370 N.C.—No. 4 Pages 590-697

ORGANIZATION OF THE STATE BAR; CERTIFICATION OF PARALEGALS; PROFESSIONAL CONDUCT; ADMINISTRATION OF THE STATE BAR; CONTINUING LEGAL EDUCATION; LEGAL SPECIALIZATION

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE 27, 2018

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

THE SUPREME COURT
OF
NORTH CAROLINA

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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 6 APRIL 2018

ORDERS

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

HEADNOTE INDEX

APPEAL AND ERROR

Appeal and Error—sparse record—Supreme Court's constitutional and inherent authority—Court of Appeals decision—no precedential value— Where the record in a case was too sparse for adequate judicial review, the Supreme Court expressed no opinion on the merits of the case and exercised its constitutional and inherent authority to order that the decision of the Court of Appeals in the case had no precedential value. **Sanchez v. Cobblestone Homeowners Ass'n of Clayton, Inc., 624.**

ATTORNEYS

Attorneys—disciplinary hearing—public reprimand—conduct prejudicial to administrative of justice—A deputy commissioner of the North Carolina Industrial Commission was publicly reprimanded for conduct in violation of Canons 1 and 2A of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brought the judicial office into disrepute in violation of N.C.G.S. § 7A-376. **In re Shipley, 595.**

CORPORATIONS

Corporations—piercing the veil—not a theory of liability—Where plaintiffs, who owned a dance studio, allegedly entered into contracts with defendant dancers pursuant to which plaintiffs procured visas for defendant dancers in exchange for the dancers' express promise to work exclusively for plaintiffs, and thereafter defendant dancers began working for defendant dance studio, the Supreme Court rejected plaintiffs' argument that defendant dance studio owners (the Manlys) could be held liable in their individual capacities for the tort claims brought against defendant dance studio (Metropolitan Ballroom). Because plaintiffs failed to state a valid, underlying claim against defendants, it was immaterial whether Metropolitan Ballroom or the Manlys, in their individual capacities, would be liable for those claims. **Krawiec v. Manly, 602.**

CRIMINAL LAW

Criminal Law—jury instruction—self-defense—omission of stand-your-ground provision—The trial court erred in a first-degree murder case by giving its self-defense jury instruction that omitted the relevant stand-your-ground provision. Defendant showed a reasonable possibility that, had the trial court given the required stand-your-ground instruction, a different result would have been reached

at trial. Defendant was entitled to a new trial with proper self-defense and stand-your-ground instructions. **State v. Lee, 671.**

EVIDENCE

Evidence—Rape Shield Law—STDs in complainant absent in defendant—In defendant's trial for sexual offenses committed against his daughter, the trial court erred by excluding evidence of the complainant's history of sexually transmitted diseases (STDs) pursuant to Rule of Evidence 412. The excluded evidence—which included expert testimony regarding the presence of STDs in the complainant and the absence of those STDs in defendant and the inference that defendant did not commit the charged crimes—fell within the exception to the Rape Shield Law set forth in Rule of Evidence 412(b)(2), as "evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant." There was a reasonable probability that, had this error not been committed, a different result would have been reached at trial. **State v. Jacobs, 661.**

FALSE PRETENSE

False Pretense—motion to dismiss—sufficiency of indictment—amount of money obtained not required—The trial court properly denied defendant's motion to dismiss the charges of obtaining property by false pretenses. The indictment was facially valid and fulfilled the purpose of the Criminal Procedure Act of 1975. The indictment did not need to include the amount of money obtained because it adequately advised defendant of the conduct that was the subject of the accusation. Further, the State presented sufficient evidence at trial regarding defendant's false representation of ownership. **State v. Mostafavi, 681.**

KIDNAPPING

Kidnapping—restraint—actions after sexual assault—The trial court did not err by denying defendant's motion to dismiss a second-degree kidnapping charge, because there was sufficient evidence of restraint that was separate and apart from that inherent in the commission of the first-degree sex offense to support the kidnapping conviction. Taken in the light most favorable to the State, the evidence showed that defendant positioned himself on top of the victim on a bed, punched him until he was stunned, and penetrated him. The victim then swung and kicked at the defendant, defendant jumped off the victim, grabbed him by the ankles, yanked him off the bed, and kicked and stomped the victim with an accomplice without a further attempt at sexual assault. Defendant's actions after the victim swung at him constituted an additional restraint. **State v. China, 627.**

PUBLIC OFFICERS AND EMPLOYEES

Public Officers and Employees—termination—police officer—right to request jury trial—The Court of Appeals erred in a police officer termination case by concluding that only petitioner City of Asheville had the right to request a jury trial. A respondent, just as much as a petitioner, may demand a jury trial in a superior court appeal of an Asheville Civil Service Board decision. The case was reversed and remanded to the Court of Appeals for further remand to the superior court. **City of Asheville v. Frost, 590.**

defendant dancers began working for defendant dance studio, the N.C. Business Court did not err by dismissing plaintiffs' claim against defendants for unfair and deceptive practices (UDP). Because plaintiffs failed to state a valid claim for tortious interfere with contact or misappropriation of trade secrets, plaintiffs necessarily also failed to adequately state a claim for UDP. **Krawiec v. Manly, 602.**

