently cleared of leaves and pine needles, that the plants had been maintained for approximately two and a half months, and that the area surrounding the plants had been recently accessed and maintained by defendant Bishop. Thus, in the present case, the close proximity of the growing plants to an area maintained by defendants, the reasonably close proximity of defendants' residence to the plants, and one defendant's recent access to the area where the plants were found growing are all factors to consider in the sufficiency analysis.

Second, this Court has considered as an indicator of control over the place where the contraband is found whether a defendant's personal items were found in the same location as the contraband. In *Miller*, this Court held the State's evidence was sufficient when, *inter alia*, defendant's birth certificate and State-issued identification card were found next to small plastic baggies and in the same room as cocaine. 363 N.C. at 97-98, 678 S.E.2d at 593. Also, a defendant's opportunity to place contraband in the place where it was found is additional indicia of control. In *Matias*, the State's evidence was sufficient when, *inter alia*, officers

discovered contraband in the space between the pads in the seat where the defendant had been sitting, 354 N.C. at 552-53, 556 S.E.2d at 271, and in *Brown*, evidence was sufficient when, *inter alia*, the defendant possessed a key to the residence where contraband was found, 310 N.C. at 569-70, 313 S.E.2d at 589.

Here, in addition to defendants' proximity to the marijuana plants, multiple indicia of control are present from which the jury could infer knowledge and possession. The marijuana plants were surrounded by a fence that was not easily surmountable. Similar to the defendant in *Thorpe*, defendants here had the ability to control who entered this portion of the property by establishing the sole entry point in the front yard next to their home. Also, as in *Bradshaw*, there is additional evidence here that at least one of the defendants had recently occupied the area where the marijuana was found. On the date the plants were discovered, defendant Chekanow stated that she had not been in that area of the property for over a year, while defendant Bishop testified to mowing about twenty percent of the fenced-in area, including mowing a path for the chickens around the chicken coop, a path around defendants' fruit trees, and an area roughly six feet from the fence line, indicating he frequently occupied the half-acre area. Also, viewing the evidence in the light most favorable to the State, one officer reported a trail leading from defendants' residence, by the chicken coop, and to the location where the marijuana plants were growing. This officer, who observed the trail from the helicopter, stated that the grass appeared to be "smashed down" as though it had been walked on regularly. Additionally, like the defendant in *Miller*, the evidence here indicates that additional items belonging to defendants were in the same location as the contraband in that defendants kept their chickens and chicken coop in the same fenced-in, one-half acre of their property where the marijuana was growing.

Third, this Court has considered evidence of a defendant's suspicious behavior in conjunction with the discovery of the contraband. For example, in *Butler*, this Court held the State's evidence was sufficient to survive a motion to dismiss when, *inter alia*, defendant made eye contact with officers and then proceeded to walk "very briskly" through a bus terminal, repeatedly glancing back at the officers following him, before hurrying into a taxicab and shouting "let's go, let's go, let's go." 356 N.C. at 147-48, 567 S.E.2d at 141. The evidence here shows that defendant Chekanow directed an "unfortunate gesture" at the clearly marked State Highway Patrol helicopter as it flew over her property. Further, in the light most favorable to the State, defendant Chekanow

appeared to flee the premises in a vehicle as the helicopter hovered to investigate the possible field of marijuana.

Finally, in its sufficiency analysis, this Court has considered additional evidence found in defendant's possession which links the defendant to the contraband. For example, in *Brown*, in addition to the defendant's proximity to the cocaine and indicia of his control over the apartment where the cocaine was discovered, this Court also considered that officers found over $1,700 in cash on the defendant's person in determining there was sufficient evidence of constructive possession. 310 N.C. at 569, 313 S.E.2d at 589. Also, in *State v. Spencer*, the Court considered in its sufficiency analysis the fact that officers found marijuana seeds in the defendant's bedroom at the same time marijuana plants were found in a dilapidated shed located twenty yards behind defendant's home. 281 N.C. at 129-30, 187 S.E.2d at 784.

Here, a search of defendants' property resulted in the discovery of gardening equipment outside an outbuilding. Though officers conceded the tools could have been used either for marijuana cultivation or innocent gardening, the State's evidence further revealed dark red dirt found on the shovel consistent with the dark red clay at the base of the marijuana plants, while the soil in defendants' garden was dark brown. In the light most favorable to the State, this evidence shows the tools found in or around defendants' outbuilding, including a "starter kit," were used to cultivate the marijuana plants.

Defendants provide several arguments based on their testimony at trial to rebut their alleged knowledge and possession of the marijuana plants; however, this evidence is for the jury to weigh, not the trial court, and it is certainly not for the appellate courts to reweigh. Further, "[t]he State's evidence *need not* exclude every reasonable hypothesis of innocence before the trial court properly can deny the defendant's motion to dismiss for insufficiency of the evidence." *Beaver*, 317 N.C. at 651, 346 S.E.2d at 481 (citing *State v. Riddick*, 315 N.C. 749, 759, 340 S.E.2d 55, 61 (1986)). When a trial court rules on a motion to dismiss, the court gives considerable deference to the State's evidence. Here, the Court of Appeals simply failed to consider the State's presentation of incriminating circumstances in addition to defendants' proximity to the contraband and ownership of the property on which it was found; in sum, instead of focusing on what the State did provide, the court focused on what the State did not produce in distinguishing this case from other constructive possession cases in which evidence was found sufficient to withstand a motion to dismiss.

Notwithstanding defendants' nonexclusive possession of the location in which the contraband was found, we hold there is sufficient evidence of constructive possession when the State presents evidence of defendants' ownership of the property on which the plants were growing, defendants' reasonable proximity to the growing marijuana plants, defendants' ability to control access to that portion of the property via a fence and sole entry point, one defendant's recent maintenance of the area where the plants were found, the presence of defendants' chickens and their chicken coop in the area where the plants were found, one defendant's suspicious behavior—the gesture and flight—before the discovery of the plants, and the discovery of equipment on defendants' property that could have been used to cultivate the plants. From this evidence a jury could reasonably infer that defendants knowingly possessed the marijuana plants. Thus, the trial court properly denied defendants' motions to dismiss for insufficiency of the evidence.

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.

Justice NEWBY concurring in the result only.

Exclusive possession is a right inherent to the ownership of real property. While the majority concedes that defendants owned and occupied the property, it proceeds on a theory of nonexclusive constructive possession, without acknowledging that defendants, as the owners in possession, have the "intent and capability to maintain control and dominion" over their three-acre residential property. Because property ownership by definition includes the right to exclusive possession, under the facts of this case defendants' ownership and occupancy raise an inference of constructive possession sufficient to submit the case to the jury. Accordingly, I concur in the result only.

The only question presented by this appeal is whether the State presented substantial evidence that defendants knowingly possessed the twenty-two mature, growing marijuana plants located on a one-half acre portion of their three-acre residential property. The majority applies the test for constructive possession which requires proof of defendants' "intent and capability to maintain control and dominion over" the marijuana plants on their real property, having either sole or joint control, and considering the totality of the circumstances. Here it is undisputed

that defendants, being in actual possession of the land, owned and occupied the three-acre residential property where the marijuana was growing. *See Matthews v. Forrest*, 235 N.C. 281, 284, 69 S.E.2d 553, 556 (1952) (opining that actual possession of land includes acting in dominion over it and making the ordinary use of it).

The majority acknowledges that our cases recognize "exclusive possession" arising under circumstances "when contraband was discovered inside a contained area such as a home or vehicle of which the defendant was the *sole* owner, resident, or occupant." Nonetheless, the majority concludes that "[c]onsidering the circumstances of this case, neither defendant was in sole occupation of the premises on which the contraband was found, defendants allowed another individual regular access to the property, and the nature of the sprawling property on which contraband was found was such that imputing exclusive control of the premises would be unjust." Apparently based upon an assumption that a three-acre parcel is "sprawling" to which "defendants allowed another individual regular access," the majority declares defendants' possessory interest in their property "nonexclusive." "Nonexclusive" means not having the power to exclude others from use of the property. *Cf. Exclusive possession*, *Black's Law Dictionary* (10th ed. 2014) ("The exercise of exclusive dominion over property, including the use and benefit of the property."); *Webster's Third New International Dictionary* 793 (1971) ("excluding or having power to exclude (as by preventing entrance or debarring from possession, participation, or use) . . . . limiting or limited to possession, control, or use (as by a single individual or organization or by a special group or class)").

Yet, by definition, ownership of land includes the right to exclusive possession.

> There is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

3 William Blackstone, *Commentaries* *1-2; *see id.* at *8 (noting as a foundational principle that the right of property "g[ives] a man an exclusive right to retain in a permanent manner . . . specific land, which before belonged generally to every body, but particularly to nobody," and that this right "excludes every one else but the owner from the use of it"). By definition, property includes "[c]ollectively, the rights in a valued

resource such as land . . . . It is common to describe property as a 'bundle of rights.' "[1] *Property*, *Black's Law Dictionary* (10th ed. 2014).

"Property rights are 'in rem' rights. That is, they are rights that may be exercised and that are protectable 'against all the world.' Thus, if a person has a property right, that person has a right to exclude others from the use of the determinate thing that is owned." 1 James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 1.03, at 1-11 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 6th ed. 2011); see *also Hildebrand v. S. Bell Tel. & Tel. Co.*, 219 N.C. 402, 408, 14 S.E.2d 252, 256 (1941) ("The term [property] comprehends not only the thing possessed but also, in strict legal parlance, means the right of the owner to the land; the right to possess, use, enjoy and dispose of it, and the corresponding right to exclude others from its use."). "Thus, it would appear that property is a right of exclusive dominion and unrestricted user, within the law." *Stedman v. City of Winston-Salem*, 204 N.C. 203, 204, 167 S.E. 813, 814 (1933); *see also Vann v. Edwards*, 135 N.C. 661, 665, 47 S.E. 784, 786 (1904) (defining "property" as "rightful dominion over external objects; ownership; the unrestricted and exclusive right to a thing; the right to dispose of the substance of a thing in every legal way, to possess it, to use it and to exclude every one else from interfering with it").

In accordance with these fundamental principles of real property ownership, "[c]onstructive possession has been found when the contraband was on the property in which the defendant had some *exclusive possessory interest* and there was evidence of his or her *presence* on the property and it has been found where possession is not exclusive but defendant exercises sole or joint physical custody." *State v. Thorpe*, 326 N.C. 451, 454-55, 390 S.E.2d 311, 313 (1990) (emphases added) (citing *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972), and *State v. Brown*, 310 N.C. 563, 313 S.E.2d 585 (1984)). Much like an essential aspect of real property ownership, constructive possession has been described by this Court as the "intent and capability to maintain control and dominion over," *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986), or the "power and intent to control":

---

1. *See also Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831, 107 S. Ct. 3141, 3145, 97 L. Ed. 2d 677, 685-86 (1987) ("We have repeatedly held that, as to property reserved by its owner for private use, 'the right to exclude [others is] "one of the most essential sticks in the bundle of rights that are commonly characterized as property." ' " (Alteration in original) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433, 102 S. Ct. 3164, 3175, 73 L. Ed. 2d 868, 881 (1982))).

> He has possession of the contraband material . . . when he has both the power and intent to control its disposition or use. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession.

Harvey, 281 N.C. at 12, 187 S.E.2d at 714. As a result, "constructive possession can be reasonably inferred from the fact of ownership of premises where contraband is found." *Thorpe*, 326 N.C. at 455, 390 S.E.2d at 314; *id.* at 456, 390 S.E.2d at 314 (inferring knowledge and possession "by virtue of ownership and custody" and buttressing the inference with the defendant's physical presence). "Such ownership is strong evidence of control and 'gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession.' " *Id.* at 455, 390 S.E.2d at 314 (quoting *Harvey*, 281 N.C. at 12, 187 S.E. 2d at 714).[2]

When possession is not exclusive, with others having a common right to enter the property, the State must "show other incriminating circumstances before constructive possession may be inferred." *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989) (citation omitted); *see id.* at 695-99, 386 S.E.2d at 188-91 (finding sufficient evidence to go to the jury on the defendant's nonexclusive constructive possession of narcotics found in multi-occupant mobile home when, *inter alia*, a "sales contract" indicated that the defendant had purchased the home, and the defendant was present at the time of the search); *see also State v. Williams*, 307 N.C. 452, 456, 298 S.E. 2d 372, 375 (1983) (finding sufficient evidence of constructive possession "giv[ing] rise to an inference of knowledge and possession" of heroin found in a dilapidated building behind a residence when the mailbox bore the defendant's name and the defendant had been seen at the multi-occupant residence even though he was not present at the time of the search).

---

2. This view of property rights is consistent with our trespass laws. The legal right to enter a property requires consent from the party with the current possessory interest. *See* N.C.G.S. § 14-159.12(a)(1) (2015) (stating that a person commits first-degree trespass if, "without authorization, he enters or remains . . . [o]n premises of another"); *id.* § 14-159.13(a) (2015) (stating that a person commits second-degree trespass if, "without authorization, he enters or remains on premises of another").

Defendants' ownership of the property here gave them the right of exclusive possession, and their exercise of that right, occupying and using the property at the time the marijuana plants were growing, gives rise to an inference that would permit a jury to find that defendants constructively possessed the plants. Moreover, here defendants demonstrated their power and intent to exclusively control their property as owners. The officers located the cultivated marijuana plants on roughly one-half acre of defendants' three-acre property in a fenced-in portion of the property adjacent to the yard, accessible by a single gate "right there in front of the house, at the front yard." Officers located the marijuana plants just sixty to seventy yards from that gate, around two hundred feet from the house itself, and approximately ten yards from the maintained lawn area. These facts illustrate that defendants as owners exercised their right to exclude others from the fenced-in property protected by the gated access. As noted by the majority, defendants as the property owners recognized their inherent right to exclude others from their property by explicitly granting access to a third party.

Thus, not only did defendants own the three-acre residential property, but they daily occupied and exercised exclusive control over it. Their status as owners and their exercise of ownership rights constitute substantial evidence of the element of constructive possession, *see Brown*, 310 N.C. at 568-70, 313 S.E.2d at 588-89, particularly when viewed in the light most favorable to the State, *see State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995). While the majority correctly states the standard of review, it nonetheless weighs the facts in favor of defendants to determine that the possession was nonexclusive. When reviewing a motion to dismiss, facts that may weigh in favor of defendants' nonexclusive possession are reserved for the jury's consideration.

In its application, the majority uses ownership as one factor and glosses over the distinctions between property owners and temporary occupants without clearly differentiating between cases in which the defendant does not own, have a possessory interest in, or occupy the property.[3] Likewise, it fails to distinguish between different types

3. *Compare Williams*, 307 N.C. at 456, 298 S.E.2d at 375 (finding evidence of permanent residence to be "substantial evidence to raise a reasonable inference that defendant was in constructive possession" of an outbuilding where heroin was found), *and Harvey*, 281 N.C. at 13, 187 S.E.2d at 714 (Evidence placing defendant "within three or four feet of the marijuana within his home," without anyone else in the room, "supports a reasonable inference that the marijuana was in defendant's possession."), *with State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270-71 (2001) (stating that contraband "found on the

of property uses such as commercial property upon which the owner invites the public. Such an analysis forsakes bedrock property ownership principles and overlooks both defendant property owners' right to control their property and their demonstrated exercise of that right in this case.

Thus, while I agree that the other incriminating circumstances presented here support the State's case against defendants, I would conclude that defendants' ownership of their three-acre residential property, and their demonstrated exercise of exclusive control over it, are sufficient to allow the case to go to the jury. Accordingly, I concur in the result only.

Chief Justice MARTIN and Justice JACKSON join in this concurring opinion.

---

premises under the control of an accused, . . . in and of itself, gives rise to an inference of knowledge and possession," but requiring a showing of "other incriminating circumstances" to prove a passenger, who had occupied a vehicle for twenty minutes, possessed the cocaine), *and State v. Butler*, 356 N.C. 141, 147-48, 567 S.E.2d 137, 141 (2002) (requiring "additional incriminating circumstances" to establish defendant passenger's constructive possession of cocaine given his nonexclusive control over the taxicab where it was found).

STATE OF NORTH CAROLINA
v.
OMAR JALAM COOK

No. 251A17

Filed 2 March 2018

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. ___, 802 S.E.2d 575 (2017), finding no error after appeal from judgments entered on 9 February 2016 by Judge Hugh B. Lewis in Superior Court, Mecklenburg County. Heard in the Supreme Court on 8 January 2018.

Joshua H. Stein, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State.

Ann B. Petersen for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE v. DOWNEY

[370 N.C. 507 (2018)]

STATE OF NORTH CAROLINA
v.
GLENWOOD EARL DOWNEY

No. 85A17

Filed 2 March 2018

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. ___, 796 S.E.2d 517 (2017), affirming an order denying defendant's motion to suppress entered on 16 September 2015 by Judge Thomas H. Lock, and a judgment entered on 30 September 2015 by Judge Reuben F. Young, both in Superior Court, Johnston County. Heard in the Supreme Court on 7 February 2018.

Joshua H. Stein, Attorney General, by Derrick C. Mertz, Special Deputy Attorney General, for the State.

Glenn Gerding, Appellate Defender, by Michele A. Goldman, Assistant Appellate Defender, for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
ERIC GLENN LANE

No. 606A05-3

Filed 2 March 2018

1. Evidence—Sorenson evidence—materiality analysis—hair sample testing

The trial court did not err in a first-degree murder case by considering the Sorenson evidence in its materiality analysis of defendant's hair sample testing request when there were contested factual issues regarding the validity of the Sorenson evidence. The evidence created an insurmountable hurdle to the success of defendant's materiality argument.

2. Evidence—hair sample—DNA testing—relevancy—sentencing

The trial court did not err in a first-degree murder case by concluding the hair sample DNA testing was not material to defendant's defense. There was no reasonable probability that the DNA testing of the hair samples would have changed the jury's recommendation of death.

3. Constitutional Law—North Carolina—supervisory or inherent authority—right to postconviction DNA testing

The Supreme Court declined to use its constitutional supervisory authority or inherent authority to order postconviction DNA testing. There was enough other incriminating evidence to convict and sentence defendant regardless of the results of any hair analysis.

Appeal pursuant to N.C.G.S. § 15A-270.1 from an order entered on 18 August 2015 by Judge Arnold O. Jones, II in Superior Court, Wayne County. Heard in the Supreme Court on 11 December 2017.

Joshua H. Stein, *Attorney General*, *by Nicholaos G. Vlahos*, *Assistant Attorney General*, *for the State.*

Glenn Gerding, *Appellate Defender*, *by Daniel Shatz*, *Assistant Appellate Defender*, *for defendant-appellant.*

BEASLEY, Justice.

In this appeal we consider the materiality of postconviction DNA testing of hair samples in a capital case. In denying defendant's motion for postconviction DNA testing, the trial court found that defendant failed to show the requested testing was material to his defense—specifically, that there was no reasonable probability that the verdict would have been more favorable to defendant if the testing had been conducted. We agree and hold defendant has failed to prove the materiality of his request.

On 7 April 2003, defendant was indicted in Wayne County for first-degree murder, first-degree statutory rape, first-degree statutory sex offense, indecent liberties with a minor, lewd and lascivious conduct, and first-degree kidnapping of five-year old "P.W."[1] Defendant was tried capitally in Wayne County, and his first trial in the fall of 2004 ended in a mistrial due to juror misconduct. Defendant's second trial commenced on 1 June 2005.

The evidence at trial[2] tended to show that at approximately 4:45 p.m. on Friday, 17 May 2002, P.W. was playing at her friend Michael's house and riding a red and white bicycle up and down his driveway. The two children saw defendant in his nearby yard and went over to play on his swing set. At one point, the children went inside defendant's house to look at his goldfish and eels and then eventually returned to Michael's house. Around 6:30 p.m., Michael's mother told P.W. that she needed to go home because Michael and his family were leaving for the evening. P.W. left on the red and white bicycle.

When it was time for her dinner, P.W. could not be found at Michael's house or in the neighborhood. P.W.'s family repeatedly searched the neighborhood to no avail and called law enforcement the next morning. After commencing a general search for P.W. and questioning several people, including defendant, law enforcement agencies were unable to find P.W. Defendant's home and property were searched multiple times with his consent, and his story about his interactions with P.W. remained consistent throughout the weekend despite multiple interviews: namely, P.W. and Michael had been at defendant's house for about ten minutes on

---

1. Pursuant to North Carolina Rules of Appellate Procedure 4(e), the decedent's initials are used to protect her identity.

2. A more detailed version of the procedural history and the evidence presented at trial in this case can be found in *State v. Lane*, 365 N.C. 7, 707 S.E.2d 210 (2011); here we recite an abbreviated version of the procedural history and facts of the case with emphasis on that which is necessary for analysis of defendant's materiality argument.

Friday afternoon to play on his swing set and the children came inside briefly to view his goldfish and eels.

During the early afternoon of Sunday, 19 May 2002, local residents discovered P.W.'s body while they were fishing in a nearby creek. Her upper body was wrapped in a trash bag; her legs were pulled up to her chest with duct tape, and her face and hair were not visible due to the duct tape wrapped around her head. The crotch of her shorts and panties had been jaggedly cut, and that area was bloody and red. An autopsy later showed that P.W. had suffered some blunt force trauma, had several bruises and lacerations, and had sustained a sexual assault. The official cause of P.W.'s death was "asphyxia secondary to suffocation," and the medical examiner concluded that P.W. had been alive when she was put into the trash bag. She died in part because she vomited while struggling against the duct tape and breathed some of the vomit into her lungs. A red and white bicycle, identified as the one P.W. had been riding on Friday evening, was also discovered in the creek. A blue tarp rolled up with duct tape at one end was found in a nearby ditch.

Several witnesses reported they had seen a white male on a red scooter or moped between 7:15 and 7:45 p.m. on Friday night near the bridge that crossed the creek where P.W.'s body was discovered. The witnesses described the scooter as having a black basket and reported that the rider wore a light or white helmet. The witnesses also reported seeing the man struggle with both a large bundle wrapped in a blue tarp and a small red and white bicycle. Based on this information and their knowledge that defendant had a red scooter, law enforcement returned to defendant's house. Defendant consented to another search of his residence and the storage sheds on his property, where law enforcement found a red scooter with a black basket, a white helmet, rolls of duct tape and electrical tape with blue fibers consistent with the tarp found near where P.W.'s body was discovered, and trash bags similar to the one wrapped around P.W.'s upper body. Again, defendant repeated that he had not seen P.W. after she left his house with Michael on Friday afternoon, and his story remained consistent with previous interviews.

But on 21 May 2002, defendant made a confession, first orally and then reduced to writing, which he corrected and signed:

> I, Eric Lane, came home from work on Friday, May 17, 2002, at about 3:00 p.m. or 3:30 p.m. I . . . started drinking beer. Michael . . . and [P.W.] . . . came over to my house at about ten or 15 minutes after I got home. I had drank about three beers before they got there. They [ ] were

riding bicycles. I was lying in the backyard in front of the swing. They asked if they could swing. I said yes. They asked me to push them on the swing so I did. . . . [P.W.] asked for something to drink. I went in the house and got some—got them some Pepsi. They came to the door and [P.W.] stepped in the house. . . . I told them to go look at the eels which were in the living room. They then went to [my son's] room to look at the goldfish. They stayed in the house about ten minutes. They then went back outside and played on the swing again. I went back out with them.

. . . .

After about five minutes . . . [they] left. . . .

. . . I was still drinking. About 15 minutes later, [P.W.] came back to the house riding a white and red bicycle. She asked if she could look at the eels again so we went in the house. At first I sat at the kitchen table while [P.W.] played with [my son's] toys in his room. She played in his room for ten or 15 minutes. I was still drinking beer.

I got up and started feeding the eels and she came into the living room with me. She was wearing jean shorts/skirt. I don't remember what color her shirt was. She was wearing white tennis shoes. I think I was wearing tan shorts. I wasn't wearing a shirt. I was wearing my white cap with "USA" and American flag on it.

I started playing with her, tickling her. She fell on the floor laughing. We were both [on] the floor playing. The next thing I remember I woke up on top of her. I pushed myself up with my hand which was on her shoulder. She was unconscious. My shorts were down as well as my underwear. I pulled up her shorts and maybe her panties. They were not all the way down. I shook her trying to get her to wake up. I had my hands on her shoulders while shaking her.

I started to walk around the house and tried to figure out what happened. . . . I then walked outside where I saw her bicycle. I put it in the white building. I walked around the building for ten or 15 minutes trying to figure out what to do. I knew I had to get her out so I grabbed a blue tarp in the white building and got a roll of duct tape out of the

other building. I grabbed the trash bag out of the trash can because it was the only one I had. It was white with red handles. I wrapped her in the trash bag and then taped the bag around her. I put the tarp around her and wrapped her in the tarp. I taped the tarp around her. I drank for a minute. I got her and a couple of beers and went to the white building. I put her in the middle of my scooter where you put your feet. My scooter is red. . . . I hung the bicycle on the scooter basket. I then left on the scooter.

I went to the creek. [Defendant described the route he took]. . . . I got to [the] creek, parked the scooter and got [P.W.] and the bicycle off the scooter. The tarp came off of her when I was getting her off. I don't know what time it was but it was getting dark.

A car came so I ran and threw the bicycle in the creek and [hid] under the bridge. I sat there and drank the two beers I had and threw the bottles in the creek. I laid the body at the edge of the water under the bridge where someone could find it.

I grabbed the tarp and went to the scooter. I took the same path back home. The tarp blew off on the way back. I didn't stop to get it. I just went home.

. . . I guess I raped her, too, but I don't remember.

I was wearing a white helmet when I took [P.W.] to the creek.

When I pulled out of my driveway, the body almost fell off the scooter. I stopped and pulled her back onto the scooter. . . . I was wearing a red pullover shirt and a blue jacket and tan shorts. The deputies have all the clothing that I was wearing except for the red shirt, which is still at the house. There was no blood on the floor of my house. I remember seeing a black SUV at the end of my driveway when I stopped to pull the tarp back on the scooter.

I remember that when [P.W.] and I were in the living room, I started tickling her and we both were on the floor. I tickled her between her legs and her private parts area. Her pants came down. Somehow my pant[s] came down also. I don't remember actually having sex with her but I'm pretty sure I did. I don't remember looking for signs

> that we had sex. I thought she was dead when I put the trash bag over her. She never moved so I thought I had suffocated her with my body or her neck twisted and she died.

During the interview, defendant expressed shame and remorse by making statements such as: "I'm sick. I'm a sick person. I wish I was dead," and "I'm a rapist and a killer. I wish I was dead." Defendant subsequently gave a second statement utilizing the same timeline and details, saying he "d[id] not remember but if the girl was sexually molested then I must have did [sic] it" and recounting how he wrapped P.W.'s body in a tarp and disposed of her at the creek. Based on his confession, defendant was arrested and deputies returned to his home to conduct another search. They recovered the shirt and shoes defendant said he had been wearing the day P.W. died, as well as a piece of defendant's living room carpet.

The State presented forensic evidence at trial. The trash bag in which P.W. was found was determined to be consistent with others taken from defendant's home. Blue fibers found on defendant's gloves and clothes, scooter, a roll of duct tape taken from defendant's home, P.W.'s body and clothing, the trash bag P.W. was wrapped in, the duct tape around her body, and defendant's carpet and bed cover were determined to be consistent with the blue tarp fabric found near the creek where P.W.'s body was recovered. North Carolina State Bureau of Investigation Special Agent James Gregory testified that neither defendant nor his maternal relatives could be excluded as the source of a small Caucasian hair fragment found in P.W.'s anal cavity during the autopsy. Special Agent Gregory also testified that the hairs collected from the living room carpet sample and defendant's vacuum cleaner were "microscopically consistent" with P.W.'s hair, meaning they could have come from P.W. or anyone else whose hair had similar characteristics. Finally, Special Agent Gregory testified about his examination of the contents of the trash bag in which P.W.'s body was found. Among the debris found in the trash bag, he discovered nine to ten body hair fragments consistent with African ancestry. Special Agent Gregory did not conduct any further testing on these fragments (hair samples) because he was "specifically looking for Caucasian head hairs." State Bureau of Investigation Special Agent Suzi Barker testified that she examined the vaginal and rectal swabs and smears from P.W.; however, she saw no sperm or semen in any of the samples.

On 8 July 2005, the jury convicted defendant of first-degree murder based on malice, premeditation, and deliberation, as well as under the felony murder rule. The jury also convicted defendant on all remaining

charges, except for the charge of lewd and lascivious conduct, which the trial court dismissed. Following a capital sentencing proceeding in which defendant represented himself without assistance of counsel, the jury found two aggravating circumstances regarding the murder: (1) defendant committed the murder while engaged in the commission of rape, first-degree sexual offense, or kidnapping, and (2) the murder was especially heinous, atrocious, or cruel. The jury found as a non-statutory mitigating circumstance that defendant has a learning disability. After determining the mitigating circumstance was insufficient to outweigh the aggravators, the jury recommended and the trial court imposed the death penalty. The trial court also ordered that defendant serve additional terms totaling 809 to 1010 months for the noncapital convictions. Defendant appealed directly to this Court, and this Court allowed defendant's motion to bypass the Court of Appeals as to his appeals from the noncapital convictions.

On 12 December 2008, this Court remanded the case to the trial court for a further hearing to determine whether defendant was capable of self-representation under *Indiana v. Edwards*, 554 U.S. 164, 171 L. Ed. 2d 345 (2008). *See State v. Lane*, 362 N.C. 667, 668, 669 S.E.2d 321, 322 (2008) (per curiam), *clarified by* ___ N.C. ___, 706 S.E.2d 775 (2009) (order) (instructing the trial judge to determine whether defendant fell within the category of "borderline-competent" or "gray-area" defendants who are "competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves"). The trial court conducted an evidentiary hearing and determined that defendant was not a "borderline-competent" or "gray-area" defendant as defined in *Edwards*, and was thus competent to represent himself.

Considering the *Edwards* issue and others, on 11 March 2011, this Court found that "defendant received a fair trial and capital sentencing proceeding free of prejudicial error, and that the death sentence recommended by the jury and imposed by the trial court [was] not excessive or disproportionate." *State v. Lane*, 365 N.C. 7, 40, 707 S.E.2d 210, 230, *cert. denied*, 565 U.S. 1081, 181 L. Ed. 2d 529 (2011).

Defendant was appointed postconviction counsel, and on 12 December 2014, defendant filed a motion pursuant to N.C.G.S. § 15A-269 seeking postconviction DNA testing of the vaginal and rectal swabs and smears collected from the victim's body during an autopsy. The State did not object, and on 7 January 2015, the trial court entered an order permitting defendant to submit the vaginal and rectal swabs and smears to Sorenson Forensics, LLC (Sorenson), an independent

laboratory approved by the North Carolina State Crime Laboratory for DNA testing pursuant to N.C.G.S. § 15A-266.7(a)(2). An initial forensic case report, dated 25 March 2015, indicated that Sorenson found sperm that the North Carolina State Crime Laboratory failed to detect in the vaginal and rectal swabs and smears. The trial court conducted a hearing on 2 April 2015 to determine what further DNA testing was required to assess whether the postconviction DNA testing results were favorable or unfavorable to defendant pursuant to N.C.G.S. § 15A-270. Defendant agreed to further DNA testing on the vaginal and rectal swabs and smears, and the trial court ordered Sorenson to conduct STR and Y-STR DNA testing on the sperm fraction discovered in the vaginal and rectal swabs and compare the results with defendant's liquid blood sample taken in 2002 and defendant's newly ordered buccal (cheek) swab sample.

On 11 May 2015, the trial court held an evidentiary hearing under N.C.G.S. § 15A-270 to evaluate the results of Sorenson's DNA testing. Before the hearing, defendant objected to any evidence that would be offered by the State on whether the results of Sorenson's DNA testing were favorable or unfavorable to him because no motion for appropriate relief regarding the DNA evidence was pending before the court. Nonetheless, finding the proceeding was governed by N.C.G.S. §§ 15A-269 and 15A-270, the court heard evidence from the State regarding the Sorenson DNA testing results. Specifically, the State introduced five forensic case reports from Sorenson detailing the STR DNA and Y-STR DNA testing of the vaginal and rectal swabs and smears collected from the victim during autopsy and their comparisons with defendant's bloodstain card and the new sample of defendant's DNA. The reports established that the Y-STR DNA profile recently obtained from defendant and the Y-STR DNA profile obtained from defendant's bloodstain card matched the Y-STR DNA profile obtained from the epithelial and sperm fractions of the vaginal swabs and the sperm fraction of the rectal swabs collected from the victim's body by the medical examiner during the autopsy. Additionally, the reports indicated that the sperm fraction of the vaginal swabs collected from the victim's body by the medical examiner during autopsy contained a mixture of STR DNA profiles from two contributors, defendant being included as a possible contributor and the other contributor likely being the victim. Defendant did not object to the State's motion to introduce any of the case reports and stipulated to the written language on all the reports. From this evidence (hereinafter Sorenson evidence), the trial court found that the postconviction DNA testing results were "unfavorable" to defendant, announcing its finding in open court; however, after the State drafted and submitted a proposed written order to opposing counsel, defendant objected to

entry of the order based on his various challenges to the way evidence was handled and processed by the SBI. The trial court never signed a written order containing the finding that the postconviction DNA testing results were unfavorable to defendant.

On 3 June 2015, defendant filed a new motion for postconviction DNA testing of the hair samples found in the trash bag in which the victim's body had been placed. Defendant requested that these hair samples be submitted for independent DNA testing, other forensic testing, or both. Defendant argued to the trial court that the requested DNA testing is "unquestionably material" to his defense because

> [t]he hairs obtained from the plastic bag and duct tape wrapped around the victim was [sic] examined microscopically but not submitted for DNA analysis. Given Mr. Lane's continued insistence that he is innocent, the identity of the perpetrator in this case remains at issue. The tests requested are likely to resolve this issue by identifying the perpetrator and/or confirming Mr. Lane's claim of innocence . . . .

This time, the State opposed the motion, asking the trial court to deny the request or hold a hearing to determine whether defendant could show the testing sought "is material to his defense."

The trial court heard defendant's motion on 9 July 2015. Defendant argued the requested DNA testing was material for two reasons: (1) the evidence at trial showed there were two separate crimes: "There was a rape, and there was a murder. The [Sorenson DNA] evidence that has come back has implicated our client in the rape . . . . We contend that these hairs could potentially relate to another perpetrator, and potentially the only perpetrator of that murder"; and (2) at trial, the State's closing argument relied in part on the forensic analysis of fourteen head hairs recovered from defendant's residence that were found to be microscopically consistent with P.W.'s head hairs: "If those head hairs that were found in that vacuum roll at Mr. Lane's house were material to the State . . . these hairs found on the body of the victim are clearly material."

The trial court entered an order on 18 August 2015 denying defendant's motion for postconviction DNA testing of hair samples citing defendant's failure "to show that the requested postconviction DNA testing of hair samples is material to his defense" in accordance with N.C.G.S. § 15A-269. In reaching its decision, the trial court considered: (1) the court file, (2) the evidence presented at trial, (3) defendant's

motion for postconviction DNA testing of hair samples and the State's response to that motion, (4) the arguments of counsel, (5) defendant's prior motion for postconviction DNA testing of the vaginal and rectal swabs and smears collected from P.W.'s body during autopsy, and (6) the materials generated by Sorenson after conducting the court-ordered postconviction DNA testing of the vaginal and rectal swabs and smears. In considering all of this information, the trial court specifically stated it "does not find the existence of a reasonable probability that the verdict would have been more favorable to Defendant Lane if the testing being requested in Defendant Lane's current motion had been conducted on the evidence."

On 28 August 2015, defendant filed a written notice of appeal pursuant to N.C.G.S. § 15A-270.1. On appeal, defendant first argues it was error for the trial court to consider the Sorenson evidence in its materiality analysis of defendant's hair sample testing request when there were contested factual issues regarding the validity of the Sorenson evidence. Second, even if the first round of postconviction DNA testing performed by Sorenson was determined to be valid and relevant, the hair sample DNA testing is still material to his defense because the results could implicate a second perpetrator in the crimes, specifically in the killing of the victim, or confirm his claim of innocence. In his third argument, defendant requests that, regardless of whether the testing is material to defendant's defense, this Court should use its constitutional supervisory authority or inherent authority to order the testing.

Although the standard of review for denial of a motion for postconviction DNA testing has not been expressly stated by this Court, we adopt, as the Court of Appeals did in *State v. Gardner*, the analogous standard of review for a denial of a motion for appropriate relief (MAR) because the trial court sits as finder of fact in both circumstances. *See State v. Gardner*, 227 N.C. App. 364, 365-66, 742 S.E.2d 352, 354 (2013), *disc. rev. denied*, 367 N.C. 252, 749 S.E.2d 860 (2013). In reviewing a denial of a motion for postconviction DNA testing, "[f]indings of fact are binding on this Court if they are supported by competent evidence and may not be disturbed absent an abuse of discretion. The lower court's conclusions of law are reviewed *de novo*." *Id.* at 365-66, 742 S.E.2d at 354, (italics added) (quoting *State v. Patton*, 224 N.C. App. 399, 2012 WL 6590534, at *2 (2012) (unpublished) (citations omitted), *petitions for disc. rev. and cert. dismissed*, 366 N.C. 565, 738 S.E.2d 375 (2013)). A trial court's determination of whether defendant's request for postconviction DNA testing is "material" to his defense, as defined in N.C.G.S. § 15A-269(b)(2), is a conclusion of law, and thus we review de novo the

trial court's conclusion that defendant failed to show the materiality of his request.

As with proceedings for postconviction MARs, "the moving party has the burden of proving by a preponderance of the evidence every fact essential to support" the motion for postconviction DNA testing, which includes the facts necessary to establish materiality. N.C.G.S. § 15A-1420(c)(5) (2017); *accord State v. Turner*, 239 N.C. App. 450, 453-54, 768 S.E.2d 356, 359 (2015) (quoting *State v. Adcock*, 310 N.C. 1, 37, 310 S.E.2d 587, 608 (1984)).

Section 15A-269 of the North Carolina General Statutes states, in relevant part:

> (a) A defendant may make a motion before the trial court that entered the judgment of conviction against the defendant for performance of DNA testing . . . if the biological evidence meets all of the following conditions:
>
> (1) Is *material* to the defendant's defense.
>
> (2) Is related to the investigation or prosecution that resulted in the judgment.
>
> (3) Meets either of the following conditions:
>
> a. It was not DNA tested previously.
>
> b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.
>
> (b) The court shall grant the motion for DNA testing . . . upon its determination that:
>
> (1) The conditions set forth in subdivisions (1), (2), and (3) of subsection (a) of this section have been met;
>
> (2) *If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant*; and
>
> (3) The defendant has signed a sworn affidavit of innocence.

N.C.G.S. § 15A-269 (2017) (emphases added). The materiality standard that a defendant must assert in his motion, and that the trial court must find, is contained in subdivision 15A-269(b)(2): "If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant." This definition of "material" is consistent with how that term has been defined in the context of claims based on *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed.2d 215 (1963).[3] Given the similarities in the *Brady* materiality standard and the standard contained in N.C.G.S. § 15A-269(b)(2), it appears the General Assembly adopted the *Brady* standard to guide a trial court in determining whether a defendant's request for postconviction DNA testing should be allowed. In such context, this Court has explained that "material" means "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *State v. Tirado*, 358 N.C. 551, 589, 599 S.E.2d 515, 540 (2004) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494 (1985), *cert. denied*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005)). The determination of materiality must be made "in the context of the entire record," *State v. Howard*, 334 N.C. 602, 605, 433 S.E.2d 742, 744 (1993) (quoting *United States v. Agurs*, 427 U.S. 97, 112, 49 L. Ed. 2d 342, 355 (1976)), and hinges upon whether the evidence would have affected the jury's deliberations. In the context of a capital case, we must consider whether the evidence would have changed the jury's verdict in either the guilt or sentencing phases. *See Brady*, 373 U.S. at 87, 10 L. Ed. 2d at 218.

[1] In his first issue, defendant argues that the trial court erred in considering the Sorenson results in the court's materiality analysis of defendant's request for DNA testing of the hair samples because contested factual issues remained regarding the validity of the Sorenson results. Defendant takes issue with the trial court's finding number twenty-two in its order denying his request for postconviction DNA testing of the hair samples. In this finding, the trial court listed the evidentiary considerations which led it to conclude that defendant's request for postconviction DNA testing of the hair samples was not material to his defense. Specifically, the court considered

> the evidence that was presented at trial, Defendant Lane's current motion for post-conviction DNA testing of hair

3. In *Brady*, the United States Supreme Court held "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." 373 U.S. at 87, 10 L. Ed. 2d at 218.

> samples, the State's response to that motion, the arguments of counsel, Defendant Lane's prior motion for post-conviction DNA testing of the vaginal and rectal swabs and smears collected from the victim's body by the medical examiner during autopsy which was granted by this Court, and *the materials generated by Sorenson Forensics after conducting that court-ordered post-conviction DNA testing*[.]

(Emphasis added.) The language in italics suggests the trial court relied in part on the Sorenson results in making its determination that DNA testing of the hair samples was not material to the defense. Because of his unresolved challenges to the validity of the Sorenson results,[4] defendant contends that there should have been greater factual development on the issues regarding this evidence before it was considered in the trial court's materiality analysis with respect to the DNA testing of hair samples.

Notwithstanding defendant's challenges to the validity of the Sorenson evidence, the second issue is dispositive of this case. As discussed below, despite defendant's contentions that the requested testing is material to his defense, we conclude that the additional overwhelming evidence of defendant's guilt presented at trial, the dearth of evidence at trial pointing to a second perpetrator, and the inability of forensic testing to determine whether the hair samples at issue are relevant to establish a third party was involved in these crimes together create an insurmountable hurdle to the success of defendant's materiality argument.[5]

At trial, the State's evidence showed that defendant, and defendant alone, raped, sodomized, and murdered P.W. Defendant's confession, introduced into evidence at trial, indicates defendant and P.W. were alone in defendant's residence when the crimes occurred. At no point did defendant mention a second perpetrator in his confession. Defendant

---

4. Defendant contends the trial court did not resolve his objection to the trial court's draft order authored by the State. The trial court only rendered its decision orally during the evidentiary hearing on 11 May 2015 and has not yet entered an order stating the Sorenson evidence was unfavorable to defendant. On defendant's motion, this Court stayed further trial court proceedings while resolving the issue *sub judice*.

5. We do not take a position on the validity of the Sorenson results from the first round of postconviction DNA testing or comment on the arguments made by the parties as to the trial court's ability to consider those results of that testing in the materiality analysis before us. We only conclude that, regardless of whether the Sorenson results are considered at all, there is not a reasonable probability that even a "favorable" result in the second round of testing would result in "a more favorable outcome for defendant" in a new trial.

also confessed that he wrapped P.W. in a plastic trash bag that he got out of a trash can at his residence. The autopsy showed P.W. was alive when she was raped and sodomized, and was alive when she was put into the trash bag. The autopsy further showed the cause of P.W.'s death was asphyxiation secondary to suffocation; thus, the murder weapon was the trash bag that defendant confessed to both procuring and using. A Caucasian hair was found in P.W.'s anal canal, and forensic testing revealed that defendant, or his maternal relatives, could not be ruled out as the source of the hair.

Additionally, the State's forensic evidence revealed that the trash bag in which P.W. was found was consistent with the size, composition, construction, texture, red drawstrings, and reinforcement characteristics of the trash bags found in defendant's home. Fibers from a blue tarp and a roll of duct tape also found at defendant's home were consistent with the tarp and duct tape found near the location where P.W.'s body was found. Fourteen hairs consistent with the victim's head hairs were found in defendant's vacuum cleaner and carpet sample, confirming P.W. was in defendant's home, and these hairs exhibited signs of being cut, confirming P.W. was subjected to some kind of force.

The eyewitness testimony presented at trial is also consistent with defendant's confession that he, and he alone, moved P.W. to the creek and disposed of her body there. Several eyewitnesses testified that between 7:15 and 7:45 p.m. on the evening in question, they saw a man with a red scooter or moped equipped with a black basket, who was wearing a light or white helmet, struggling with a large bundle wrapped in a blue tarp and with a child's red and white bicycle, near the bridge under which P.W.'s body was found. Three of those eyewitnesses indicated the man was white, while the other two did not identify his race. The only inconsistency in the eyewitness testimony that tended to support the argument that a second perpetrator may have been involved came from a single eyewitness who was confronted on cross-examination with the assertion that she initially told law enforcement that she saw a "black man with dark arms." But the eyewitness testified that she did not remember telling law enforcement the man she saw was African-American.

At trial, the foregoing evidence was sufficient to convict and sentence defendant even without the results of the first round of postconviction DNA testing, because the evidence at trial showed no semen present in the victim's vaginal and anal swabs. Therefore, regardless of any consideration of the Sorenson evidence, the trial evidence was

ample to support a finding of defendant's guilt and dictated the trial court's ultimate conclusion on materiality.

Further, even if the hair samples in question were tested and found not to belong to the victim or defendant, they would not necessarily implicate another individual as a second perpetrator. Defendant argues that if he and P.W. are excluded as the source of the hair fragments, such a finding would result in a more favorable outcome for defendant; however, defendant failed to show the hair samples were placed in the trash bag at the time the crimes were committed. In addition to the hair samples, the trash bag covering the victim was filled with other creek debris because the bag had holes in it and had been in the creek for almost two days. P.W.'s body was found underneath a public roadway, in a location frequented by fishermen, and was in the middle of a construction zone; thus, there was great potential for contamination of the hole-ridden, weathered trash bag. Also, defendant cannot show the hair samples were not already in the bag when the victim was placed inside it.

Therefore, even if the samples were tested and produced a "favorable" result to defendant, that is, they were found to belong to an individual other than P.W. or defendant, it is not reasonably likely that such a finding would change the verdict for defendant. "Where ample evidence, including eyewitness testimony and defendant's own admission to law enforcement, supported a finding of defendant's guilt, defendant's motion for post-conviction DNA testing did not allege a 'reasonable probability that the verdict would have been more favorable to the defendant.' " *State v. Pegram*, ___ N.C. App. ___, 808 S.E.2d 179, 2017 WL 6002819 at *1 (2017) (unpublished) (brackets omitted). In this case, though there is no eyewitness account of the crimes themselves other than defendant's confession, a plethora of eyewitness testimony corroborates defendant's own account of how he disposed of P.W.'s body. A great deal of physical evidence also ties items in defendant's home to the location where the victim's body was found and links defendant to the crimes committed against P.W. His confession is consistent with all of this evidence, and he never implicated a second perpetrator. All the evidence in this case points to defendant—and defendant alone—as committing the crimes against the victim. In light of this evidence, defendant has failed to convince this Court that DNA testing of the hair samples is material regarding his convictions.

[2] As to defendant's sentence, there is not a reasonable probability that the DNA testing of the hair samples would have changed the jury's recommendation of death. Here, the jury found two aggravating circumstances regarding the murder of P.W.: (1) defendant committed the murder while

engaged in the commission of rape, first-degree sexual offense, or kidnapping, N.C.G.S. § 15A-2000(e)(5) (2017), and (2) the murder was especially heinous, atrocious, or cruel, *id.* § 15A-2000(e)(9) (2017). According to the plain language of subdivision 15A-2000(e)(5), the jury could have found this aggravating circumstance even if it believed defendant was merely an accomplice in the crimes perpetrated against P.W. Even if the hair samples were tested and the testing revealed they were from a third person, the jury would still be permitted to consider this aggravating factor if it was convinced another individual was involved in the crimes. Further, as already discussed, sufficient evidence—even without considering the Sorenson evidence—shows defendant committed a sexual offense against P.W. In addition to his confession, a Caucasian hair was discovered in P.W.'s anal canal during the autopsy, and defendant and his maternal relatives "could not be excluded" as the source. As to the N.C.G.S. § 15A-2000(e)(9) circumstance found by the jury, this murder, given the victim's age and the evidence detailing that she died by choking on her own vomit while wrapped in duct tape and a trash bag either immediately after or during the commission of a sexual assault, could certainly be considered especially heinous, atrocious, or cruel even if there was evidence that another person could have been involved.

Therefore, no *reasonable* probability exists under the facts of this case that a jury would fail to convict defendant or would not recommend the death penalty, even if the jury were able to consider a potential third person's hair samples that were found in the damaged trash bag in which the victim's body was placed. In fact, defendant argued to the jury at trial that the presence of these hair samples in the trash bag implicated someone other than him in the crimes, but, in light of the remaining evidence, that argument appears to have had no effect on the jury's verdict or recommendation.

[3] In addressing defendant's third issue, we also decline to use our inherent or supervisory power to order the testing regardless of materiality. During oral arguments, the parties asserted that this case implicated the balance between the thoroughness of reviewing a capital case and the finality of it. In reflecting on this balance, the Supreme Court of the United States recognized the dangers inherent in using postconviction DNA testing as an unfettered discovery tool:

> DNA testing alone does not always resolve a case. Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent. The availability of technologies not available at trial cannot mean that every criminal

> conviction, or even every criminal conviction involving biological evidence, is suddenly in doubt. The dilemma is how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice.
>
> That task belongs primarily to the legislature.

Dist. Att'y's Office v. Osborne, 557 U.S. 52, 62, 174 L. Ed. 2d 38, 47-48 (2009) (citation omitted). In North Carolina, the General Assembly made a defendant's statutory right to postconviction DNA testing contingent upon several conditions precedent, one of which is the trial court's conclusion that the requested DNA testing is material to the defense. N.C.G.S. § 15A-269(a) (2017), (b)(2). The policy behind the law is "to assist federal, State, and local criminal justice and law enforcement agencies in the identification, detection, or exclusion of individuals who are subjects of the investigation or prosecution of felonies or violent crimes against the person," *id.* § 15A-266.1 (2017); *see State v. Doisey*, 240 N.C. App. 441, 445, 770 S.E.2d 177, 180 (2015) (explaining that the law governing postconviction DNA testing's "ultimate focus is to help solve crimes through DNA *testing*"), rather than provide postconviction capital defendants with an endless series of challenges. In this case, there is "enough other incriminating evidence" to convict and sentence defendant regardless of the results of any hair analysis and as noted previously, the hair analysis results could be irrelevant because, *inter alia*, the hairs could have already been in the bag when defendant placed P.W. in it, or they could have made their way into the bag while it was soaking in a creek, exposed to the elements for two days. Ordering the testing when defendant has failed to show that a reasonable probability exists that the results of the requested testing would change the outcome of the case would set a precedent for allowing criminal defendants to ceaselessly attack the finality of criminal convictions without significantly assisting in the search for truth.

Therefore, we affirm the trial court's order denying defendant's motion requesting postconviction DNA testing of hair samples.

AFFIRMED.

STATE v. SCHALOW

[370 N.C. 525 (2018)]

STATE OF NORTH CAROLINA
v.
LEONARD PAUL SCHALOW

No. 4PA17

Filed 2 March 2018

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 795 S.E.2d 567 (2016), vacating defendant's conviction and a resulting judgment entered on 5 November 2015 by Judge Mark E. Powell in Superior Court, Henderson County. Heard in the Supreme Court on 5 February 2018.

Joshua H. Stein, *Attorney General*, *by Joseph L. Hyde*, *Assistant Attorney General*, *for the State-appellant.*

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

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE v. WILLIAMS

[370 N.C. 526 (2018)]

STATE OF NORTH CAROLINA
v.
DARYL WILLIAMS

No. 171A17

Filed 2 March 2018

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. ___, 801 S.E.2d 169 (2017), reversing a judgment entered on 12 August 2015 by Judge Paul L. Jones in Superior Court, Wayne County, and awarding defendant a new trial. On 17 August 2017, the Supreme Court allowed the State's petition for discretionary review of an additional issue. Heard in the Supreme Court on 10 January 2018.

Joshua H. Stein, Attorney General, by Scott A. Conklin, Assistant Attorney General, for the State-appellant.

Gilda C. Rodriguez for defendant-appellee.

PER CURIAM.

We reverse in part the decision of the Court of Appeals for the reasons stated in the dissenting opinion, and we remand this case to the Court of Appeals to address defendant's remaining argument on appeal. The State's petition for discretionary review as to an additional issue was improvidently allowed.

REVERSED IN PART AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

TULLY v. CITY OF WILMINGTON

[370 N.C. 527 (2018)]

KEVIN J. TULLY
v.
CITY OF WILMINGTON

No. 348A16

Filed 2 March 2018

1. Constitutional Law—North Carolina—employer violation of own policy—refusal to consider appeal—exam required for promotion—police officer

The trial court erred by dismissing plaintiff police officer's constitutional claim arising under Article I, Section 1. A police officer states a claim under the North Carolina Constitution against his employer when that employer violates its own policy by refusing to consider his appeal regarding the validity of an examination required for a promotion.

2. Constitutional Law—Law of the Land clause—job promotion—no property interest

The trial court did not err by granting the City's motion to dismiss a police officer's Article I, Section 19 claim. There is no authority recognizing a property interest in a job promotion, and the police officer conceded in his brief that no such property interest existed.

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 854 (2016), reversing a judgment entered on 1 May 2015 by Judge Gary E. Trawick in Superior Court, New Hanover County. Heard in the Supreme Court on 10 October 2017.

Tin Fulton Walker & Owen PLLC, by S. Luke Largess and Cheyenne N. Chambers, for plaintiff-appellee.

Cranfill Sumner & Hartzog LLP, by Katie Weaver Hartzog, for defendant-appellant.

Elliot Morgan Parsonage, PLLC, by Robert M. Elliot and R. Michael Elliot, for North Carolina Advocates for Justice, amicus curiae.

Law Offices of Michael C. Byrne, by Michael C. Byrne, for North Carolina Fraternal Order of Police, amicus curiae.

Edelstein and Payne, by M. Travis Payne, for Professional Fire Fighters and Paramedics of North Carolina, amicus curiae.

McGuinness Law Firm, by J. Michael McGuinness; and Milliken Law, by Megan Milliken, for Southern States Police Benevolent Association and North Carolina Police Benevolent Association, amici curiae.

HUDSON, Justice.

Here we address whether a police officer states a claim under the Constitution of North Carolina against his employer when that employer violates its own policy by refusing to consider his appeal regarding the validity of an examination required for a promotion. Because we conclude that Plaintiff Kevin J. Tully has adequately stated a claim that his rights under Article I, Section 1 of the North Carolina Constitution were violated by the City of Wilmington (the City), we affirm in part the decision of the Court of Appeals reversing the dismissal of his claims.

I. Factual and Procedural History

The following facts from Tully's complaint are taken as true for the purpose of analyzing the City's motion for judgment on the pleadings. The Wilmington Police Department (the Police Department) hired Tully in 2000 and promoted him to corporal in 2007. At the time this complaint was filed, Tully was a member of the violent crimes section and had investigated more than fifty homicides and served as lead investigator in at least 12 of those cases, which had a 100% clearance rate. Tully holds an associate's degree in Applied Science in Criminal Justice and Protective Services Technology and a bachelor's degree in Criminal Justice and has received his Advanced Police Certification from the North Carolina Criminal Justice Education and Training Standards Commission. He was named "Wilmington Police Officer of the Year" in 2011.

In October 2011, Tully sought a promotion to the rank of sergeant in the Police Department. He took a written examination, a required step in a multi-phase promotional process then in effect as set forth in the Police Department Policy Manual (the Policy Manual), but he did not receive a passing score.[1] Tully had based his answers on the prevailing

1. Pursuant to the Policy Manual, "[t]hose candidates competing for the position of Sergeant must score in the top 50 percentile of those taking the written examination in order to advance to the next phase of the promotional process." Police Department, City of Wilmington, *Policy Manual*, Directive 4.11, ¶ III(B)(1)(d)(2), at 3 (rev. July 25, 2011).

law at the time, and, after receiving a copy of the official examination answers, he discovered that the official answers were based on outdated law. Tully filed a grievance regarding this discrepancy through the City's internal grievance process but was informed in a 3 January 2012 letter from City Manager Sterling Cheatham that "the test answers were not a grievable item." A supervisor also told Tully that "[e]ven if you are correct, there is nothing that can be done."

Directive 4.11 of the Policy Manual states that "[t]his policy establishes uniform guidelines that govern promotional procedures within the Wilmington Police Department and ensures procedures used are job-related and non-discriminatory." Police Department, City of Wilmington, *Policy Manual*, Directive 4.11, ¶ I, at 1 (rev. July 25, 2011). Directive 4.11 also states that the Police Department is to work with the City's Human Resources Department to

> ensure that fair and professional standards are utilized for the purpose of promoting sworn police employees. . . . It is the objective of the City of Wilmington to provide equal promotional opportunities to all members of the Police Department based on a candidate's merit, skills, knowledge, and abilities without regard to age, race, color, sex, religion, creed, national origin, or disability.

Id. ¶ II, at 2.

Directive 4.11 explains that all examination "instruments used shall have demonstrated content and criterion validity, which is accomplished by contracting with qualified outside entities to develop the written testing instruments. Instruments will assess a candidate's knowledge, skills, and abilities as related to the promotional position." *Id.* ¶ III(B)(1)(c),

---

The Policy Manual also specifies that "[t]he top 1/3 of candidates whom complete all specified phases [of the promotional process] will be placed on the eligibility lists for promotions." *Id.* ¶ III(A)(2)(e), at 2. After conducting interviews, the Chief of Police may then pick a candidate from the top third list or may, after notifying all of those candidates that they will not be promoted, select a candidate in the second third. *Id.* Because Tully relied upon the Policy Manual in his complaint and the City attached it to its answer, the document may be considered at the motion for judgment on the pleadings stage. *See Bigelow v. Town of Chapel Hill*, 227 N.C. App. 1, 4, 745 S.E.2d 316, 319-20 ("[A] document attached to the moving party's pleading may . . . be considered in connection with a Rule 12(c) motion [if] the non-moving party has made admissions regarding the document." (first alteration in original) (quoting *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 205, 652 S.E.2d 701, 708 (2007))), *disc. rev. denied*, 367 N.C. 223, 747 S.E.2d 543 (2013).

at 3. The "Grievance and Appeals" section of Directive 4.11 provides the following:

> 1. Candidates may appeal any portion of the selection process. The appeal must be made consistent with the City of Wilmington Personnel Policy on Employee Grievances.
>
> 2. If practical, re-application, re-testing, re-scoring and/or re-evaluation of candidates may be required if an error in the process is substantiated.

Id. ¶ III(F), at 6.

On 30 December 2014, Tully filed a complaint in the Superior Court in New Hanover County, asserting two claims under the North Carolina Constitution[2] on the ground that he "never had a true opportunity to grieve his denial of promotion based on his answers to the Sergeant's test." In his first claim, Tully asserted that the City violated Article I, Section 19 of the Constitution, which states in pertinent part that "[n]o person shall be . . . deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. Specifically, Tully's complaint asserted that he

> has a property interest in his employment with the City of Wilmington and that property interest cannot be denied or impeded without due process of law. . . . By denying [his] promotion due to his answers on the Sergeant's test and then determining that such a reason was not grievable, the City arbitrarily and irrationally deprived [him] of property in violation of the law of the land, in violation of the North Carolina Constitution.

In his second claim, Tully asserted that the City violated his rights under Article I, Section 1 of the Constitution, which states that "[w]e hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." *Id.* art. I, § 1. Specifically, Tully claimed that "[b]y denying [his] promotion due to his answers on the Sergeant's test and then determining that such a reason was not grievable, the City arbitrarily and irrationally deprived [him] of enjoyment of the fruits of his own labor, in violation of the North Carolina Constitution."

---

2. References to the "Constitution" in this opinion are to North Carolina's Constitution unless otherwise specified.

As a remedy for these alleged violations, Tully sought a judgment declaring that the City's decision to deny him a promotion based on the October 2011 Sergeant's examination was an unconstitutional "deprivation of [his] property interest in his employment" and of the "enjoyment of the fruits of his own labor." He also requested damages resulting from the City's allegedly unconstitutional actions.

After filing its answer, the City moved for judgment on the pleadings under Rule 12(c) of the North Carolina Rules of Civil Procedure. The City argued that the parties' pleadings established that Tully did not have a property interest that could support his claims for a violation of either Section 1 or Section 19 of Article I.[3] Following a hearing on 6 April 2015 before the Honorable Gary E. Trawick, the trial court granted the City's motion and dismissed all of Tully's claims with prejudice.

Tully appealed to the North Carolina Court of Appeals, which issued a divided opinion on 16 August 2016 reversing the trial court. *Tully v. City of Wilmington*, ___ N.C. App. ___, 790 S.E.2d 854 (2016). The majority first clarified that Tully's claims were "*not* based upon an assertion that he was entitled *to receive a promotion* to the rank of Sergeant, but simply that he was entitled *to a non-arbitrary and non-capricious promotional process*" in accordance with the rules set forth in the Policy Manual, including its appeals provision. *Id.* at ___, 790 S.E.2d at 858.

After acknowledging that this case presented an issue of first impression under North Carolina law and analyzing various federal and state cases relevant to the discussion, the Court of Appeals majority concluded that "it is inherently arbitrary for a government entity to establish and promulgate policies and procedures and then not only utterly fail to follow them, but further to claim that an employee subject to those policies and procedures is not entitled to challenge that failure." *Id.* at ___, 790 S.E.2d at 860 (emphasis omitted). The majority also stated that " 'irrational and arbitrary' government actions violate the 'fruits of their own labor' clause." *Id.* at ___, 790 S.E.2d at 858 (citing *Treants Enters. v. Onslow County*, 83 N.C. App. 345, 354, 350 S.E.2d 365, 371 (1986), *aff'd*, 320 N.C. 776, 360 S.E.2d 783 (1987)).

In a dissenting opinion, the Honorable Wanda G. Bryant relied principally upon the distinction between the government acting in its capacity as regulator and its capacity as employer, explaining that

3. The City's motion did not reference Tully's specific claim that the City's actions deprived him of enjoyment of the fruits of his labor in violation of Article I, Section 1.

"[b]ecause the City is acting as an employer rather than as a sovereign, and is vested with the power to manage its own internal operations, Tully's pleadings—although asserting what appears to be an unfair result in a standard process—do not state a viable constitutional claim." *Id.* at ___, 790 S.E.2d at 861 (Bryant, J., dissenting). Judge Bryant noted, however, that "because our state Supreme Court has mandated that the N.C. Constitution be liberally construed, particularly those provisions which safeguard individual liberties, I would strongly urge the Supreme Court to take a close look at this issue to see whether it is one that, as currently pled, is subject to redress under our N.C. Constitution."[4] *Id.* at ___, 790 S.E.2d at 863 (citation omitted). Tully filed a timely notice of appeal to this Court.

II. Standard of Review

We review de novo a trial court's order granting a motion for judgment on the pleadings under Rule of Civil Procedure 12(c). *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51, 790 S.E.2d 657, 659 (2016) (citation omitted). "The party moving for judgment on the pleadings must show that no material issue of fact exists and that he is entitled to judgment as a matter of law." *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 682, 360 S.E.2d 772, 780 (1987) (citation omitted). In considering a motion for judgment on the pleadings,

> "[a]ll well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false." As with a motion to dismiss, "[t]he trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party." A Rule 12(c) movant must show that "the complaint . . . fails to allege facts sufficient to state a cause of action or admits facts which constitute a complete legal bar" to a cause of action.

CommScope Credit Union, 369 N.C. at 51-52, 790 S.E.2d at 659-60 (alterations in original) (first quoting *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 682-83, 360 S.E.2d 772, 780 (1987); then quoting *Jones v. Warren*, 274 N.C. 166, 169, 161 S.E.2d 467, 470 (1968)).

---

4. We do not base our decision today upon substantive due process or equal protection, which are referenced in the Court of Appeals discussion, but rather squarely base our decision upon the constitutional provision guaranteeing the right to enjoy the fruits of one's labor. Accordingly, the dissent's and the City's reliance upon the United States Supreme Court's equal protection analysis in *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591, 170 L. Ed. 2d 975 (2008), is inapplicable.

III. Analysis

A. Article I, Section 1

[1] The City contends that Tully's complaint failed to plead a viable cause of action under Article I, Section 1 of our Constitution, which states in pertinent part that "all persons are . . . endowed by their Creator with certain inalienable rights," including "the enjoyment of the fruits of their own labor." N.C. Const. art. I, § 1. We acknowledge that application of this constitutional provision in the present context is an issue of first impression. After careful consideration, we conclude that Tully has successfully stated a claim under Section 1 of Article I and affirm the Court of Appeals on that ground.

As we explained in *Corum v. University of North Carolina*,

> [t]he civil rights guaranteed by the Declaration of Rights in Article I of our Constitution are individual and personal rights entitled to protection against state action . . . . The Declaration of Rights was passed by the Constitutional Convention on 17 December 1776, the day before the Constitution itself was adopted, manifesting the primacy of the Declaration in the minds of the framers. The fundamental purpose for its adoption was to provide citizens with protection from the State's encroachment upon these rights. . . . The very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State.

330 N.C. 761, 782-83, 413 S.E.2d 276, 289-90 (citing *State v. Manuel*, 20 N.C. 3 & 4 Dev. & Bat. 144 (1838)), *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992). We also noted in *Corum* that "[o]ur Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens" and that "[w]e give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property." *Id.* at 783, 413 S.E.2d at 290 (citations omitted). We also explained that this Court "has recognized a direct action under the State Constitution against state officials for violation of rights guaranteed by the Declaration of Rights" when no other state law remedy is available. *Id.* at 783, 413 S.E.2d at 290 (citing *Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 89 S.E.2d 290 (1955)); *see id.* at 783, 413 S.E.2d at 290 ("Having no other remedy, our common law guarantees plaintiff a direct action under the State Constitution for

alleged violations of his constitutional freedom of speech rights." (citing *Sale*, 242 N.C. 612, 89 S.E.2d 290)); *see also Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 342, 678 S.E.2d 351, 356 (2009) ("[W]hen faced with a plaintiff who had suffered a colorable constitutional injury that could not be redressed through other means, this Court [has] allowed the plaintiff to proceed with his direct constitutional claim because the state law remedy did not apply to the facts alleged by the plaintiff."); *id.* at 342, 678 S.E.2d at 357 (recognizing "our long-standing emphasis on ensuring redress for every constitutional injury").

This Court has previously recognized claims against government defendants rooted in the right to enjoy the fruits of one's labor. In *State v. Ballance*, in which we held that a statute regulating photographers violated Sections 1 and 19 of Article I, we explained that the "fundamental guaranties" set forth in Sections 1 and 19 "are very broad in scope, and are intended to secure to each person subject to the jurisdiction of the State extensive individual rights." 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949). In *State v. Warren* we observed that

> Section 1, Article I, of the Constitution of North Carolina guarantees to the citizens of the State "the enjoyment of the fruits of their own labor" and declares this an inalienable right.
>
> The basic constitutional principle of personal liberty and freedom embraces the right of the individual to be free to enjoy the faculties with which he has been endowed by his Creator, to live and work where he will, to earn his livelihood by any lawful calling, and to pursue any legitimate business, trade or vocation. This precept emphasizes the dignity, integrity and liberty of the individual, the primary concern of our democracy.

252 N.C. 690, 692-93, 114 S.E.2d 660, 663 (1960).

We have also addressed a public employee's liberty interest in pursuing her chosen profession free from unreasonable actions of her employer. In *Presnell v. Pell* a school employee sued her employer school district and certain administrators for defamation and wrongful termination after, as her complaint alleged, the school's principal caused her to be fired based upon his false allegation that she had distributed liquor to maintenance contractors on school premises. 298 N.C. 715, 717-18, 260 S.E.2d 611, 613 (1979). Although we held that the plaintiff's at-will employment status meant that she had no cognizable *property* interest in continued employment, we explained that her

> complaint does however sketch a colorable claim that a constitutionally protected "liberty" interest may be at stake. One of the liberty interests encompassed in the Due Process Clause of the Fourteenth Amendment is the right "to engage in any of the common occupations of life," unfettered by unreasonable restrictions imposed by actions of the state or its agencies. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Truax v. Raich*, 239 U.S. 33 (1915). The right of a citizen to live and work where he will is offended when a state agency unfairly imposes some stigma or disability that will itself foreclose the freedom to take advantage of employment opportunities. *Board of Regents v. Roth*, [408 U.S. 564 (1972)]. . . .
>
> . . . The liberty interest here implicated—the freedom to seek further employment—was offended not by her dismissal alone, but rather by her dismissal based upon alleged unsupported charges which, left unrefuted, might wrongfully injure her future placement possibilities.

Id. at 724, 260 S.E.2d at 617. We then concluded that the plaintiff's opportunity to avail herself of a post-termination administrative hearing that could be appealed to Superior Court provided her with sufficient procedural due process to safeguard her liberty interest. *Id.* at 725, 260 S.E.2d at 617.[5]

More recently, in *King v. Town of Chapel Hill*, which concerned a tow truck company's challenge to a local towing ordinance, we explained that "[t]his Court's duty to protect fundamental rights includes preventing arbitrary government actions that interfere with the right to the fruits of one's own labor." 367 N.C. 400, 408-09, 758 S.E.2d 364, 371 (2014) (first citing N.C. Const. art. I, § 1; then citing *Roller v. Allen*, 245 N.C. 516, 525, 96 S.E.2d 851, 859 (1957)).

The City here correctly notes that cases involving the right to pursue one's profession free from unreasonable governmental action generally involve the government acting as regulator or sovereign rather than as an employer (with the exception of *Presnell)*. Nevertheless, we are persuaded that Article I, Section 1 also applies when a governmental entity acts in an arbitrary and capricious manner toward one of its employees

5. Here, Tully did not plead a due process claim based on a liberty interest, but only on a property interest. For that reason, we do not express any opinion as to the possible viability of such a claim in this context.

by failing to abide by promotional procedures that the employer itself put in place. We note that other courts have recognized the impropriety of government agencies ignoring their own regulations, albeit in other contexts. S*ee, e.g.*, *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268, 98 L. Ed. 681, 687 (1954) (concluding that that Board of Immigration Appeals violated petitioner's due process rights by acting "contrary to existing valid regulations"); *United States v. Heffner*, 420 F.2d 809, 811-12 (4th Cir. 1969) ("An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down. This doctrine was announced in [*Accardi*] . . . . T]he doctrine's purpose [is] to prevent the arbitrariness which is inherently characteristic of an agency's violation of its own procedures."); *see also Farlow v. N.C. State Bd. of Chiropractic Exam'rs*, 76 N.C. App. 202, 208, 332 S.E.2d 696, 700 (observing that *Accardi*'s "rationale is sound"), *appeal dismissed and disc. rev. denied*, 314 N.C. 664, 336 S.E.2d 621 (1985).

Here Tully has adequately stated a claim under the portion of Article I, Section 1 safeguarding the fruits of his labor because, taking all the facts in his complaint as true, he alleges that the City arbitrarily and capriciously denied him the ability to appeal an aspect of the promotional process despite the Policy Manual's plain statement that "[c]andidates may appeal any portion of the selection process." Tully's allegations state that by summarily denying his grievance petition without any reason or rationale other than that the examination answers "were not a grievable item" despite their being a "portion of the selection process," the City ignored its own established rule.[6] Tully then alleges that in so doing, "the City arbitrarily and irrationally deprived [him] of enjoyment of the fruits of his own labor." Accordingly, we conclude that the City's actions here implicate Tully's right under Article I, Section 1 to pursue his chosen profession free from actions by his governmental employer that, by their very nature, are unreasonable because they contravene policies specifically promulgated by that employer for the purpose of having a fair promotional process.

This right is not without limitation, however. Based upon our distillation of the admittedly sparse authority in this area of the law, we hold that to state a direct constitutional claim grounded in this unique right

6. Moreover, the alleged reason for Tully's grievance—that the sergeant's examination contained outdated law—went to the very heart of the Policy Manual's directive that "[a]ll" examination "instruments used shall have demonstrated content and criterion validity."

under the North Carolina Constitution, a public employee must show that no other state law remedy is available and plead facts establishing three elements: (1) a clear, established rule or policy existed regarding the employment promotional process that furthered a legitimate governmental interest; (2) the employer violated that policy; and (3) the plaintiff was injured as a result of that violation. If a public employee alleges these elements, he has adequately stated a claim that his employer unconstitutionally burdened his right to the enjoyment of the fruits of his labor.

Here the Policy Manual set forth clear rules specifying that "[c]andidates may appeal any portion of the selection process" and examination "instruments used shall have demonstrated content and criterion validity."[7] These rules serve the legitimate governmental interest of providing a fair procedure that ensures qualified candidates move to the next stage of the promotional process. The Policy Manual itself explains that "[i]t is the objective of the City of Wilmington to provide equal promotional opportunities to all members of the Police Department based on a candidate's merit, skills, knowledge, and abilities." Second, in his complaint Tully alleges facts showing that the City violated the above rules by arbitrarily denying his appeal challenging inaccurate official examination answers. Third, Tully has sufficiently alleged an injury in that the City's arbitrary denial of his appeal meant that, if proven, the examination defects—and his flawed test score resulting from those defects—were never addressed. Tully's allegations show that the City's actions injured him by denying him a fair opportunity to proceed to the next stage of the competitive promotional process, thereby "unfairly impos[ing] [a] stigma or disability that will itself foreclose the freedom to take advantage of employment opportunities." *Presnell*, 298 N.C. at 724, 260 S.E.2d at 617 (citation omitted).

At this stage we express no opinion on the ultimate viability of Tully's claim. Accordingly, we need not speculate regarding whether Tully

---

7. The parties dispute whether these rules are incorporated by reference into the City's Charter. Tully points to language in the "Personnel Policies" portion of the City's Charter stating that "[u]nless specifically excepted by this act, all other ordinances and policies affecting the employees of the City of Wilmington shall apply to employees under the Civil Service Act." Wilmington, N.C., Code of Ordinances art. XI, § 11.8. The City observes, however, that the City's Civil Service Act does not cover promotions within the Police Department and thus cannot incorporate by reference Directive 4.11 as that provision of the Policy Manual concerns promotions. We express no opinion on whether Directive 4.11 stands on the same footing as a duly enacted city ordinance given that the above-described rules are clear and established for purposes of this claim.

would likely have received the promotion had the Police Department followed its own policy. Similarly, we need not address the remedy to which Tully would be entitled if he ultimately succeeds in proving his claim. As we explained in *Corum*,

> [w]hat that remedy will require, if plaintiff is successful at trial, will depend upon the facts of the case developed at trial. It will be a matter for the trial judge to craft the necessary relief. As the evidence in this case is not fully developed at this stage of the proceedings, it would be inappropriate for this Court to attempt to establish the redress recoverable in the event plaintiff is successful . . . .

330 N.C. at 784, 413 S.E.2d at 290-91.

B. Article I, Section 19

[2] The City also contends that the Court of Appeals majority erred in allowing Tully's claim under Article I, Section 19 to proceed. The law of the land clause of that provision states that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. As we explained in *Ballance*, " 'law of the land' is synonymous with 'due process of law,' a phrase appearing in the Federal Constitution and the organic law of many states." 229 N.C. at 769, 51 S.E.2d at 734 (citing, *inter alia*, *Yancey v. N.C. State Highway & Pub. Works Comm'n*, 222 N.C. 106, 22 S.E.2d 256 (1942)). "In analyzing a due process claim, we first need to determine whether a constitutionally protected property interest exists. To demonstrate a property interest under the [Constitution], a party must show more than a mere expectation; he must have a legitimate claim of entitlement." *McDonald's Corp. v. Dwyer*, 338 N.C. 445, 447, 450 S.E.2d 888, 890 (1994) (citation omitted).

Tully's complaint specifically asserted that his Article I, Section 19 claim was based upon a "property interest in his employment with the City of Wilmington" and that "[b]y denying [his] promotion due to his answers on the Sergeant's test and then determining that such a reason was not grievable, the City arbitrarily and irrationally deprived [him] of property in violation of the law of the land."

We have previously explained that a property interest in employment "can arise from or be created by statute, ordinance, or express or implied contract, the scope of which must be determined with reference to state law," *Presnell*, 298 N.C. at 723, 260 S.E.2d at 616 (citations

omitted), and that "[n]othing else appearing, an employment contract in North Carolina is terminable at the will of either party," *id.* at 723-24, 260 S.E.2d at 616 (citation omitted). Moreover, "[t]he fact that plaintiff was employed by a political subdivision of the state does not itself entitle her to tenure, nor does the mere longevity of her prior service." *Id.* at 724, 260 S.E.2d at 616.

We are aware of no authority recognizing a property interest in a promotion, and Tully concedes in his brief to this Court that no such property interest exists here. Accordingly, we conclude that the trial court correctly granted the City's motion to dismiss Tully's Article I, Section 19 claim because no property interest is implicated here. On this issue we reverse the Court of Appeals.

IV. Conclusion

Taking all of Tully's allegations in the light most favorable to him, as we must at the pleading stage, we hold that Tully has alleged a claim for the deprivation of his right to the enjoyment of the fruits of his labor under Article I, Section 1 of the North Carolina Constitution. "As this case moves forward to summary judgment or trial, plaintiff will have to prove that his allegations are true" and that his constitutional rights were indeed violated. *Turner v. Thomas*, 369 N.C. 419, 429, 794 S.E.2d 439, 447 (2016); *see also Harwood v. Johnson*, 326 N.C. 231, 241, 388 S.E.2d 439, 445 (1990) (concluding that although "the complaint is sufficient to withstand a motion to dismiss[,] [i]t remains to be determined, upon summary judgment, or at trial, whether plaintiff can forecast or prove" that the defendants violated his constitutional rights).

Accordingly, we affirm the Court of Appeals' holding that the trial court erred in dismissing Tully's claim arising under Article I, Section 1. We reverse the portion of the Court of Appeals decision concluding that Tully stated a valid claim under Article I, Section 19. This case is remanded to the Court of Appeals for further remand to the trial court for additional proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

EDWARD F. WILKIE AND DEBRA T. WILKIE
v.
CITY OF BOILING SPRING LAKES

No. 44PA17

Filed 2 March 2018

Eminent Domain—inverse condemnation—private purpose

Plaintiff homeowners were entitled to assert a statutory inverse condemnation claim pursuant to N.C.G.S. § 40A-51 based upon the extended flooding of their property as the result of actions taken by defendant City to adjust a lake's shore line for an allegedly private purpose. The statute did not make the availability of the remedy dependent upon whether the purpose that led to the taking was public or private.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 796 S.E.2d 57 (2016), reversing an order entered on 5 November 2015 by Judge Ebern T. Watson, III, in Superior Court, Brunswick County, and remanding the matter for further proceedings. Heard in the Supreme Court on 8 November 2017.

Smith Moore Leatherwood, LLP, by Kip David Nelson and Matthew A. Nichols; and Law Office of Kurt B. Fryar, by Kurt B. Fryar, for plaintiff-appellants.

Cauley Pridgen, P.A., by James P. Cauley, III, and David M. Rief; and Jack Cozort for defendant-appellee.

ERVIN, Justice.

The issue in this case is whether plaintiffs Edward F. and Debra T. Wilkie are entitled to seek compensation pursuant to N.C.G.S. § 40A-51 based upon the extended flooding of their property as the result of actions taken by defendant City of Boiling Spring Lakes for an allegedly private purpose. For the reasons set forth below, we reverse the Court of Appeals' decision and remand this case to the Court of Appeals for consideration of defendant's remaining challenges to the trial court's order.

Plaintiffs own a house and lot bordering Spring Lake, a thirty-one acre body of water owned by defendant that is fed by natural springs that empty into the lake and by surface water runoff from the surrounding area. Two fixed pipes drain excess water from Spring Lake.

On 25 June 2013, defendant's Board of Commissioners received a petition signed by plaintiffs[1] and other persons owning property adjacent to Spring Lake requesting that defendant modify the height of the drain pipes. According to a number of persons who owned property adjoining Spring Lake, the installation of replacement pipes a number of years earlier had lowered the lake level. On 2 July 2013, after several meetings during which concerns about the lake level continued to be expressed, the Board voted "to return Spring Lake to its original shore line as quickly as can be done."

On or about 11 July 2013, "elbows" were placed onto the inlet side of the two outlet pipes for the purpose of raising the pipes by eight or nine inches and elevating the lake level. After the pipes were raised, plaintiffs claimed that portions of their property were covered by the lake. Plaintiffs and a number of other lakeside property owners signed a second petition seeking removal of the "elbows" from the outlet pipes that was presented to the Board on 6 August 2013.

After receiving the second petition, the Board voted to lower the lake level by three inches. A number of additional Board meetings were held between 6 August 2013 and 13 January 2014, during which several residents complained that water from the lake continued to encroach upon their property. However, a majority of the Board refrained from voting to remove the elbows during these meetings. On 13 January 2014, the Board voted to hire Sungate Design Group, an engineering firm, to determine the appropriate lake level. In light of Sungate's recommendation that the lake be returned to its original level, the elbows were removed on 30 July 2014.

On 23 May 2014, plaintiffs filed a complaint in which they sought, among other things, compensation pursuant to N.C.G.S. § 40A-51. In support of their request for relief, plaintiffs asserted that they had "lost approximately fifteen to eighteen percent" of their lakeside property

1. The only member of the family who actually signed the petition was Ms. Wilkie, who affixed her name and that of Mr. Wilkie to the document.

"due to the installation of the 'elbow' and subsequent rise of Spring Lake's water level," that the Board "voted to install an elbow on a drainage pipe within Spring Lake for the purpose of raising Spring Lake's water level" "to further a public use and public purpose," and that "[t]he City did not file a complaint containing a declaration of this taking." As a result, plaintiffs sought compensation for the taking of their property pursuant to N.C.G.S. §§ 40A-8 and 40A-51, the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 19 of the North Carolina Constitution.[2]

After conducting a hearing pursuant to N.C.G.S. § 40A-47 for the purpose of resolving all disputed issues between the parties other than the amount of damages, if any, to which plaintiffs were entitled, the trial court entered an order on 5 November 2015 determining that the installation of the elbows "for the benefit of, and at the sole request of, residents around the lake" elevated the lake level and "encroached upon and submerged" plaintiffs' property and resulted in a "taking of [plaintiffs'] property without just compensation being paid." Although defendant "maintain[ed] Spring Lake at elevated levels" "for a private use," the trial court determined that plaintiffs had "proven their N.C.G.S. §[ ]40A-51 cause of action" because defendant took a temporary easement in a portion of plaintiffs' property without filing a complaint containing a declaration of taking.[3] As a result, the trial court ordered that further proceedings be held for the purpose of determining the amount of compensation to which plaintiffs were entitled in light of the temporary taking of a portion of their property.

In seeking relief from the trial court's order before the Court of Appeals, defendant argued that plaintiffs' claims should be dismissed because a claim for inverse condemnation does not lie unless plaintiffs' property is taken for a public use or public purpose. According to defendant, the trial court's determination that defendant decided to raise the

---

2. According to surveys obtained by plaintiffs on 14 May 2014, while the elbows were still in place, and 18 March 2015, after the elbows had been removed, "the Lake encroached upon and submerged 1,192 square feet of [plaintiffs'] property" "during the time the elbows were installed." An appraisal commissioned by plaintiffs estimated that the value of the topsoil and centipede grass lost due to the flooding of plaintiffs' property amounted to $1,000. The validity of these damage estimates appears to be a disputed issue of fact.

3. The trial court also determined that the installation of the elbows proximately caused the encroachment of the lake water upon plaintiffs' land, that this encroachment was foreseeable, and that defendant had taken "a temporary easement interest in 1,120 square feet of [plaintiffs'] property for a period of 1 year and 20 days" along with "a portion of the topsoil and centipede grass that was located on the same."

lake level for the benefit of private landowners "should have ended the case." In defendant's view, the remedy provided by N.C.G.S. § 40A-51(a) is only available when "property has been taken by an act or omission of a condemnor listed in G.S. 40A-3(b) or (c)" "[f]or the public use or benefit." In addition, defendant argued that the trial court had erred by concluding that a taking had occurred given that (1) the encroachment upon and damage to plaintiffs' property was not foreseeable; (2) the trial court misapplied the principles enunciated in the decision of the United States Supreme Court in *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012); (3) plaintiffs were estopped from complaining about the effects of a decision that they had requested defendant to make; and (4) the trial court failed to make findings of fact concerning the boundaries of plaintiffs' property and of the property that defendant had allegedly taken.

Plaintiffs, on the other hand, contended that "neither a 'public use' nor a 'public purpose' is an element of an inverse condemnation action." According to plaintiffs, this Court held in *Kirby v. North Carolina Department of Transportation*, 368 N.C. 847, 856, 786 S.E.2d 919, 926 (2016), that a plaintiff need only show "a substantial interference with certain property rights . . . [that] caused a decrease in the fair market value of [plaintiff's] land" and defined a "taking" in *Long v. City of Charlotte*, 306 N.C. 187, 199, 293 S.E.2d 101, 109 (1982) (quoting *Penn v. Carolina Virginia Coastal Corp.*, 231 N.C. 481, 57 S.E.2d 817 (1950)), as "appropriating or injuriously affecting [private property] in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof." After noting that N.C.G.S. § 40A-51 makes no use of the term "public use," plaintiffs argue that the phrase "of a condemnor listed in [N.C.]G.S. [§] 40A-3(b) or (c)" modifies "act or omission" rather than specifying the motivation underlying the taking upon which a particular claim advanced in reliance upon N.C.G.S. § 40A-51 relied.

In reversing the trial court's order, the Court of Appeals began by noting that "[o]rders from a condemnation hearing concerning title and area taken are vital preliminary issues that must be immediately appealed pursuant to N.C.[G.S.] § 1-277, which permits interlocutory appeals of determinations affecting substantial rights." *Wilkie v. City of Boiling Spring Lakes*, ___ N.C. App. ___, ___, 796 S.E.2d 57, 61 (2016) (quoting *Town of Apex v. Whitehurst*, 213 N.C. App. 579, 582-83, 712 S.E.2d 898, 901 (2011)). According to the Court of Appeals, "there can be no inverse condemnation when property is not taken for a public use," *id.* at ___, 796 S.E.2d at 62, given that the power of eminent domain is exercised when "the government takes property *for public use*," *id.* at

___, 796 S.E.2d at 63 (quoting *Kirby*, 368 N.C. at 854, 786 S.E.2d at 924 (italics added) (emphasis omitted)). The Court of Appeals pointed out that "[t]he plain language of section 40A-51 defines when the remedy of an inverse condemnation action is available against a public condemnor" and "limits the availability of this remedy to instances in which property is taken by a condemnor pursuant to one of the enumerated acts or omissions in section 40A-3(b)." *Id.* at ___, 796 S.E.2d at 63. Since "the plain language of section 40A-51 limits its application to action taken by a municipality 'for the public use or benefit,' " the Court of Appeals held that "there is no remedy of inverse condemnation under the statute when property is not taken 'for the public use or benefit.' " *Id.* at ___, 796 S.E.2d at 63. As a result, the Court of Appeals reversed the trial court's order without addressing defendant's remaining contentions and held that, since plaintiffs had sought relief pursuant to both N.C.G.S. § 40A-51 and Article I, Section 19 of the North Carolina Constitution and since "an aggrieved person has a direct claim under the North Carolina Constitution for violation of his or her constitutional rights when no adequate state law remedy exists," this case should be remanded to the trial court for the purpose of allowing it to address plaintiffs' state constitutional claims. *Id.* at ___, 796 S.E.2d at 63-64 (first citing *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289, *cert. denied*, 506 U.S. 985, 113 S. Ct. 493, 121 L. Ed. 2d 431 (1992); then citing, *inter alia*, *Midgett v. N.C. State Highway Comm'n*, 260 N.C. 241, 250, 132 S.E.2d 599, 608 (1963), *overruled in part on other grounds by Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 616, 304 S.E.2d 164, 174 (1983)). On 3 May 2017, this Court entered a special order granting plaintiffs' request for discretionary review of the issues of "[w]hether the Court of Appeals erred by holding that taking for a public use or benefit is an element of a cause of action set forth in [N.C.G.S.] §[ ]40A-51" and "[w]hether the Court of Appeals erroneously interpreted [N.C.G.S.] §[ ]40A-51," while denying plaintiffs' request for discretionary review of certain additional issues.

In seeking relief from the Court of Appeals' decision before this Court, plaintiffs argue that N.C.G.S. § 40A-51 is "clear and unambiguous" and only requires a showing "(1) that property has been taken, (2) by an act or omission, (3) of a condemnor listed in N.C.[G.S.] § 40A-3(b) or (c), and (4) that no condemnation complaint containing a declaration has been filed," with the Court of Appeals having erred by "adding a 'public use or benefit' requirement" to the elements of a statutory inverse condemnation claim. According to plaintiffs, the phrase " 'listed in [N.C.]G.S. [§] 40A-3(b) or (c)' should be applied to the immediately preceding word 'condemnor' as opposed to the earlier phrase 'act or

omission,' " so as to limit "the type of *entity* that can be sued for inverse condemnation" rather than "the type of *action or omission* for which a property owner can recover following a taking." In advancing this argument, plaintiffs point to the doctrine of the last antecedent, pursuant to which "relative and qualifying words, phrases, and clauses ordinarily are to be applied to the word or phrase immediately preceding." *HCA Crossroads Residential Ctrs., Inc. v. N.C. Dep't of Human Res.*, 327 N.C. 573, 578, 398 S.E.2d 466, 469 (1990). In addition, plaintiffs contend that N.C.G.S. § 40A-51 is a remedial statute that should be interpreted broadly, citing *O & M Industries v. Smith Engineering Co.*, 360 N.C. 263, 268, 624 S.E. 2d 345, 348 (2006) (stating that "[a] remedial statute must be construed broadly 'in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained' " (quoting *Puckett v. Sellars*, 235 N.C. 264, 267, 69 S.E.2d 497, 499 (1952))). Plaintiffs assert that a construction of N.C.G.S. § 40A-51 allowing compensation even if the property in question could not have been acquired by eminent domain finds additional support in the statutory references to an "act or omission," rather than to "condemnation" or "eminent domain," on the theory that the General Assembly's linguistic choices tend to broaden the circumstances under which statutory inverse condemnation claims can properly be advanced. A similar inference can be drawn by reading the statutory requirement that condemnors instituting eminent domain proceedings plead "the public use for which the property is taken," N.C.G.S. § 40A-41 (2017), and file a memorandum of action containing "[a] statement of the property taken for public use," *id.* § 40A-43 (2017), in conjunction with the absence of any requirement that statutory inverse condemnation claimants do more than provide "[a] statement of the property allegedly taken," N.C.G.S. § 40A-51(b)(3) (2017). According to plaintiffs, "[t]he General Assembly simply did not intend for 'public use or benefit' to be an element of a cause of action under section 40A-51, when property has already been taken."

Defendant, on the other hand, contends that an examination of both the language in which N.C.G.S. § 40A-51 is couched and the statute's legislative history demonstrates that an inverse condemnation claimant must allege and show that the property in question was taken by one of "the enumerated acts or omissions" listed in N.C.G.S. § 40A-3(b) and (c). According to defendant, the statutory reference to an "act or omission" would be superfluous in the absence of such an interpretation, given that "everything a condemnor does is either an act or omission." Defendant asserts that the doctrine of the last antecedent provides no assistance in interpreting N.C.G.S. § 40A-51, since "listed in N.C.G.S. § 40A-3(b) or (c)" could modify either the entire phrase "enumerated acts or omissions

of condemnors" or nothing more than "condemnors." Defendant claims that the language granting "the authority to exercise the power of eminent domain" in N.C.G.S. § 40A-1 applies to and limits the availability of the statutory inverse condemnation remedy set out in N.C.G.S. § 40A-51 on the grounds that "inverse condemnation is the process of forcing a government to exercise its power of eminent domain," citing *Hoyle v. City of Charlotte*, 276 N.C. 292, 302, 172 S.E.2d 1, 8 (1970).

According to defendant, even if the phrase "listed in [G.S.] 40A-3(b) or (c)" refers to "condemnors," rather than "acts or omissions," N.C.G.S. § 40A-51 requires that the claimant show that his or her injury resulted from a "taking," which is a "term of art" that refers to "takings under the power of eminent domain." In defendant's view, "the application of inverse condemnation [is limited] to those situations '[w]here private property is *taken* for a public purpose by a governmental agency having the power of eminent domain,' " (quoting *State Highway Commission v. L.A. Reynolds Co.*, 272 N.C. 618, 623, 159 S.E.2d 198, 202 (1968)), with the only public purposes for which local public condemnors are entitled to assert the power of eminent domain being those enumerated in N.C.G.S. § 40A-3(b) and (c). As a result of the fact that defendant's actions were not intended to further one of the statutorily enumerated public purposes, defendant "lacked the power of condemnation and thus did not take the Wilkies' property." Defendant claims that plaintiffs had an adequate remedy other than inverse condemnation in light of N.C.G.S. § 40A-51(c), which provides that "[n]othing in this section shall in any manner affect an owner's common-law right to bring an action in tort for damage to his property," with a property owner having the right to seek common law relief against a defendant that acts for purposes "beyond the power of eminent domain."

The essential issue before us in this case[4] is whether a property owner seeking to assert a statutory inverse condemnation claim pursuant to N.C.G.S. § 40A-51 must show that the condemnor acted to further a public purpose. In order to resolve this issue, we are required

4. Plaintiffs also argue that defendant failed to note a timely appeal from the trial court's order and that the raising of the lake level constituted a taking for a public purpose. After carefully reviewing the record, we conclude that the trial court did not err by denying plaintiffs' motion to dismiss defendant's appeal and that the Court of Appeals did not err by addressing defendant's challenges to the trial court's order on the merits. In addition, we decline to address plaintiffs' "public use or benefit" argument both because we denied plaintiffs' request for discretionary review of that issue and because we need not do so given our decision with respect to the statutory construction issue that we did elect to review.

to construe the relevant statutory language. After carefully considering the relevant statutory language and precedent, we conclude that the references to N.C.G.S. § 40A-3(b) and (c) contained in N.C.G.S. § 40A-51 serve to simply delineate the universe of entities against whom a statutory inverse condemnation action can be brought pursuant to N.C.G.S. § 40A-51 rather than limiting the acts or omissions that must be shown in order to permit the maintenance of the statutory inverse condemnation action authorized by N.C.G.S. § 40A-51.

"Questions of statutory interpretation are ultimately questions of law for the courts and are reviewed de novo." *In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (citing *Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998)). "The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998), *cert. denied*, 526 U.S. 1098, 119 S. Ct. 1576, 143 L. Ed. 2d 671 (1999)). "The 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 Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted). The process of construing a statutory provision must begin with an examination of the relevant statutory language. *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992); *see also State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010) (stating that, "[w]hen construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself"). "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) (alteration in original) (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)). In other words, "[i]f the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citation omitted).

N.C.G.S. § 40A-51(a) provides, in pertinent part, that

> [i]f property has been taken by an act or omission of a condemnor listed in [N.C.]G.S. [§] 40A-3(b) or (c) and no complaint containing a declaration of taking has been filed the owner of the property [ ] may initiate an action to seek compensation for the taking.

N.C.G.S. § 40A-51(a) (2017). N.C.G.S. § 40A-3(b)[5] and (c),[6] to which reference is made in N.C.G.S. § 40A-51(a), contain a list of entities that have "the power of eminent domain" "[f]or the public use or benefit." In other words, N.C.G.S. § 40A-3(b) and (c) specify the public entities that are entitled to exercise the power of eminent domain and the purposes for which the entities in question are entitled to exercise that authority. When read in context and in accordance with ordinary English usage, the reference to N.C.G.S. § 40A-3(b) and (c) contained in N.C.G.S. § 40A-51(a) makes most sense as a simple delineation of the range of entities against whom a statutory inverse condemnation action can be brought rather than as a description of the motivations underlying the "act[s] or omission[s]" necessary for the existence of a statutory inverse condemnation claim. As a result, we hold that the plain meaning of the reference to N.C.G.S. § 40A-3(b) and (c) contained in N.C.G.S. § 40A-51(a) is to specify the entities against whom a statutory inverse condemnation claim can be asserted and nothing more.

A number of additional considerations support this "plain meaning" construction of the relevant statutory language. As plaintiffs note, "relative and qualifying words, phrases, and clauses ordinarily are to be applied to the word or phrase immediately preceding" rather than

---

5. N.C.G.S. § 40A-3(b) (2017) allows "the governing body of each municipality or county" to "possess" "the power of eminent domain" for the purposes of: "[o]pening, widening, extending, or improving roads, streets, alleys, and sidewalks"; "[e]stablishing, extending, enlarging, or improving" various public enterprises; [e]stablishing, extending, enlarging or improving parks, playgrounds, and other recreational facilities"; "[e]stablishing, extending, enlarging or improving storm sewer and drainage systems and works, or sewer and septic tank lines and systems"; [e]stablishing, enlarging, or improving hospital facilities, cemeteries, or library facilities"; "[c]onstructing, enlarging, or improving city halls, fire stations, office buildings, courthouse jails and other buildings for use by any department, board, commission or agency"; "[e]stablishing drainage programs"; "[a] cquiring designated historic properties"; and "[o]pening, widening, extending, or improving public wharves." N.C.G.S. § 40A-3(b) also extends the "power of eminent domain" to "[t]he board of education of any municipality or county" "for purposes authorized by Chapter 115C of the General Statutes."

6. N.C.G.S. § 40A-3(c) (2017) authorizes "[a] sanitary district board," "[t]he board of commissioners of a mosquito control district," "[a] hospital authority," "[a] watershed improvement district," "[a] housing authority," "[a] corporation as defined in [N.C.]G.S. [§] 157.50," "a commission established under the provisions of Article 22 of Chapter 160A," "[a]n authority created under the provisions of Article 1 of Chapter 162A," "[a] district established under the provisions of Article 4 of Chapter 162A," "[t]he board of trustees of a community college," "[a] district established under the provisions of Article 6 of Chapter 162A," and "[a] regional public transportation authority" to exercise "the power of eminent domain" "[f]or the public use or benefit."

"extending to or including others more remote," "unless the context indicates a contrary intent." *HCA Crossroads*, 327 N.C. at 578, 398 S.E.2d at 469 (citations omitted); *see also Lockhart v. United States*, ___ U.S. ___, ___, 136 S. Ct. 958, 962, 194 L. Ed. 2d 48, 53 (2016) (stating that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows" (ellipsis in original) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S. Ct. 376, 380, 157 L. Ed. 2d 333, 340 (2003))). In view of the fact that the expression "listed in G.S. 40A-3(b) or (c)" as it appears in N.C.G.S. § 40A-51(a) is immediately preceded by "of a condemnor" and in view of the fact that the context does not clearly suggest that this reference to "listed in G.S. 40A-3(b) or (c)" is intended to apply to anything other than the immediately preceding expression, the doctrine of the last antecedent, as previously recognized by this Court, supports our "plain meaning" determination that "listed in G.S. 40A-3(b) or (c)" refers to the defendants against whom a statutory inverse condemnation claim may be asserted rather than to both the identity of the person against whom the claim is asserted and the purpose for which that entity acted at the time that it injured the claimant's property.

In addition, it seems to us that a decision to provide a claimant whose property has been taken for a public purpose with a statutory inverse condemnation remedy while depriving a claimant who has suffered the same injury for a non-public purpose of the right to utilize that statutory remedy seems inconsistent with the likely legislative intent. "[W]hen the Act is considered as a whole in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained," a decision to construe N.C.G.S. § 40A-51 so as to limit plaintiffs' statutory inverse condemnation remedy to instances in which the condemnor acted for a public purpose would "attribute to [the General Assembly] a purpose and intent so fraught with injustice as to shock the consciences of fair-minded men" while a contrary construction "is consonant with the general purpose and intent of the Act . . .[,] is in harmony with the other provisions of the statute, and serves to effectuate the objective of the legislation." *Puckett*, 235 N.C. at 267-68, 69 S.E.2d at 499-500; *see also O & M Indus.*, 360 N.C. at 266-68, 624 S.E.2d at 347-49 (construing broadly a "remedial" statute that codified a state constitutional provision "giving to mechanics and laborers an adequate lien on the subject-matter of their labor").[7] As a result, a number

7. Defendant asserts that N.C.G.S. § 40A-51 is a procedural, rather than a remedial, statute given that the claimant's right to recover arises from the relevant constitutional provisions rather than from N.C.G.S. § 40A-51. Although this assertion may, as a technical

of relevant canons of statutory construction provide additional support for the manner in which we believe that the "plain meaning" of N.C.G.S. § 40A-51(a) should be understood.

Although defendant contends that "taken" and "taking" as used in N.C.G.S. § 40A-51(a) are terms of art that serve to limit statutory inverse condemnation proceedings to claims arising from actions or omissions undertaken for a public purpose, we do not find that argument persuasive.[8] "Usually, words of a statute will be given their natural, approved, and recognized meaning," *Black v. Littlejohn*, 312 N.C. 626, 638, 325 S.E.2d 469, 478 (1985) (citing *In Re Martin*, 286 N.C. 66, 77, 209 S.E.2d 766, 774 (1974)). Admittedly, "[w]hen a term has long-standing legal significance, it is presumed that legislators intended the same significance to attach by use of that term, absent indications to the contrary." *Id.* at 639, 325 S.E.2d at 478 (quoting *Sheffield v. Consol. Foods Corp.*, 302 N.C. 403, 437, 276 S.E.2d 422, 427 (1981)). Although this Court's decisions sometimes utilize "taking" and "taken" in ways that are at variance from their ordinary meaning, *see*, *e.g.*, *Kirby*, 368 N.C. at 855, 786 S.E.2d at 925 (noting that "[a] taking effectuated by eminent domain does not require 'an actual occupation of the land,' but 'need only be a substantial interference with elemental rights growing out of the ownership of the property' " (quoting *Long*, 306 N.C. at 198-99, 293 S.E.2d at 109)); *W. Carolina Power Co. v. Hayes*, 193 N.C. 104, 107, 136 S.E. 353, 354 (1927) (noting that "[i]t has also been held that for the purpose of determining the sum to be paid as compensation for land taken under the right of eminent domain," "the land is taken within the meaning of this

---

matter, be true, a decision in defendant's favor would deprive plaintiffs of access to the relatively clear statutory procedures spelled out in N.C.G.S. § 40A-51 and compel plaintiffs to seek redress using procedures that are less suited to the type of claim that they seek to assert. As a result, we are inclined to believe that, when viewed in any realistic sense, N.C.G.S. § 40A-51 is intended to have a remedial effect by codifying any remedies that might otherwise be available to claimants in plaintiffs' position and should be treated as a remedial statute.

8. To be sure, a number of decisions of this Court and the Court of Appeals have made reference to a "public use" requirement in generally defining an inverse condemnation claim. *See*, *e.g.*, *State Highway Comm'n. v. L.A. Reynolds Co.*, 272 N.C. at 623, 159 S.E.2d at 202; *Kirby v. N.C. Dep't. of Transp.*, 239 N.C. App. 345, 356, 769 S.E.2d 218, 228 (2015), *aff'd*, 368 N.C. 847, 786 S.E.2d 919 (2016); *Peach v. City of High Point*, 199 N.C. App. 359, 365, 683 S.E.2d 717, 722 (2009); *Adams Outdoor Advert. of Charlotte v. N.C. Dep't. of Transp.*, 112 N.C. App. 120, 122, 434 S.E.2d 666, 667 (1993). However, this Court has never refused to recognize the availability of an inverse condemnation action on such grounds or imported such a requirement into the statutory inverse condemnation action recognized by N.C.G.S. § 40A-51.

principle when the proceeding is begun," rather than when the land was physically occupied), this Court has never gone so far as to hold that "taken" invariably means "taken by the power of eminent domain" or that "taking" means nothing more or less than a "taking for the public use."[9] On the contrary, defendant's attempt to read "public use," "public benefit," or similar expressions into N.C.G.S. § 40A-51(a) based upon the reference to N.C.G.S. § 40A-3(b) and (c) runs afoul of the general principle that "[c]ourts should 'give effect to the words actually used in a statute' and should neither 'delete words used' nor 'insert words not used' in the relevant statutory language during the statutory construction process." *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016) (quoting *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014)). Finally, while "a court may consider the purpose of the statute" "[i]n ascertaining [the legislature's] intent," *State v. Tew*, 326 N.C. 732, 738, 392 S.E.2d 603, 607 (1990); *see also State v. Barnett*, 369 N.C. 298, 304, 794 S.E.2d 306, 311 (2016) (stating that, "[i]n ascertaining the legislative intent, courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish" (quoting *State ex rel. Utils. Comm'n v. Pub. Staff*, 309 N.C. 195, 210, 306 S.E.2d 435, 444 (1983))), the statement of intent upon which defendant relies expressly applies to "condemning entities," their "authority to exercise the power of eminent domain," and the procedures through which those entities are entitled to assert their right of eminent domain, *see* N.C.G.S. § 40A-1(a) (2017) (stating that "it is the intent of the General Assembly that . . . the uses set out in [N.C.]G.S. [§] 40-3 are the exclusive uses for which the authority to exercise the power of eminent domain is granted to private condemnors, local public condemnors, and other public condemnors"); *id.* § 40A-1(b) (2017) (providing that "[i]t is the intent of the General Assembly that the procedures provided by this Chapter shall be the exclusive condemnation procedures to be used in this State by all private condemnors and all local public condemnors"), rather than to the extent to which individuals whose property has been

9. Our decision in *State Highway Commission v. Batts*, 265 N.C. 346, 361-62, 144 S.E.2d 126, 137-38 (1965), in which we determined that the State Highway Commission was seeking to condemn land for a private purpose and described the removal of the landowner's trees in anticipation of the proposed condemnation as "an unauthorized trespass" for which the landowner had no recourse against the Commission, does not compel a determination that N.C.G.S. § 40A-51 necessarily incorporates a "public purpose" requirement given that *Batts* did not involve a statutory inverse condemnation claim pursuant to N.C.G.S. § 40A-51 (and, in fact, was decided before that statute was enacted). The statement about the absence of any reference to N.C.G.S. § 40A-51 can be made about our decision in *Clark v. Asheville Contr'g Co.*, 316 N.C. 475, 485-87, 342 S.E.2d 832, 838 (1986).

taken are entitled to assert a statutory inverse condemnation claim pursuant to N.C.G.S. § 40A-51. As a result, we are not persuaded by any of the arguments that defendant has advanced in support of its request that we affirm the Court of Appeals' decision with respect to this issue.

"A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35.

> While North Carolina does not have an express constitutional provision against the "taking" or "damaging" of private property for public use without payment of just compensation, this Court has allowed recovery for a taking on constitutional as well as common law principles. We recognize the fundamental right to just compensation as so grounded in natural law and justice that it is part of the fundamental law of this State, and imposes upon a governmental agency taking private property for public use a correlative duty to make just compensation to the owner of the property taken. This principle is considered in North Carolina as an integral part of " the law of the land" within the meaning of Article I, Section 19 of our State Constitution.

Beroth Oil Co. v. N.C. Dep't of Transp., 367 N.C. 333, 340-41, 757 S.E.2d 466, 472-73 (2014) (quoting *Long*, 306 N.C. at 195-96, 293 S.E.2d at 107-08 (footnotes and citations omitted)). " '[I]nverse condemnation [ ]' [is] a term often used to designate 'a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.' " *City of Charlotte v. Spratt*, 263 N.C. 656, 662-63, 140 S.E.2d 341, 346 (1965) (quoting *City of Jacksonville v. Schumann*, 167 So. 2d 95, 98 (Fla. Dist. Ct. App. 1964), *cert. denied*, 172 So.2d 597 (1965)). Although a condemning entity must establish that a proposed taking will further a public purpose before a condemnation can be authorized, we can see no reason why a reciprocal burden to establish the existence of a public purpose should be imposed upon a property owner who has been deprived of his or her property by governmental action taken for a nonpublic purpose. *See Lloyd v. Town of Venable*, 168 N.C. 531, 535, 84 S.E. 855, 857 (1915) (noting that "the owner who consents to a taking of his property, when no legal right or power to do so exists, should receive the same measure of justice as in the other case, where the power does exist"); *see also Kirkpatrick v. City of Jacksonville*, 312 So. 2d 487, 490 (Fla. Dist. Ct. App. 1975) (per curiam) ("The proviso that a landowner's

property may be taken from him only 'for a public purpose' is for the landowner's protection and is not placed in the Constitution as a sword to be used against the landowner when the state has summarily taken his property without due process."); *Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 813 (Tex. 2016) (*Lehrmann, J., concurring*) (stating that "it makes no sense to say that a property owner is entitled to compensation if the government does the right thing but not if it does the wrong thing"). In light of these fundamental principles and the manner in which N.C.G.S. § 40A-51(a) is worded, we cannot conclude that the General Assembly intended to make the availability of the statutory inverse condemnation remedy provided by N.C.G.S. § 40A-51 dependent upon the purpose which led to the infliction of the injury for which the affected property owner seeks redress. As a result, we reverse the Court of Appeals' determination to the contrary and remand this case to the Court of Appeals for consideration of defendant's remaining challenges to the trial court's order.

REVERSED AND REMANDED.

WILLOWMERE COMMUNITY ASSOCIATION, INC., A NORTH CAROLINA NON-PROFIT CORPORATION, AND NOTTINGHAM OWNERS ASSOCIATION, INC., A NORTH CAROLINA NON-PROFIT CORPORATION

v.

CITY OF CHARLOTTE, A NORTH CAROLINA BODY POLITIC AND CORPORATE, AND CHARLOTTE-MECKLENBURG HOUSING PARTNERSHIP, INC., A NORTH CAROLINA NON-PROFIT CORPORATION

No. 419PA16

Filed 2 March 2018

Parties—standing—homeowners associations—compliance with bylaws

Where the plaintiff homeowners associations (HOAs) filed a lawsuit challenging the validity of a zoning ordinance that permitted multifamily housing on parcels of land abutting property owned by plaintiffs, plaintiff HOAs' failure to comply with various provisions in their corporate bylaws when their respective boards of directors initiated litigation did not prevent them from having standing to bring the lawsuit.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 792 S.E.2d 805 (2016), affirming an order of summary judgment entered on 14 April 2015 by Judge Forrest D. Bridges in Superior Court, Mecklenburg County. Heard in the Supreme Court on 12 December 2017.

Law Office of Kenneth T. Davies, P.C., by Madeline J. Trilling and Kenneth T. Davies, for plaintiff-appellants.

Thomas E. Powers III, Assistant City Attorney, and Terrie Hagler-Gray, Senior Assistant City Attorney, for defendant-appellee City of Charlotte.

Moore & Van Allen PLLC, by Glenn E. Ketner, III, Anthony T. Lathrop, and William M. Butler, for defendant-appellee Charlotte-Mecklenburg Housing Partnership, Inc.

BEASLEY, Justice.

In this appeal we consider the extent to which a corporate entity must affirmatively demonstrate compliance with its internal bylaws and governance procedures before it may invoke the jurisdiction of the General Court of Justice. The Court of Appeals held that plaintiffs lacked standing because they failed to strictly comply with their corporate bylaws in bringing this suit. We agree with plaintiffs that a showing of strict compliance is not necessary to satisfy the requirements of our standing jurisprudence. Accordingly, we reverse the decision of the Court of Appeals.

Plaintiffs Willowmere Community Association, Inc. (Willowmere) and Nottingham Owners Association, Inc. (Nottingham) are non-profit corporations representing homeowners in the residential communities of Willowmere and Nottingham located in Charlotte. Plaintiffs instituted this litigation on 14 March 2014 by filing a Petition for Review in the Nature of Certiorari in Superior Court, Mecklenburg County, challenging the validity of a zoning ordinance enacted by the City of Charlotte and seeking a declaratory judgment that the zoning ordinance is invalid.[1] The challenged zoning ordinance permits multifamily housing on

1. Plaintiffs' filing originally named the City of Charlotte and Charlotte-Mecklenburg Housing Partnership, Inc. (CMHP) as well as New Dominion Bank, the owner of the parcels subject to the zoning ordinance, as defendants. New Dominion Bank is not a party to this appeal.

parcels of land abutting property owned by plaintiffs. Defendants each filed a response in which they denied the material allegations in the petition and moved to dismiss the action under Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. With leave of the trial court, on 9 July 2014, plaintiffs amended their initial filing under Rule 15(a) of the North Carolina Rules of Civil Procedure to restyle it as a complaint for declaratory judgment, alleging the same causes of action and requesting the same principal relief—that the court invalidate the zoning ordinance. Defendant CHMP answered plaintiffs' amended complaint on 17 October 2014, and defendant City of Charlotte filed its new answer on 22 October 2014. Plaintiffs and defendants each filed cross-motions for summary judgment on the issue of the ordinance's validity.

The trial court granted defendants' motions for summary judgment and denied plaintiffs' motion for summary judgment based on the court's conclusion that it lacked subject matter jurisdiction to adjudicate plaintiffs' claims. Specifically, the trial court reasoned that plaintiffs lacked standing to bring the instant suit because they each failed to comply with various provisions in their corporate bylaws when their respective boards of directors decided to initiate this litigation.[2] The trial court relied on the evidence submitted at the summary judgment hearing, which established that neither plaintiff explicitly authorized filing the present suit during a meeting with a quorum of directors present, either in person or by telephone. The trial court concluded that plaintiff Willowmere lacked standing because its board of directors agreed to initiate the lawsuit in an e-mail conversation, which was not an expressly authorized substitute for the board's written consent to take action without a formal meeting under Willowmere's corporate bylaws. Similarly, as to plaintiff Nottingham, the trial court concluded that its decision to institute this litigation was defective under its bylaws which require, *inter alia*, a formal meeting with a quorum of directors present (either in person or by telephone), recorded minutes of the meeting reflecting the proceedings of the board of directors, the board's written consent for any action outside of a formal meeting, and an explanation of its action posted by the board within three days after its decision. The trial

2. While none of defendants' motions or pleadings to the trial court explicitly raised the issue of plaintiffs' standing to bring suit, the trial court was permitted to consider the threshold question of its own subject-matter jurisdiction in ruling on the parties' cross-motions for summary judgment. *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 86 (1986) ("Every court necessarily has the inherent judicial power to inquire into, hear and determine questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction." (citing *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964))).

court's view was that, "[w]hile Plaintiffs' bylaws each permit their directors to sue regarding matters affecting their planned communities, the directors can only act through a meeting or a consent action without a meeting," and "[n]either Willowmere nor Nottingham has met their burden to show that their directors acted to initiate this litigation through one of these means in this case."[3]

Plaintiffs timely appealed to the Court of Appeals, which affirmed the trial court's award of summary judgment to defendants. *Willowmere Cmty. Ass'n, Inc. v. City of Charlotte*, ___ N.C. App. ___, ___, 792 S.E.2d 805, 812-13 (2016). On 26 January 2017, this Court allowed plaintiffs' petition for discretionary review. We now reverse the decision of the Court of Appeals.

This Court reviews a trial court's decision dismissing a case for lack of subject matter jurisdiction and a trial court's award of summary judgment de novo. *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008) (applying de novo review to a motion to dismiss for lack of standing); *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) ("Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007))).

"As a general matter, the North Carolina Constitution confers standing on those who suffer harm: 'All courts shall be open; [and] every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law . . . .' " *Mangum*, 362 N.C. at 642, 669 S.E.2d at 281-82 (alterations in original) (quoting N.C. Const. art. I, § 18). "The rationale of [the standing] rule is that only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue." *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973).

> "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the

3. The trial court also stated that, if it had subject-matter jurisdiction over this matter, it would have invalidated the zoning ordinance because the ordinance was adopted in a manner inconsistent with the requirements of N.C.G.S. § 160A-383 (2015). That issue is not before us, and we express no opinion on the merits of plaintiffs' claim for declaratory judgment or the validity of the zoning ordinance. *See* N.C. R. App. P. 16(a) (limiting this Court's review to the issues presented in the petition for discretionary review and properly presented in the parties' briefs to this Court).

> outcome of the controversy as to assure that concrete adverseness which sharpens the presentation[s] of issues upon which the court so largely depends for illumination of difficult constitutional questions.' "

Id. at 28, 199 S.E.2d at 650 (alteration in original) (quoting *Flast v. Cohen*, 392 U.S. 83, 99, 20 L. Ed. 2d 947, 961 (1968) (quoting *Baker v. Carr*, 369 U.S. 186, 204, 7 L. Ed. 2d 663, 678 (1962))). "[W]hether [a] party has standing to attack the constitutionality of a statute is a question of law, which may not be settled by the parties." *Id.* at 28-29, 199 S.E.2d at 650 (first citing *Nicholson v. State Educ. Assistance Auth.*, 275 N.C. 439, 447-48, 168 S.E.2d 401, 406-07 (1969); then citing *State ex rel. Carringer v. Alverson*, 254 N.C. 204, 208, 118 S.E.2d 408, 410-11 (1961)).

"Legal entities other than natural persons may have standing." *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990). "To have standing the complaining association or one of its members must suffer some immediate or threatened injury." *Id.* at 129, 388 S.E.2d at 555 (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342, 53 L. Ed. 2d 383, 393 (1977)). "[A]n association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Id.* at 129, 388 S.E.2d at 555 (quoting *Warth v. Seldin*, 422 U.S. 490, 511, 45 L. Ed. 2d 343, 362 (1975)).

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. at 130, 388 S.E.2d at 555 (citing *Wash. State Apple Advert.*, 432 U.S. at 343, 53 L. Ed. 2d at 394). "When an organization seeks declaratory or injunctive relief on behalf of its members, 'it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.' " *Id.* at 130, 388 S.E.2d at 555 (quoting *Warth*, 422 U.S. at 515, 45 L. Ed. 2d at 364).

The Court of Appeals decision below and defendants' arguments to this Court are not based on plaintiffs' failure to meet the elements of associational standing described in *River Birch* or on the contention that plaintiffs have not "alleged . . . a [sufficient] personal stake in the

outcome of the controversy."[4] *Stanley*, 284 N.C. at 28, 199 S.E.2d at 650 (quoting *Flast*, 392 U.S. at 99, 20 L. Ed. 2d at 961). Instead, defendants contend that, by failing to follow the internal governance procedures mandated by their respective bylaws, plaintiffs' boards of directors "had no authority to act on behalf of [plaintiffs] in filing and prosecuting this lawsuit." In support of their argument, defendants rely entirely on Court of Appeals cases holding that a corporate entity "lacked standing" to bring suit based on (1) a challenge asserted *by a member of the plaintiff entity* that the plaintiff failed to comply with explicit prerequisites to filing suit imposed by the entity's bylaws or (2) the corporate entity's lack of *privity of estate* with the defendants against whom the entity sought to enforce restrictive covenants. *See Beech Mountain Prop. Owners' Ass'n v. Current*, 35 N.C. App. 135, 139, 240 S.E.2d 503, 507 (holding that, because the property owners' association did not, itself, own any property in the development at issue, it "lack[ed] the capacity" to enforce restrictive covenants that run with the land against other property owners in the development); *accord Laurel Park Villas Homeowners Ass'n v. Hodges*, 82 N.C. App. 141, 143-44, 345 S.E.2d 464, 465-66 (1986) (reaffirming the holding in *Beech Mountain* that, without owning property in the community at issue, an incorporated homeowners' association "lacked standing" to enforce restrictive covenants against property owners appearing in their deeds), *disc. rev. denied*, 318 N.C. 507, 349 S.E.2d 861 (1986); *see also Peninsula Prop. Owners Ass'n v. Crescent Res., LLC*, 171 N.C. App. 89, 95-97, 614 S.E.2d 351, 353-56 (2005) (holding that the plaintiff homeowners' association lacked standing when it failed to comply with its bylaw provision requiring a two-thirds majority vote of members to approve filing suit against the defendant on behalf of the association, when this issue was raised by the defendant property owner *who was a member of the property owners' association*[5]*)*, *appeal dismissed and disc. rev. denied*, 360 N.C. 177, 626 S.E.2d 648 (2005).

---

4. In their briefs to the Court of Appeals, defendants additionally argued that plaintiffs lacked standing because they failed to establish an injury in fact stemming from the zoning ordinance and failed to meet the associational standing elements discussed in *River Birch*. However, defendants did not obtain a ruling from the trial court on this issue to preserve it for appellate review, and defendants did not include this issue in the list of issues for discretionary review pursuant to N.C. R. App. P. 15(d). As a result, that issue is not before us, and we decline to address it now. *See* N.C. R. App. P. 16(a).

5. Though not emphasized in the Court of Appeals' analysis in *Peninsula*, the fact that the defendant, Crescent Resources, LLC, owned property in the community governed by the association was noted in the opinion, clear from the record, and briefed by the parties. *See Peninsula*, 171 N.C. App. at 95, 614 S.E.2d at 355 ("Crescent owned . . . two of the nine hundred lots within the [planned residential community] at the time the [plaintiff] filed its complaint" and had "voting rights.").

Because *Beech Mountain* and *Laurel Park* deal entirely with the plaintiff associations' capacity to enforce restrictive covenants against the defendant property owners, those cases have no applicability here. *See Sedberry v. Parsons*, 232 N.C. 707, 710-11, 62 S.E.2d 88, 90 (1950) ("Where the owner of a tract of land subdivides it and sells distinct parcels thereof to separate grantees, imposing restrictions on its use pursuant to a general plan of development or improvement, such restrictions may be *enforced by any grantee against any other grantee*, either on the theory that there is a mutuality of covenant and consideration, or on the ground that mutual negative equitable easements are created.") (emphasis added) (quoting 26 C.J.S. *Deeds* § 167, at 548-49 (1941) (footnotes omitted)). The "standing" at issue in those cases, more appropriately characterized as privity of estate, was the plaintiffs' capacity to enforce restrictive covenants applicable to real property against the defendants and had nothing to do with the corporate bylaws or internal governance procedures of the plaintiff homeowners' associations.[6] *See*

6. The plaintiff homeowners' association in *Laurel Park* argued that it had standing to enforce the restrictive covenants against the defendants under N.C.G.S. § 47A-10, which expressly permitted the manager or board of directors of a condominium homeowners' association to sue on the association's behalf against a unit owner to enforce, *inter alia*, the association's "bylaws," "administrative rules and regulations," and "covenants, conditions and restrictions" in deeds. 82 N.C. App. at 142, 345 S.E.2d at 465 (quoting N.C.G.S. § 47A-10 (1985)). The Court of Appeals rejected this argument because the complaint named the association as the plaintiff rather than "the manager or board of directors on behalf of the association" and the statute only expressly addressed the authority of the association's manager or board to sue *but not* that of the association itself. *See id.* at 142, 345 S.E.2d at 465; N.C.G.S. § 47A-10. Applying its earlier decision from *Beech Mountain*, the Court of Appeals in *Laurel Park* concluded that the plaintiff homeowners' association could not enforce restrictive covenants against a unit owner in the community because the association itself (the only named plaintiff) did not own property in the community. 82 N.C. App. at 143, 345 S.E.2d at 465.

The Court of Appeals in *Laurel Park* went on to address, in dicta, the plaintiff's further argument that its corporate bylaws gave it authority to bring suit on behalf of the unit owners. *Id.* at 143-44, 345 S.E.2d at 466. The Court of Appeals rejected this argument as well, reasoning that "[t]here is nothing in the articles or the bylaws authorizing persons other than the board, its officers, or the membership to act on behalf of the corporation, and nothing in the record suggesting that any of these authorized this action," and "the statute specifically designates who may sue to enforce the restrictions" but does not designate the association itself. *Id.* at 144, 345 S.E.2d at 466. The reference in *Laurel Park* to the association's bylaws was not, as the Court of Appeals opinion in this case suggests, an instance of a corporation "fail[ing] to comply with [its] own bylaws in bringing [an] action," *Willowmere*, ___ N.C. App. at ___, 792 S.E.2d at 812 (citing *Laurel Park*, 82 N.C. App. at 143-44, 345 S.E.2d at 466), but rather a recognition that the bylaws cannot create corporate authority beyond what was provided by statute. Additionally, the statute the Court of Appeals construed in *Laurel Park* specifically governed condominium unit owners' associations and has no applicability to a homeowners' association of a planned community incorporated under the North Carolina Nonprofit Corporation Act. *Compare* N.C.G.S. § 47C-1-102 (2017) (North Carolina Condominium Act) *with* N.C.G.S. § 47F-1-102 (2017) (North Carolina Planned Community Act).

Runyon v. Paley, 331 N.C. 293, 302, 416 S.E.2d 177, 184 (1992) ("Thus, where the covenant is sought to be enforced by someone not a party to the covenant or against someone not a party to the covenant, the party seeking to enforce the covenant must show that he has a sufficient legal relationship with the party against whom enforcement is sought to be entitled to enforce the covenant.").

In *Peninsula*, the Court of Appeals held that the property owners' association lacked standing to commence legal proceedings against Crescent Resources, LLC ("Crescent"), the previous developer of the community, because the association failed to comply with an explicit provision in its bylaws that required any litigation against Crescent to be approved by a two-thirds majority vote of all association members entitled to vote. 171 N.C. App. at 94, 97, 614 S.E.2d at 354, 356. But that case is distinguishable from the case at bar because in *Peninsula*, the failure of the plaintiff to comply with the bylaws was raised by Crescent, which was a member of the plaintiff association. *See id.* at 91, 95, 614 S.E.2d at 353, 355. One of the underlying issues raised by the plaintiff in *Peninsula* was the very fact that Crescent, as developer of the community, had drafted the association's bylaws and explicitly included the two-thirds approval provision, which, in the plaintiff's view, contravened Crescent's fiduciary duties as the controlling member of the association when the bylaws were created. *See id.* at 90, 94-95, 614 S.E.2d at 352, 354-55. As a member of the plaintiff association and as the party that was clearly intended to benefit from the two-thirds approval requirement in the bylaws, Crescent was entitled to raise the association's failure to comply with this provision of its bylaws as a bar to the plaintiff's suit. Nonetheless, neither this Court nor the Court of Appeals has ever held (until the Court of Appeals opinion in this case) (1) that a defendant who is *a stranger to the plaintiff association* may assert that the plaintiff's failure to abide by its own bylaws necessitates dismissal of the plaintiff's complaint for lack of standing or (2) that a corporate defendant must affirmatively demonstrate compliance with its bylaws and internal governance procedures in order to have standing.

Nothing in our jurisprudence on standing requires a corporate litigant to affirmatively plead or prove its compliance with corporation bylaws and internal rules relating to its decision to bring suit. *Cf. Mangum*, 362 N.C. at 644, 669 S.E.2d at 283 ("We . . . note that North Carolina is a notice pleading jurisdiction, and as a general rule, there is no particular formulation that must be included in a complaint or filing in order to invoke jurisdiction or provide notice of the subject of the suit to the opposing party." (citing *Mangum v. Surles*, 281 N.C. 91, 99, 187 S.E.2d 697, 702 (1972) ("[I]t is the essence of the Rules of Civil Procedure

that decisions be had on the merits and not avoided on the basis of mere technicalities."))). Indeed, since "standing is a 'necessary prerequisite to a court's proper exercise of subject matter jurisdiction,' " *Crouse v. Mineo*, 189 N.C. App. 232, 236, 658 S.E.2d 33, 36 (2008) (quoting *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878, *disc. rev. denied*, 356 N.C. 610, 574 S.E.2d 474 (2002)), and can be challenged "at any stage of the proceedings, even after judgment," *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (quoting *Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E.2d 876, 880 (1961), *appeal dismissed and cert. denied*, 371 U.S. 22, 9 L. Ed. 96 (1962)), adopting such a rule would subject countless judgments across North Carolina to attack for want of subject matter jurisdiction. We decline to adopt such a rule.

There is no evidence in this case suggesting that any member of the communities of Willowmere or Nottingham opposed plaintiffs' prosecution of this suit. We decline to permit a defendant who is a stranger to an association to invoke the association's own internal governance procedures as an absolute defense to subject matter jurisdiction in a suit filed by the association against that defendant. If a member of either plaintiff association disagrees with the decision to file suit, the proper vehicle to challenge the association's failure to comply with its respective bylaws in making that decision is a suit against the nonprofit corporation brought by the aggrieved member or members of the association or, in certain circumstances, a derivative action. *Cf.* N.C.G.S. § 55A-3-04 (2017) (providing that, "the validity of [a] corporate action shall not be challenged on the ground that the [nonprofit] corporation lacks or lacked power to act" except in a proceeding brought against the corporation "by a member or a director" of the corporation, "the Attorney General," or "[i]n a proceeding by the corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, against an incumbent or former director, officer, employee, or agent of the corporation");[7] *id.* § 55A-7-40 (2017) (authorizing and explaining the procedures

7. Plaintiffs argued to this Court that defendants are precluded under N.C.G.S. § 55A-3-04 from challenging "the validity of corporate action" to bring this suit because defendants are not listed among the classes of parties authorized to bring such a challenge in section 55A-3-04(b). Because plaintiffs failed to raise this argument before the trial court, it is not properly preserved for our review. *See* N.C. R. App. P. 10(a); *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 194-96, 657 S.E.2d 361, 363-64 (2008). Accordingly, we decline to address whether defendants' assertion that plaintiffs failed to comply with their respective bylaws in their decision to bring this action amounts to a challenge that their action was *ultra vires* or "[in]valid[ ] . . . on the ground that the corporation lacks or lacked power to act." *See* N.C.G.S. § 55A-3-04. It is sufficient to say that, while a member of either plaintiff association could permissibly challenge the association's failure to comply with its bylaws in instituting this suit (regardless of whether the challenge falls within the scope of N.C.G.S. § 55A-3-04), defendants may not.

by which to prosecute a derivative action under the North Carolina Nonprofit Corporation Act). "[T]he General Statutes . . . provide means for *association members* harmed by the improper commencement of this suit to seek redress from the courts if they wish to do so—either by seeking to stay or dismiss the action, or by pursuing a separate action against the appropriate parties for the unauthorized filing of the lawsuit." *Willowmere*, ___ N.C. App. at ___, 792 S.E.2d at 813 (Dietz, J., concurring) (emphasis added); *see* N.C.G.S. § 47F-2-103(a) (2017) (providing that "the declaration, bylaws, and articles of incorporation [of a planned community] form the basis for the legal authority for the planned community to act," and "are enforceable by their terms").

This holding also comports with the reasoning of other jurisdictions that have considered the issue. *See Lake Forest Master Cmty. Ass'n v. Orlando Lake Forest Joint Venture*, 10 So. 3d 1187, 1195-96 (Fla. Dist. Ct. App.) (concluding that a specific Florida statute requiring the approval of a majority of members of a homeowners' association entitled to vote before initiating any litigation involving amounts in controversy over $100,000 was for the protection of members *and could not be asserted as an affirmative defense to suit* by a non-member defendant), *review denied*, 23 So. 3d 1182 (Fla. 2009); *Little Can. Charity Bingo Hall Ass'n v. Movers Warehouse, Inc.*, 498 N.W.2d 22, 24 (Minn. Ct. App. 1993) ("[A] third party has no power to challenge corporate action based on [a violation of the entity's bylaws]."); *see also Stolow v. Greg Manning Auctions Inc.*, 258 F. Supp. 2d 236, 249 (S.D.N.Y.) ("A third-party, who is not a member of the association or corporation nor a party to the bylaws, lacks standing to bring suit against an organization for violation of its bylaws."), *aff'd*, 80 F. App'x 722 (2d Cir. 2003); *Port Liberte II Condo. Ass'n v. New Liberty Residential Urban Renewal Co.*, 435 N.J. Super. 51, 66, 86 A. 3d 730, 739 (App. Div. 2014) (holding that the plaintiff condominium homeowners' association had standing to sue the defendant developers and various contractors despite procedural defects in the approval of the litigation based, in part, on the logic that the defendants could not enforce the bylaws of the association, including one requiring members to authorize litigation, because they were not members of the association).

Accordingly, we hold that, despite plaintiffs' failure to strictly comply with their respective bylaws and internal governance procedures in their decision to initiate this suit, they nonetheless "possess a 'sufficient stake in an otherwise justiciable controversy' to confer jurisdiction on the trial court to adjudicate this legal dispute." *Willowmere*, ___ N.C. App. at ___, 792 S.E.2d at 813 (quoting *Peninsula*, 171 N.C. App. at 92,

614 S.E.2d at 353). For the reasons stated above, the decision of the Court of Appeals is reversed, and this case is remanded to that court for further remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

ELI GLOBAL, LLC, ET AL.	)	
	)	
v.	)	From Durham County
	)	
JAMES A. HEAVNER	)	

No. 12PA17

ORDER

Upon consideration the motion to dismiss the appeal is allowed. It is further ordered that the decision of the Court of Appeals is vacated.

By Order of the Court in Conference, this 1st day of March, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 2nd day of March, 2018.

Jackson, J., recused.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

IN RE SOUTHEASTERN EYE CENTER – PENDING MATTERS	)	
_____	)	From Guilford County
IN RE SOUTHEASTERN EYE CENTER – JUDGMENTS	)	

No. 168A17

ORDER

Appellant has failed to demonstrate grounds for appellate review under N.C.G.S. 7A-27(a)(3) (2017). The appeal in this matter is therefore dismissed.

By order of the Court in Conference, this the 1st day of March, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 2nd day of March, 2018.

s/Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

IN RE SE. EYE CTR.

[370 N.C. 565 (2018)]

IN RE SOUTHEASTERN EYE CENTER – PENDING MATTERS	)	
_____	)	From Wake County
IN RE SOUTHEASTERN EYE CENTER – JUDGMENTS	)	

No. 259A17

ORDER

Appellant has failed to demonstrate grounds for appellate review under N.C.G.S. 7A-27(a)(3) (2017). The appeal in this matter is therefore dismissed.

By order of the Court in Conference, this the 1st day of March, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 2nd day of March, 2018.

s/Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

IN RE SOUTHEASTERN EYE CENTER – PENDING MATTERS	)	
_____	)	From Wake County
IN RE SOUTHEASTERN EYE CENTER – JUDGMENTS	)	

No. 358A16

ORDER

Appellants have failed to demonstrate grounds for appellate review under N.C.G.S. 7A-27(a)(3) (2017). The appeals in this matter are therefore dismissed.

By order of the Court in Conference, this the 1st day of March, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of March, 2018.

s/Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

STATE v. AMERSON

[370 N.C. 567 (2018)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Lee County
	)	
PIERRE AMERSON	)	

No. 45P18

ORDER

Defendant's Emergency Petition for Writ of Certiorari is allowed; the orders entered by the trial court denying defendant's motion to continue on 15 December 2017 and denying defendant's reconsideration motion on 24 January 2018 are vacated; and this case is remanded to the Superior Court, Lee County, for the entry of an order allowing a reasonable continuance from the scheduled 19 March 2018 trial date and further proceedings not inconsistent with this order.

By order of the Court in conference, this the 27th day of February, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 27th day of February, 2018.

CHRISTIE S. CAMERON ROEDER
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
Assistant Clerk, Supreme Court of
North Carolina

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Mecklenburg County
	)	
CHARLES AUGUSTUS SHORE, JR.	)	

No. 339P17

ORDER

Upon consideration of the Petition for Discretionary Review filed by the Defendant on the 10th day of October, 2017, the Court allows the Defendant's Petition for Discretionary Review for the limited purpose of remanding this case to the Court of Appeals for consideration of the merits of the Defendant's argument concerning the issue of mistrial. Except as specifically allowed, the petition is denied.

By Order of the Court, this the 1st day of March, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 2nd day of March, 2018.

AMY L. FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
Assistant Clerk, Supreme Court
of N.C.

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

1 MARCH 2018

003P18	State v. Jason Carmona	1. Def's *Pro Se* Motion for Appropriate Relief 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Union County 3. Def's *Pro Se* Motion to Withdraw Plea of Guilty	1. Dismissed 2. Dismissed 3. Dismissed
004P18	State v. Travis Rashad Mitchell	1. Def's Motion for Temporary Stay (COA17-369) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/08/2018** 2. 3.
006P18	James Allen Minyard v. Erik A. Hooks, Secretary of Public Safety, Carlos Hernandez, Superintendent of Avery-Mitchell Correctional Institution	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **01/10/2018**
007P18	Julian Andres Valdivieso v. Donnie Harrison	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **01/08/2018**
008P18	State v. Bernardo Roberto Pena a/k/a Martin Rangel Pena	1. State's Motion for Temporary Stay (COA16-1075) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **01/09/2018** 2.
009P18	In the Matter of A.L.Z.	1. Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA17-507) 2. Respondent-Mother's Motion for Temporary Stay 3. Respondent-Mother's Petition for *Writ of Supersedeas*	1. 2. Allowed **02/27/2018** 3.
010P18	State v. Mark Burwell	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-89) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
011P18	State v. David Michael Costin	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COA17-521)	Denied

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

1 MARCH 2018

012PA17	Eli Global, LLC and Greg Lindberg v. James A. Heavner	1. Plts' Motion to Dismiss Appeal as Settled 2. Def's Motion to Vacate Ruling of COA as Part of Dismissing Appeal	1. Special Order 2. Special Order **Jackson, J., recused**
012P18	Harrison Hall, Employee v. U.S. Xpress, Inc., Employer and Liberty Mutual Insurance Company, Carrier	1. Defs' Motion for Temporary Stay 2. Defs' Petition for *Writ of Supersedeas*	1. Allowed **01/09/2018** 2.
013P18	Rene Jhovany Rodrigues Bustos v. Donnie Harrison	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **01/11/2018**
014P18	Pender County and The Town of Atkinson v. Donald Sullivan and Marion P. Sullivan	Defs' *Pro Se* Motion for Notice of Appeal (COA17-1160)	Dismissed *ex mero motu*
015P18	In the Matter of Estate of Ernestine E. Stephens	1. Petitioner's *Pro Se* Petition for *Writ of Mandamus* 2. Petitioner's *Pro Se* Motion for Default Judgment for Failure to Answer/ Respond	1. Dismissed 2. Dismissed
021P18	State v. Brad Cayton Norwood	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **01/19/2018** 2.
022P18	State v. Samuel Tyler Potter	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **01/19/2018** 2.
023A18	State v. Angela Marie Rankin	1. State's Motion for Temporary Stay (COA17-396) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **01/22/2018** 2. Allowed 3. ---

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

1 MARCH 2018

024A18	State v. Jerry Giovani Thompson	1. State's Motion for Temporary Stay (COA17-477) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **01/19/2018** 2. Allowed **02/08/2018** 3. ---
026PA17	David Wichnoski, O.D., P.A., et al. v. Piedmont Fire Protection Systems, LLC, et al.	Joint Motion to Continue Oral Argument	Allowed **01/08/2018**
026P18	State v. Stephen Kyprianides	1. Def's *Pro Se* Motion for Notice of Appeal (COA17-1261) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* Motion to Amend Notice of Appeal Based Upon a Constitutional Question 4. Def's *Pro Se* Motion to Amend PDR	1. Dismissed 2. Dismissed 3. Allowed 4. Allowed **Ervin, J., recused**
028P18	State v. Eugene Matthews	1. Def's *Pro Se* Motion for Notice of Concern for Constructive Ineffective Assistance of Counsel Claim (COAP17-619) 2. Def's *Pro Se* Motion to Demand Lower Appellate Court to Send Copy of Motion	1. Dismissed 2. Dismissed
029P18	Francoise Mededji v. Ferdinand Ikende Bongolo	1. Def's *Pro Se* Motion for Notice of Appeal (COA17-957, P17-918) 2. Def's *Pro Se* Motion for PDR	1. Dismissed *ex mero motu* 2. Denied
035P18	State v. Timothy Lee Creed	1. Def's *Pro Se* Motion for Leave to File Petition for *Writ of Erro[r]*, *Coram Nobis* in Moore County Superior Court 2. Def's *Pro Se* Motion for *Writ of Erro[r]*, *Coram Nobis* 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed 3. Allowed

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

1 MARCH 2018

045P18	State v. Pierre Amerson (DEATH)	1. Def's Emergency Petition for *Writ of Certiorari* in a Death Case 2. Def's Motion to Consider Supplemental *Ex Parte* Transcript and Argument Related to Emergency Petition for *Writ of Certiorari*	1. Special Order **02/27/2018** 2. Allowed **02/27/2018**
052A95-2	State v. Kjellyn Orlando Leary	1. Def's *Pro Se* Motion for Mandamus Mandate Mandatory Injunction Appeals 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP16-188)	1. Dismissed 2. Dismissed
052PA17-2	Cooper v. Berger, et al.	1. Plt's Motion to Expedite Mandate 2. Plt's Motion to Lift Stay	1. Denied **02/02/2018** 2. Denied **02/02/2018**
055A18	State v. James Howard Terrell, Jr.	1. State's Motion for Temporary Stay (COA17-268) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **02/23/2018** 2.
056P18	In the Matter of B.E.M., a Minor Juvenile	1. Petitioners' (David L. Coldren and Michelle) Motion for Temporary Stay 2. Petitioners' (David and Michelle Coldren) Petition for *Writ of Supersedeas*	1. Denied **02/26/2018** 2.

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

1 MARCH 2018

091P14-4	State v. Salim Abdu Gould	1. Def's *Pro Se* Motion for Stay	1. Denied **11/16/2017**
		2. Def's *Pro Se* Petition for *Writ of Supersedeas*	2. Dismissed
		3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	3. Denied
		4. Def's *Pro Se* Motion for Discretionary Review	4. Dismissed
		5. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	5. Dismissed as moot
		6. Def's *Pro Se* Motion for Notice of Appeal	6. Dismissed
		7. Def's *Pro Se* Motion for Dismissal	7. Dismissed
		8. Def's *Pro Se* Motion for Notice to Higher Court of Demand for Default Judgment	8. Dismissed
		9. Def's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	9. Dismissed
		10. Def's *Pro Se* Motion for Leave to File *In Forma Pauperis*	10. Dismissed as moot
109P17-3	In re Olander R. Bynum	Petitioner's *Pro Se* Motion for Reconsideration	Dismissed
110A17	Steven Harris v. North Carolina Department of Public Safety	Petitioner's Motion to Dismiss Appeal	Dismissed as moot **12/22/2017**
118P09-3	State v. Titus Germaine Williams	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, New Hanover County	Dismissed **Ervin, J., recused**
130A03-2	State v. Quintel Martinez Augustine (DEATH)	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Cumberland County	Allowed **Ervin, J., recused**
131P16-6	State v. Somchoi Noonsab	1. Def's *Pro Se* Motion to Dismiss	1. Dismissed
		2. Def's *Pro Se* Motion to Arrest Judgment	2. Dismissed
		3. Def's *Pro Se* Motion to Amend	3. Allowed
		4. Def's *Pro Se* Motion for Petition Upon the Due Process Clause	4. Dismissed *ex mero motu*
133P15-2	State v. William Earl Askew	Def's *Pro Se* Motion for PDR (COAP17-908)	Denied

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

1 MARCH 2018

146P13-2	Richmond County Board of Education v. Janet Cowell, North Carolina State Treasurer, in her Official Capacity Only, Linda Combs, North Carolina State Controller, in her Official Capacity Only, Lee Roberts, North Carolina State Budget Director, in his Official Capacity Only, Frank L. Perry, Secretary of the North Carolina Department of Public Safety, in his Official Capacity Only, Roy Cooper, Attorney General of the State of North Carolina, in his Official Capacity Only	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA17-112) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
163P16-2	State v. Arkeem Hakim Jordan	Def's *Pro Se* Motion for Fourth Amendment Violation	Dismissed **Ervin, J., recused**
168A17	In re Southeastern Eye Center	Court Order	Appeal Dismissed **03/01/2018**
182A15-3	In re Adam Jarmal Hodge	Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis* with the Register of Deeds	Dismissed **12/22/2017**
189P17-3	State v. Robert A.D. Waldrup	1. Def's *Pro Se* Motion for Evidentiary Hearing (COAP17-295) 2. Def's *Pro Se* Petition for Rehearing *En Banc*	1. Dismissed 2. Dismissed
193P15-2	State v. Allen Ray West	Def's *Pro Se* Motion for PDR (COAP17-620)	Denied
200P07-7	Kenneth Earl Robinson v. Erik A. Hooks, N.C.D.P.S. Secretary	1. Petitioner's *Pro Se* Petition for *Writ of Mandamus* 2. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* 3. Petitioner's *Pro Se* Motion to Appoint Counsel	1. Dismissed **12/13/2017** 2. Denied **12/13/2017** 3. Dismissed as moot **12/13/2017**

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

1 MARCH 2018

200P07-8	Kenneth E. Robinson v. Erik A. Hooks, N.C.D.P.S. Secretary	Petitioner's *Pro Se* Motion for Notice of Appeal	Dismissed
202A17	Locklear v. Cummings, et al.	Motion to Admit H. Asby Fulmer, III *Pro Hac Vice*	Allowed **12/12/2017**
203P17	Shaun Weaver, Employee v. Daniel Glenn Dedmon d/b/a Dan the Fence Man d/b/a Bayside Construction, Employer, Noninsured, and Daniel Glenn Dedmon, Individually, and Seegars Fence Company, Inc. of Elizabeth City, Employer, and Builders Mutual Insurance Company, Carrier	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA16-55) 2. Defs' (Seegars Fence Company, Inc. of Elizabeth City and Builders Mutual Insurance Company) PDR Under N.C.G.S. § 7A-31 3. Plt's and Defs' (Seegars Fence Company, Inc. of Elizabeth City and Builders Mutual Insurance Company) Joint Motion to Hold PDRs in Abeyance 4. Plaintiff and Defendants' Consent Motion for Leave to Withdraw PDRs	1. — 2. — 3. Allowed **11/01/2017** 4. Allowed **02/27/2018**
230P17-2	State v. Anthony Lee McNair	1. Def's *Pro Se* Motion for Final Defense 2. Def's *Pro Se* Motion to Submit Memorandum in Support of Motion for Summary Judgment	1. Dismissed 2. Dismissed
251A17	State v. Omar Jalam Cook	Def's Provisional Petition for *Writ of Certiorari* to Review Decision of COA (COA16-883)	Dismissed as moot
252PA14-3	State v. Thomas Craig Campbell	1. State's Motion for Temporary Stay (COA13-1404-3) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **02/16/2018** 2.
254P09-3	David Reed Wilson v. Mark Carver, Superintendent of Caswell Correctional Center #4415	Petitioner's *Pro Se* Motion to Reconsider	Dismissed
259A17	In re Southeastern Eye Center	Court Order	Appeal Dismissed **03/01/2018**

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

1 MARCH 2018

272P17	State v. Clarence Joseph Trent	1. Def's Motion for Temporary Stay (COA16-839) 2. Def's Petition for W*rit of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/11/2017** Dissolved **03/01/2018** 2. Denied 3. Denied **Morgan, J., recused**
278P17	State v. John Andrew Maddux	1. State's Motion for Temporary Stay (COA16-1248) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/18/2017** 2. Allowed 3. Allowed
285P17	State of North Carolina *ex rel.* North Carolina Department of Environmental Quality, Plaintiff, and Roanoke River Basin Association, Sierra Club, Waterkeeper Alliance, Cape Fear River Watch, Inc., Sound Rivers, Inc., and Winyah Rivers Foundation, Plaintiff-Intervenors v. Duke Energy Progress, LLC, Defendant ——————— State of North Carolina *ex rel.* North Carolina Department of Environmental Quality, Plaintiff and Catawba Riverkeeper Foundation, Inc., Waterkeeper Alliance, Mountaintrue, Appalachian Voices, Yadkin Riverkeeper, Inc., Dan River Basin Association, Roanoke River Basin Association, and Southern Alliance for Clean Energy, Plaintiff-Intervenors v. Duke Energy Carolinas, LLC, Defendant	1. Defs' PDR Prior to Determination of COA (COA17-893) 2. Defs' Motion to Supplement Record	1. Denied 2. Dismissed as moot

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

1 MARCH 2018

289P17	Charlene Hogue v. Brown & Patten, P.A., Donald N. Patten	Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-103)	Denied
296P15-2	Ernest James Nichols v. Richard Terry, Superintendent – Craggy Correctional Center; Frank L. Perry, Secretary of the North Carolina Department of Public Safety	Petitioner's *Pro Se* Motion for Reconsideration	Denied **12/19/2017**
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. Appellant's (Jackie B. Clayton) PDR Under N.C.G.S. § 7A-31 (COA16-960) 2. Appellant's (Jackie B. Clayton) Petition for *Writ of Certiorari* to Review Decision of COA 3. Motion (Appellant's) for Temporary Stay 4. Appellant's (Jackie B. Clayton) Petition for *Writ of Supersedeas*	1. Denied 2. Denied 3. Allowed **09/18/2017** Dissolved **03/01/2018** 4. Denied
301P17-2	Valerie Arroyo v. Daniel J. Zamora, Zamora Law Firm, PLLC	Plt's *Pro Se* Motion for PDR (COAP17-510)	Denied **Ervin, J., recused**
306P04-5	State v. Dwight Parker, Sr.	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Pitt County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed **Ervin, J., recused**
317P17	Julia Nichols v. University of North Carolina at Chapel Hill	1. Petitioner's Notice of Appeal Based Upon a Constitutional Question (COA16-1117) 2. Petitioner's PDR Under N.C.G.S. § 7A-31 3. Respondent's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed

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

1 MARCH 2018

320P17-2	In the Matter of the Imprisonment of Ryan Lamar Parsons	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **12/12/2017**
322P15-5	Raymond Alan Griffin v. Deborah Shandles, Assistant District Attorney of Wake County and Paul C. Ridgeway, Senior Resident Superior Court Judge v. John and Jane Doe _____ Raymond Alan Griffin v. Deborah Shandles, Assistant District Attorney of Wake County and Donald W. Stephens, Senior Resident Superior Court Judge v. John and Jane Doe	1. Petitioner's *Pro Se* Motion for Notice of Appeal (COAP17-860) 2. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA 3. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	1. Denied **12/29/2017** 2. Denied **12/29/2017** 3. Denied **12/29/2017**
322P15-6	Griffin v. Shandles, et al.	1. Petitioner's *Pro Se* Motion for Notice of Appeal 2. Petitioner's *Pro Se* Petition for *Writ of Mandamus*	1. Denied **01/09/2018** 2. Denied **01/09/2018**
328P06-3	State v. Robert Walter Huffman	Def's *Pro Se* Motion to Reconsider	Dismissed
335A17	Patricia Pine, Employee v. Walmart Associates, Inc. #1552, Employer and National Union Fire Insurance Co., Carrier, Claims Management, Inc., Third-Party Administrator	1. Defs' Notice of Appeal Based Upon a Dissent (COA16-203) 2. Plt's Notice of Appeal Based Upon a Constitutional Question 3. Plt's PDR Under N.C.G.S. § 7A-31	1. --- 2. Dismissed *ex mero motu* 3. Allowed
339P17	State v. Charles Augustus Shore, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1243)	Special Order
340P17	Nash Hospitals, Inc. v. State Farm Mutual Automobile Insurance Co.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-532) 2. Plt's Motion to Admit Robert L. Allgood *Pro Hac Vice*	1. Denied 2. Allowed

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

1 MARCH 2018

341P12-5	State v. Donald Durrant Farrow	1. Def's *Pro Se* Motion for PDR (COAP16-888) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	1. Dismissed 2. Dismissed **Ervin, J., recused**
343P17	Ronnie Edward Moore v. Priscilla Ann McKenzie, Individually, and Priscilla Ann McKenzie, as Executor of the Estate of Bobby Jenkins Boyd	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-53)	Denied
345P17-3	Eddricco Li'Shaun Brown v. State of North Carolina	1. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Petitioner's *Pro Se* Motion for Avernment of Jurisdiction	1. Denied **12/19/2017** 2. Dismissed **12/19/2017**
351P04-6	State v. Robert Lee Thacker	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP17-907)	Dismissed
353P17	State v. Jeremy Lee Stephens	Def's Petition for *Writ of Certiorari* to Review Order of COA (COAP16-714)	Denied
354P17	State v. Quentin Odell Mathis	Def's PDR Under N.C.G.S. § 7A-31 (COA17-126)	Denied
356P17	State v. Brandon Lee	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
358A16	In re Southeastern Eye Center	1. Plts' Motion to Dismiss Appeals 2. Plts' Motion to Supplement Motion to Dismiss Appeals	1. Dismissed as moot 2. Dismissed as moot
358A16	In re Southeastern Eye Center	Court Order	Appeal Dismissed **03/01/2018**
358P17	State v. Marvin Burton Harris, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1115)	Denied
363PA17	In the Matter of J.M. & J.M.	Petitioner and GAL's Motion to Dismiss Appeal	Allowed **01/09/2018**

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

1 MARCH 2018

365A16-2	State v. David Michael Reed	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **02/02/2018** 2
372P17	In the Matter of Kenneth Kelly Duvall v. State of N.C., et al.	1. Petitioner's *Pro Se* Motion for Default Judgment (COAP17-711) 2. Petitioner's *Pro Se* Motion for Injunctive Relief and *De Novo* Review and Answers to Constitutional Questions 3. Petitioner's *Pro Se* Motion to Appoint Counsel 4. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis* 5. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	1. Denied **11/07/2017** 2. Denied **01/24/2018** 3. Dismissed as moot **01/24/2018** 4. Allowed **01/24/2018** 5. Denied **01/24/2018**
375P17	North Carolina Farm Bureau Mutual Insurance Company, Inc. v. Beverly Lee Phillips, Victoria Phillips, and John Doe 236	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA16-620) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
378P17	State v. Deon Quintin McDonald	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-246) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
379A17	State v. Brandon Malone	1. State's Motion for Temporary Stay (COA16-1290) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent 4. State's PDR as to Additional Issues	1. Allowed **11/09/2017** 2. Allowed 3. — 4. Allowed
381P17	Francisco K. Avoki and Veronique K. Pongo v. Eagle Adjusting Serv. Inc., Josh Taylor, & Does XX-I	1. Plts' Motion for Notice of Appeal (COA17-600) 2. Defs' (Eagle Adjusting Services, Inc. and Josh Taylor) Motion to Dismiss Appeal	1. Dismissed 2. Dismissed as moot

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

1 MARCH 2018

382P10-8	State v. John Lewis Wray, Jr.	1. Def's *Pro Se* Motion for Appropriate Relief 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed **Beasley, J., recused**
382P17	State v. Lonnie Bernard Davis	1. Def's *Pro Se* Motion for Notice of Appeal 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's Motion for Notice of Appeal of COA Order Dated 20 November 2017	1. Dismissed 2. Allowed 3. Dismissed
384P17	James Gregory Armistead v. Timothy Ware/ Jennie Bowen	Petitioner's *Pro Se* Motion for PDR (COAP17-726)	Dismissed **Ervin, J., recused**
389P17	State v. James Issac Faulk	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA17-429) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
390P17	State v. Maurice Alan Craig	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP17-754)	Dismissed **Ervin, J., recused**
391P17	Corey Lavon Spell v. James Floyd Ammons, Jr., Senior Resident Superior Court Judge	Petitioner's *Pro Se* Motion for Appeal of Clerk's Order Dismissing Petition for *Writ of Certiorari* (COAP17-797)	Dismissed
392P17	In the Matter of E.J.V.	1. Petitioner-Grandmother's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA17-365) 2. Petitioner-Grandmother's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Petitioner-Grandmother's *Pro Se* Motion to Amend Notice of Appeal and PDR	1. Dismissed *ex mero motu* 2. Denied 3. Allowed
395A17	Walker, et al. v. Driven Holdings, LLC	Plts' Motion to Amend Record on Appeal	Allowed **01/23/2018**

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

1 MARCH 2018

395A17	Walker, et al. v. Driven Holdings, LLC	1. Motion to Admit Kimberly A. Haviv *Pro Hac Vice* 2. Motion to Admit Glenn M. Kurtz *Pro Hac Vice*	1. Allowed 2. Allowed
399P17	State v. Jason Eric Taylor	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1291)	Denied
404P17-2	Nancy Rogers, et al. v. Claudia Metcalf, et al.	Defs' Motion for Petition for Rehearing	Denied **12/21/2017**
406P17	State v. Daniel Luna	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel 4. Def's *Pro Se* Motion to Withdraw	1. --- 2. Allowed 3. Dismissed as moot 4. Allowed
407P17	Sheldon Straite v. North Carolina Department of Public Safety	Plt's *Pro Se* Motion for Notice of Appeal	Dismissed
408A17	State v. Antonio Lamar Stimpson	State's Motion to Substitute Counsel	Allowed **12/20/2017**
409P17	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; Timothy K. Moore, in his Official Capacity as Speaker of the North Carolina House of Representatives	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA17-367) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Retained 2. Allowed 3. Denied

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

1 MARCH 2018

410P17	Estate of Taylor A. Peyton, by and through Administrator John Peyton, and John Peyton, Individually v. North Carolina Department of Transportation ——— John Peyton, as Guardian Ad Litem for John Peyton, II, and John Peyton, Individually v. North Carolina Department of Transportation	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-257) Plt's PDR Under N.C.G.S. § 7A-31 (COA17-257)	1. Denied **Jackson, J., recused** 2. Denied **Jackson, J., recused**
411A94-6	State v. Marcus Reymond Robinson (DEATH)	1. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Cumberland County 2. North Carolina Advocates for Justice's Motion for Leave to File *Amicus* Brief 3. Charles Becton, Charles Day, Valerie Johnson, Irving L. Joyner, Floyd B. McKissick, Jr., Cressie H. Thigpen, Jr., and Fred J. Williams' Motion for Leave to File *Amicus* Brief 4. Retired Members of the North Carolina Judiciary's Motion for Leave to File *Amicus* Brief	1. Allowed 2. Allowed 3. Allowed 4. Allowed
412P13-4	State v. Henry Clifford Byrd, Sr.	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-288)	Denied **Ervin, J., recused**
412P17	State v. Raul Pachicano Diaz	1. State's Motion for Temporary Stay (COA17-444) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **12/08/2017** 2.
414A17	Ron David Metcalf v. Susan Hyatt Call	1. Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA17-418) 2. Def's Motion to Dismiss Appeal	1. — 2. Allowed

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

1 MARCH 2018

415P17	Michael Scott Davis v. Pia Law	1. Plt's *Pro Se* Motion to Lift Temporary Stay (COAP17-848) 2. Plt's *Pro Se* Petition for *Writ of Supersedeas* 3. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA 4. Plt's *Pro Se* Motion for Suspension of the Rules Under Rule 2	1. Denied **12/12/2017** 2. Denied **12/12/2017** 3. Denied **12/12/2017** 4. Denied **12/12/2017**
423P17	In the Matter of A.C.-H.	Petitioner and Guardian Ad Litem's PDR Under N.C.G.S. § 7A-31 (COA17-466)	Denied
424P17	Marshall B. Pitts, Jr. v. John Wayne Tart; Investigative Solutions, ISNC, LLC; Jimmy Lamar Henley, Jr.; and Chrystal Nicole Justesen	Plt's PDR Under N.C.G.S. § 7A-31 (COA16-830)	Denied
426P17	Annah Awartani; Gilma Varina Bonilla; Crystal Kim Parker, Individually and for Others Similarly Situated v. The Moses H. Cone Memorial Hospital Operating Corporation	1. Plts' PDR Prior to a Determination by COA (COA17-1300) 2. Plts' Motion in the Alternative Requesting Court Exercise Its Supervisory Authority 3. Def's Conditional PDR Prior to a Determination by COA	1. Denied 2. Denied 3. Dismissed as moot
427P17	State v. Jermaine Antwan Tart	1. State's Motion for Temporary Stay (COA17-561) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **12/15/2017** 2.

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

1 MARCH 2018

428P17	Martin E. Rock v. Executive Office Park of Durham Association, Inc.	1. Respondent's *Pro Se* Motion for Temporary Stay 2. Respondent's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Durham County 3. Petitioner's Petition for Writ of Prohibition 4. Petitioner's Motion to Dismiss Petition for *Writ of Certiorari* 5. Petitioner's Motion for Sanctions 6. Respondent's *Pro Se* Motion for Leave to File Reply 7. Respondent's *Pro Se* Motion to Reconsider 8. Respondent's *Pro Se* Motion for Temporary Stay 9. Respondent's *Pro Se* Petition for *Writ of Supersedeas* 10. Respondent's *Pro Se* Motion to Amend Supplemental Reply Response and Motions	1. Denied **12/15/2017** 2. Dismissed **12/15/2017** 3. Dismissed as moot 4. Allowed **12/15/2017** 5. Denied 6. Dismissed as moot 7. Denied **12/21/2017** 8. Denied **12/22/2017** 9. Denied 10. Allowed
430P17	In re Rodney Koon	Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Buncombe County	Dismissed
431P17	In re Maud Edwin Elliot Ingram	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied **01/08/2018**
431P17-2	In re Maud Edwin Elliot Ingram	1. Petitioner's *Pro Se* Motion for Objection to Order 2. Petitioner's *Pro Se* Motion for Full Evidentiary Hearing 3. Petitioner's *Pro Se* Motion to Make Written Findings and Facts Concluding Law 4. Petitioner's *Pro Se* Motion for Trial by Jury	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed

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

1 MARCH 2018

433A17	Eugene K. Ehmann, N. William Shiffli, Jr., and Thad A. Throneburg v. Medflow, Inc.; Greg E. Lindberg; Eli Global, LLC; Eli Research, LLC; Eli Equity, LLC; SNA Capital, LLC; Southland National Holdings, LLC; Southland National Insurance Corporation; DJRTC, LLC; and Medflow Holdings, LLC	Defs' (Medflow, Inc. and Medflow Holdings, LLC) Motion for Extension of Time to Serve Objections and Amendments to the Proposed Record on Appeal	Allowed **12/22/2017** **Jackson, J., recused**
433A17	Eugene K. Ehmann, N. William Shiffli, Jr. and Thad A. Throneburg v. Medflow, Inc.; Greg E. Lindberg; Eli Global, LLC; Eli Research, LLC; Eli Equity, LLC; SNA Capital, LLC; Southland National Holdings, LLC; Southland National Insurance Corporation; DJRTC, LLC; and Medflow Holdings, LLC	1. Plts' Petition for *Writ of Certiorari* to Review Order of Business Court, Mecklenburg County 2. Defs' Motion for Extension of Time to Respond to Petition for *Writ of Certiorari*	1. 2. Allowed **02/12/2018** **Jackson, J., recused**
434P17	State v. Michael Leon Green, Jr.	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-375)	Denied
436A17	State v. Gregory Anthony Gardner	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-511) 2. State's Motion to Dismiss Appeal	1. — 2. Allowed
438P17	Anthony M. Kyles v. The Goodyear Tire & Rubber Co., Employer, Liberty Mutual Ins. Co.	1. Plt's Motion for Temporary Stay 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's PDR	1. Allowed **12/29/2017** 2. 3.
440P17	State v. Carlouse Latour Allbrooks	Def's PDR Under N.C.G.S. § 7A-31 (COA16-741)	Denied

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

1 MARCH 2018

441A98-4	State v. Tilmon Charles Golphin (DEATH)	1. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Cumberland County 2. Def's Motion to Address Double Jeopardy as a Threshold Issue Prior to Consideration of the Other Issues Raised in the Petition for *Writ of Certiorari* 3. North Carolina Advocates for Justice's Motion for Leave to File *Amicus* Brief 4. Def's Motion to Amend Petition for *Writ of Certiorari*	1. Allowed 2. 3. Allowed 4. **Beasley, J., recused**
444P14	Estate of Timothy Alan Hurst, by and through Christian P. Cherry as Collector; Jeffery Wayne Henley a/k/a Jeffrey Wayne Henley; and Beverly Henley v. Moorehead I, LLC; Cramer Mountain Development Company, LLC a/k/a Cramer Mountain Development LLC; Park West Premier Properties, LLC; Park West Investments, Inc.; Park West-Stone, LLC; Park West Development Company, Inc.; Cobblestone Builders, LLC; Frank DeSimone a/k/a Frank Desimone; Bruce B. Blackmon, Jr., a/k/a Bruce Blackmon a/k/a Bruce B. Blackman; Gregory A. Mascaro a/k/a Greg Mascaro	Plts' Petition for *Writ of Mandamus*	Dismissed

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

1 MARCH 2018

449P11-17	In re Charles Everette Hinton	1. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Petitioner's *Pro Se* Motion for Full Evidentiary Hearing	1. Denied **01/12/2018** 2. Denied **01/12/2018** **Ervin, J., recused**
451A16	Karen W. Flynn, Individually and in Her Representative Capacity as Trustee for: 2002 Irrevocable Trust for Family of Martha P. Wilson; and Her Capacity as Account Custodian for: Brynley Elizabeth Wylde, Jake William Flynn, Jeffrey E. Flynn III, Joshua R. Flynn, Keegan B. Wall, Makenna Kathleen Wylde, and Riley Page Wall v. David Wayne Schamens; Piliana Moses Schamens, Individually and in Her Capacity as a Member of Invictus Asset Management, LLC; Invictus Asset Management, LLC, Individually and in Its Capacity as the General Partner of Invictus Capital Growth & Income Fund, LLP, and Invictus Income Fund, LLP; Invictus Funds, LLC; and Tradedesk Financial Group, Inc. d/b/a Tradestream Analytics, Ltd.	1. Defs' (David Wayne Schamens & Piliana Moses Schamens) *Pro Se* Notice Of Appeal Based Upon a Constitutional Question (COA16-410) 2. Plt's Motion to Dismiss Appeal 3. Plt's Motion for Sanctions	1. — 2. Allowed 3. Allowed
480P12-2	In re Charles Hollenback	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Dismissed

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

1 MARCH 2018

548A00-2	State v. Christina Shea Walters (DEATH)	1. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Cumberland County	1. Allowed
		2. North Carolina Advocates for Justice's Motion for Leave to File Amicus Brief	2. Allowed
		3. Charles Becton, Charles Daye, Valerie Johnson, Irving L. Joyner, Floyd B. McKissick, Jr., Cressie H. Thigpen, Jr., and Fred J. Williams' Motion for Leave to File Amicus Brief	3. Allowed
		4. Retired Members of the North Carolina Judiciary's Motion for Leave to File Amicus Brief	4. Allowed
580P05-15	In re David L. Smith	1. Petitioner's *Pro Se* Motion to Amend *Pro Se* Petition	1. Denied **12/13/2017**
		2. Petitioner's *Pro Se* Petition for *Writ of Mandamus*	2. Denied **12/13/2017**
		3. Petitioner's *Pro Se* Petition for *Writ of Mandamus*	3. Denied **12/13/2017**
		4. Petitioner's *Pro Se* Petition for *Writ of Mandamus*	4. Denied **12/13/2017**

ORDER AMENDING RULES 28, 29, AND 33.1 OF THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Pursuant to the authority vested in this Court by Article IV of the Constitution of North Carolina, Rules 28, 29, and 33.1 of the North Carolina Rules of Appellate Procedure are amended as follows:

Rule 28. Briefs—Function and Content

(a) **Function.** The function of all briefs required or permitted by these rules is to define clearly the issues presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned. Similarly, issues properly presented for review in the Court of Appeals, but not then stated in the notice of appeal or the petition accepted by the Supreme Court for review and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court, are deemed abandoned. Parties shall protect the identity of juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e) pursuant to said rules.

(b) **Content of Appellant's Brief.** An appellant's brief shall contain, under appropriate headings and in the form prescribed by Rule 26(g) and the appendixes to these rules, in the following order:

(1) A cover page, followed by a subject index and table of authorities as required by Rule 26(g).

(2) A statement of the issues presented for review. The proposed issues on appeal listed in the record on appeal shall not limit the scope of the issues that an appellant may argue in its brief.

(3) A concise statement of the procedural history of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court.

(4) A statement of the grounds for appellate review. Such statement shall include citation of the statute or statutes permitting appellate review. When an appeal is based on Rule 54(b) of the Rules of Civil Procedure, the statement shall show that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. When an appeal is interlocutory,

the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

(5) A full and complete statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all issues presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be.

(6) An argument, to contain the contentions of the appellant with respect to each issue presented. Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.

The argument shall contain a concise statement of the applicable standard(s) of review for each issue, which shall appear either at the beginning of the discussion of each issue or under a separate heading placed before the beginning of the discussion of all the issues.

The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the issue may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal, the transcript of proceedings, or exhibits.

(7) A short conclusion stating the precise relief sought.

(8) Identification of counsel by signature, typed name, post office address, telephone number, State Bar number, and e-mail address.

(9) The proof of service required by Rule 26(d).

(10) Any appendix required or allowed by this Rule 28.

(c) **Content of Appellee's Brief; Presentation of Additional Issues.** An appellee's brief shall contain a subject index and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel, and proof of service in the form provided in Rule 28(b) for an appellant's brief, and any appendix required or allowed by this Rule 28. It does not need to contain a statement of the issues presented, procedural history of the case, grounds for appellate review,

the facts, or the standard(s) of review, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present issues in addition to those stated by the appellant.

Without taking an appeal, an appellee may present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Without having taken appeal or listing proposed issues as permitted by Rule 10(c), an appellee may also argue on appeal whether a new trial should be granted to the appellee rather than a judgment notwithstanding the verdict awarded to the appellant when the latter relief is sought on appeal by the appellant. If the appellee presents issues in addition to those stated by the appellant, the appellee's brief must contain a full, nonargumentative summary of all material facts necessary to understand the new issues supported by references to pages in the record on appeal, the transcript of proceedings, or the appendixes, as appropriate, as well as a statement of the applicable standard(s) of review for those additional issues.

An appellee may supplement the record with any materials pertinent to the issues presented on appeal, as provided in Rule 9(b)(5).

(d) **Appendixes to Briefs.** Whenever the transcript of proceedings is filed pursuant to Rule 9(c)(2), the parties must file verbatim portions of the transcript as appendixes to their briefs, if required by this Rule 28(d). Parties must modify verbatim portions of the transcript filed pursuant to this rule in a manner consistent with Rules 3(b)(1), 3.1(b), or 4(e).

(1) **When Appendixes to Appellant's Brief Are Required.** Except as provided in Rule 28(d)(2), the appellant must reproduce as appendixes to its brief:

a. those portions of the transcript of proceedings which must be reproduced verbatim in order to understand any issue presented in the brief;

b. those portions of the transcript showing the pertinent questions and answers when an issue presented in the brief involves the admission or exclusion of evidence;

c. relevant portions of statutes, rules, or regulations, the study of which is required to determine issues presented in the brief;

d. relevant items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal, the study of which are required to determine issues presented in the brief.

(2) **When Appendixes to Appellant's Brief Are Not Required.** Notwithstanding the requirements of Rule 28(d)(1), the appellant is not required to reproduce an appendix to its brief with respect to an issue presented:

a. whenever the portion of the transcript necessary to understand an issue presented in the brief is reproduced verbatim in the body of the brief;

b. to show the absence or insufficiency of evidence unless there are discrete portions of the transcript where the subject matter of the alleged insufficiency of the evidence is located; or

c. to show the general nature of the evidence necessary to understand an issue presented in the brief if such evidence has been fully summarized as required by Rule 28(b)(4) and (5).

(3) **When Appendixes to Appellee's Brief Are Required.** An appellee must reproduce appendixes to its brief in the following circumstances:

a. Whenever the appellee believes that appellant's appendixes do not include portions of the transcript or items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal that are required by Rule 28(d)(1), the appellee shall reproduce those portions of the transcript or supplement it believes to be necessary to understand the issue.

b. Whenever the appellee presents a new or additional issue in its brief as permitted by Rule 28(c), the appellee shall reproduce portions of the transcript or relevant items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal as if it were the appellant with respect to each such new or additional issue.

(4) **Format of Appendixes.** The appendixes to the briefs of any party shall be in the format prescribed by Rule 26(g) and shall consist of clear photocopies of transcript pages that have been deemed necessary for inclusion in the

appendix under this Rule 28(d). The pages of the appendix shall be consecutively numbered, and an index to the appendix shall be placed at its beginning.

(e) **References in Briefs to the Record.** References in the briefs to parts of the printed record on appeal and to parts of the verbatim transcript or parts of documentary exhibits shall be to the pages where those portions appear.

(f) **Joinder of Multiple Parties in Briefs.** Any number of appellants or appellees in a single cause or in causes consolidated for appeal may join in a single brief even though they are not formally joined on the appeal. Any party to any appeal may adopt by reference portions of the briefs of others.

(g) **Additional Authorities.** Additional authorities discovered by a party after filing its brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties. The memorandum may not be used as a reply brief or for additional argument, but shall simply state the issue to which the additional authority applies and provide a full citation of the authority. Authorities not cited in the briefs or in such a memorandum may not be cited and discussed in oral argument. Before the Court of Appeals, the party shall file an original and three copies of the memorandum; in the Supreme Court, the party shall file an original and fourteen copies of the memorandum.

(h) **Reply Briefs.** Within fourteen days after an appellee's brief has been served on an appellant, the appellant may file and serve a reply brief, subject to the length limitations set forth in Rule 28(j). Any reply brief which an appellant elects to file shall be limited to a concise rebuttal of arguments set out in the appellee's brief and shall not reiterate arguments set forth in the appellant's principal brief. Upon motion of the appellant, the Court may extend the length limitations on such a reply brief to permit the appellant to address new or additional issues presented for the first time in the appellee's brief. Otherwise, motions to extend reply brief length limitations or to extend the time to file a reply brief are disfavored.

~~(i) **Amicus Curiae Briefs.** A brief of an amicus curiae may be filed only by leave of the appellate court wherein the appeal is docketed or in response to a request made by that court on its own initiative.~~

~~A person desiring to file an amicus curiae brief shall present to the court a motion for leave to file, served upon all parties. The motion shall state concisely the nature of the applicant's interest, the reasons why an amicus curiae brief is believed desirable, the issues of law to~~

~~be addressed in the amicus curiae brief, and the applicant's position on those issues. The proposed amicus curiae brief may be conditionally filed with the motion for leave. Unless otherwise ordered by the court, the application for leave will be determined solely upon the motion and without responses thereto or oral argument.~~

~~The clerk of the appellate court will forthwith notify the applicant and all parties of the court's action upon the application. Unless other time limits are set out in the order of the court permitting the brief, the amicus curiae shall file the brief within the time allowed for the filing of the brief of the party supported or, if in support of neither party, within the time allowed for filing appellant's brief. Motions for leave to file an amicus curiae brief submitted to the court after the time within which the amicus curiae brief normally would be due are disfavored in the absence of good cause. Reply briefs of the parties to an amicus curiae brief will be limited to points or authorities presented in the amicus curiae brief which are not presented in the main briefs of the parties. No reply brief of an amicus curiae will be received.~~

~~A motion of an amicus curiae to participate in oral argument will be allowed only for extraordinary reasons.~~

(i) **Amicus Curiae Briefs.** An amicus curiae may file a brief with the permission of the appellate court in which the appeal is docketed.

(1) **Motion.** To obtain the court's permission to file a brief, amicus curiae shall file a motion with the court that states concisely the nature of amicus curiae's interest, the reasons why the brief is desirable, the issues of law to be addressed in the brief, and the position of amicus curiae on those issues.

(2) **Brief.** The motion must be accompanied by amicus curiae's brief. The amicus curiae brief shall contain, in a footnote on the first page, a statement that identifies any person or entity—other than amicus curiae, its members, or its counsel—who, directly or indirectly, either wrote the brief or contributed money for its preparation.

(3) **Time for Filing.** If the amicus curiae brief is in support of a party to the appeal, then amicus curiae shall file its motion and brief within the time allowed for filing that party's principal brief. If amicus curiae's brief does not support either party, then amicus curiae shall file its motion and proposed brief within the time allowed for filing appellee's principal brief.

(4) **Service on Parties**. When amicus curiae files its motion and brief, it must serve a copy of its motion and brief on all parties to the appeal.

(5) **Action by Court.** Unless the court orders otherwise, it will decide amicus curiae's motion without responses or argument. An amicus motion filed by an individual on his or her own behalf will be disfavored.

(6) **Reply Briefs.** A party to the appeal may file and serve a reply brief that responds to an amicus curiae brief no later than thirty days after having been served with the amicus curiae brief. A party's reply brief to an amicus curiae brief shall be limited to a concise rebuttal of arguments set out in the amicus curiae brief and shall not reiterate or rebut arguments set forth in the party's principal brief. The court will not accept a reply brief from an amicus curiae.

(7) **Oral Argument.** The court will allow a motion of an amicus curiae requesting permission to participate in oral argument only for extraordinary reasons.

(j) **Word-Count Limitations Applicable to Briefs Filed in the Court of Appeals.** Each brief filed in the Court of Appeals, whether filed by an appellant, appellee, or amicus curiae, shall be set in font as set forth in Rule 26(g)(1) and described in Appendix B to these rules. A principal brief may contain no more than 8,750 words. A reply brief may contain no more than 3,750 words. An amicus curiae brief may contain no more than 3,750 words.

(1) **Portions of Brief Included in Word Count.** Footnotes and citations in the body of the brief must be included in the word count. Covers, captions, indexes, tables of authorities, certificates of service, certificates of compliance with this rule, counsel's signature block, and appendixes do not count against these word-count limits.

(2) **Certificate of Compliance.** Parties shall submit with the brief, immediately before the certificate of service, a certification, signed by counsel of record, or in the case of parties filing briefs pro se, by the party, that the brief contains no more than the number of words allowed by this rule. For purposes of this certification, counsel and parties may rely on word counts reported by word-processing software, as long as footnotes and citations are included in those word counts.

* * *

Rule 29. Sessions of Courts; Calendar of Hearings

(a) **Sessions of Court.**

(1) **Supreme Court.** The Supreme Court shall be in continuous session for the transaction of business. Appeals will be heard in accordance with a schedule promulgated by the Chief Justice.~~Unless otherwise scheduled by the Court, hearings in appeals will be held during the months of February through May and September through December. Additional settings may be authorized by the Chief Justice.~~

(2) **Court of Appeals.** Appeals will be heard in accordance with a schedule promulgated by the Chief Judge. Panels of the Court will sit as scheduled by the Chief Judge. For the transaction of other business, the Court of Appeals shall be in continuous session.

(b) **Calendaring of Cases for Hearing.** Each appellate court will calendar the hearing of all appeals docketed in the court. In general, appeals will be calendared for hearing in the order in which they are docketed, but the court may vary the order for any cause deemed appropriate. On motion of any party, with notice to all other parties, the court may determine without hearing to give an appeal peremptory setting or otherwise to vary the normal calendar order. Except as advanced for peremptory setting on motion of a party or the court's own initiative, no appeal will be calendared for hearing at a time less than thirty days after the filing of the appellant's brief. The clerk of the appellate court will give reasonable notice to all counsel of record of the setting of an appeal for hearing by either e-mailing or mailing a copy of the calendar.

* * *

Rule 33.1. Secure-Leave Periods for Attorneys

~~(a) **Purpose; Authorization**. In order to secure for the parties to actions and proceedings pending in the appellate division, and to the public at large, the heightened level of professionalism that an attorney is able to provide when the attorney enjoys periods of time that are free from the urgent demands of professional responsibility and to enhance the overall quality of the attorney's personal and family life, any attorney may from time to time designate and enjoy one or more secure-leave periods each year as provided in this rule.~~

~~(b) **Length; Number.** A secure-leave period shall consist of one or more complete calendar weeks. During any calendar year, an attorney's~~

~~secure-leave periods pursuant to this rule and to Rule 26 of the General Rules of Practice for the Superior and District Courts shall not exceed, in the aggregate, three calendar weeks.~~

~~(c) **Designation; Effect.** To designate a secure-leave period, an attorney shall file a written designation containing the information required by subsection (d), with the official specified in subsection (e), and within the time provided in subsection (f). Upon such filing, the secure-leave period so designated shall be deemed allowed without further action of the court, and the attorney shall not be required to appear at any argument or other in-court proceeding in the appellate division during that secure-leave period.~~

~~(d) **Content of Designation.** The designation shall contain the following information: (1) the attorney's name, address, telephone number, State Bar number, and e-mail address; (2) the date of the Monday on which the secure-leave period is to begin and of the Friday on which it is to end; (3) the dates of all other secure-leave periods during the current calendar year that have previously been designated by the attorney pursuant to this rule and to Rule 26 of the General Rules of Practice for the Superior and District Courts; (4) a statement that the secure-leave period is not being designated for the purpose of delaying, hindering, or interfering with the timely disposition of any matter in any pending action or proceeding; (5) a statement that no argument or other in-court proceeding has been scheduled during the designated secure-leave period in any matter pending in the appellate division in which the attorney has entered an appearance; and (6) a listing of all cases, by caption and docket number, pending before the appellate court in which the designation is being filed. The designation shall apply only to those cases pending in that appellate court on the date of its filing. A separate designation shall be filed as to any cases on appeal subsequently filed and docketed.~~

~~(e) **Where to File Designation.** The designation shall be filed as follows: (1) if the attorney has entered an appearance in the Supreme Court, in the office of the clerk of the Supreme Court, even if the designation was filed initially in the Court of Appeals; (2) if the attorney has entered an appearance in the Court of Appeals, in the office of the clerk of the Court of Appeals.~~

~~(f) **When to File Designation.** The designation shall be filed: (1) no later than ninety days before the beginning of the secure-leave period, and (2) before any argument or other in-court proceeding has been scheduled for a time during the designated secure-leave period.~~

(a) **Definition; Authorization.** A "secure-leave period" is a period of time that is designated by an attorney in which the appellate courts will not hold oral argument in any case in which that attorney is listed as an attorney of record. An attorney may designate secure-leave periods as provided in this rule.

(b) **Length; Number.** A secure-leave period shall consist of one complete calendar week. During a calendar year, an attorney may designate three different weeks as secure-leave periods.

(c) **Designation.** An attorney shall designate his or her secure-leave periods on the electronic filing site of the appellate courts at https://www.ncappellatecourts.org.

(d) **When to Designate.** An attorney shall designate a secure-leave period at least ninety days before it begins.

* * *

These amendments to the North Carolina Rules of Appellate Procedure shall be effective immediately.

These amendments shall be published in the North Carolina Reports and posted on the Court's web site.

Ordered by the Court in Conference, this the 1st day of March, 2018.

Michael R. Morgan
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 2nd day of March, 2018.

AMY L. FUNDERBURK
Clerk of the Supreme Court

ORDER ADOPTING RULE 31.1 OF THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Pursuant to the authority of Article IV of the Constitution of North Carolina and N.C.G.S. § 7A-33, the North Carolina Rules of Appellate Procedure are amended by adding a new Rule 31.1 to read:

Rule 31.1. Motion for En Banc Consideration by Court of Appeals

(a) **When Hearing or Rehearing En Banc May Be Ordered.** A majority of the judges on the Court of Appeals may order that an appeal be heard or reheard by the court en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the case involves a question of exceptional importance that must be concisely stated.

(b) **Content.** The motion for en banc consideration shall explain with particularity why en banc consideration is necessary.

(c) **Motions for Initial En Banc Hearing.** At any point after the appellant's brief is filed but no later than fifteen days after the filing of the appellee brief, any party may file a motion for en banc consideration. The motion shall be accompanied by proof of service upon all other parties. Within ten days after service of the motion, any party may file a response thereto. The filing shall be accompanied by proof of service upon all other parties. The court will rule upon the motion within thirty days after the case is fully briefed and may rule upon it prior to that time. The filing of the motion will not stay the time for briefs to be filed. When a motion for en banc consideration is allowed, the case will be calendared as soon as practicable.

(d) **Motions for En Banc Rehearing**. A motion to rehear any case en banc may be filed within fifteen days after the opinion of the court has been filed. The motion shall be accompanied by proof of service upon all other parties. Within ten days after service of the motion, any party may file a response thereto. The filing shall be accompanied by proof of service upon all other parties. Within thirty days after the motion is filed, the court will either allow or deny the motion. The denial of the motion will trigger the time for taking an appeal of right to the Supreme Court pursuant to N.C.G.S. § 7A-30 and for filing a petition for discretionary review pursuant to Rule 15. If the motion is allowed, the clerk shall forthwith notify the parties that the motion has been granted. The case will be reconsidered solely upon the record on appeal, the motion

for en banc rehearing and any responses thereto, new briefs of the parties if requested by the court, and oral argument if the court decides to hear oral argument. Entry of the en banc opinion vacates the original panel opinion.

(e) **Stay of Mandate.** When a motion for en banc rehearing is filed, the movant may obtain a stay of the mandate from the court. The procedure is as provided by Rule 8 of these rules for stays pending appeal.

(f) **Rule 31.1 Motions to Be Heard First.** If a party files both a motion pursuant to this rule for en banc rehearing and a Rule 31 petition for rehearing, the court will rule on the motion for en banc rehearing first. The time for ruling on the Rule 31 petition for rehearing shall commence to run from the date of entry by the Court of Appeals of an order denying the en banc motion.

This amendment to the North Carolina Rules of Appellate Procedure shall be effective immediately.

This amendment shall be promulgated by publication in the North Carolina Reports and posted on the Court's web site.

Ordered by the Court in Conference, this the 22nd day of December, 2016.

s/Edmunds, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 22nd day of December, 2016.

s/J. Bryan Boyd

J. BRYAN BOYD
Clerk of the Supreme Court

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