UNJUST ENRICHMENT

Unjust Enrichment—benefit of work visa—Where plaintiffs, who owned a dance studio, allegedly entered into contracts with defendant dancers pursuant to which plaintiffs procured visas for defendant dancers in exchange for the dancers' express promise to work exclusively for plaintiffs, and thereafter defendant dancers began working for defendant dance studio, the N.C. Business Court did not err by dismissing plaintiffs' claims against defendant dance studio for unjust enrichment. While plaintiffs' amended complaint alleged that defendant dance studio received the benefit of plaintiffs' procurement of their O1-B work visas for defendant dancers, this allegation was contradicted by documents attached to plaintiffs' amended complaint that indicated that the visas authorized defendant dancers to be employed only by plaintiffs. **Krawiec v. Manly, 602.**

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

THE CITY OF ASHEVILLE, PETITIONER
v.
ROBERT H. FROST, RESPONDENT

No. 170A17

Filed 6 April 2018

Public Officers and Employees—termination—police officer—right to request jury trial

The Court of Appeals erred in a police officer termination case by concluding that only petitioner City of Asheville had the right to request a jury trial. A respondent, just as much as a petitioner, may demand a jury trial in a superior court appeal of an Asheville Civil Service Board decision. The case was reversed and remanded to the Court of Appeals for further remand to the superior court.

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. ___, 800 S.E.2d 118 (2017), reversing an order entered on 22 December 2015 by Judge William H. Coward in Superior Court, Buncombe County. Heard in the Supreme Court on 12 December 2017.

McGuire, Wood & Bissette, P.A., by Sabrina Presnell Rockoff; and City of Asheville City Attorney's Office, by Robin Currin, Kelly Whitlock, and John Maddux, for petitioner-appellee.

John C. Hunter for respondent-appellant.

MARTIN, Chief Justice.

Appellant Robert H. Frost, a police officer in the Asheville Police Department, was accused of using excessive force against a citizen. The Asheville Police Department began an administrative investigation into the incident and suspended Officer Frost during the course of the investigation. After the investigation had been completed, a panel of supervisors in Officer Frost's chain of command unanimously recommended to the City Police Chief that Officer Frost be terminated. The City Police Chief agreed with the panel's recommendation and terminated Officer Frost. Officer Frost appealed his termination to the Asheville Civil Service Board, which conducted a three-day hearing. The Civil Service Board concluded that the City had "failed to show that [excessive force] was used" and had "failed to provide the employee, Robert Frost, with

adequate due process protections in this matter." The Civil Service Board concluded that Officer Frost's termination was not justified, that his termination should be rescinded, and that his employment should be reinstated with back pay and benefits.

Pursuant to the Asheville Civil Service Law, the City filed a petition for a trial de novo in the Superior Court of Buncombe County to determine whether Officer Frost's termination was justified. Officer Frost—who, because the City had filed the petition in the case, was the respondent—filed a timely response to the petition, requesting a jury trial. The City moved to strike Officer Frost's request for a jury trial, claiming that Officer Frost had no constitutional or statutory right to a jury trial. The superior court denied the City's motion, concluding that the Civil Service Law incorporates Rule 38 of the North Carolina Rules of Civil Procedure and that a respondent has the right to request a jury trial by following the procedures set out in that rule.

By interlocutory appeal, the City appealed this denial to the Court of Appeals. The Court of Appeals reversed the superior court, concluding that "only petitioner City of Asheville had the right to request a jury trial." *City of Asheville v. Frost*, ___ N.C. App. ___, ___, 800 S.E.2d 118, 123 (2017). Judge Robert N. Hunter, Jr. dissented, concluding that "either a petitioner or a respondent has a right to a jury trial following the [Civil Service] Board's determination." *Id.* at ___, 800 S.E.2d at 126 (Hunter, J., dissenting). Based on Judge Hunter's dissent, Officer Frost exercised his statutory right to appeal to this Court.

The right to a jury trial exists only if provided for in the North Carolina Constitution or by statute. *Kiser v. Kiser*, 325 N.C. 502, 507-08, 385 S.E.2d 487, 490 (1989). The parties do not dispute that there is no constitutional right to a jury trial in this case. So this Court must determine whether a respondent such as Officer Frost has a statutory right to a jury trial in an appeal of an Asheville Civil Service Board decision to superior court.

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). The statutory provision at issue in this case is section 8(g) of the Asheville Civil Service Law, which states:

> Within ten days of the receipt of notice of the decision of the [Asheville Civil Service] Board, either party may appeal to the Superior Court Division of the General Court of Justice for Buncombe County for a trial de novo. The appeal shall be effected by filing with the Clerk of the

> Superior Court of Buncombe County a petition for trial in superior court, setting out the fact[s] upon which the petitioner relies for relief. If the petitioner desires a trial by jury, the petition shall so state. Upon the filing of the petition, the Clerk of the Superior Court shall issue a civil summons as in [a] regular civil action, and the sheriff of Buncombe County shall serve the summons and petition on all parties who did not join in the petition for trial. It shall be sufficient service upon the City for the sheriff to serve the petition and summons upon the clerk of the City. Therefore, the matter shall proceed to trial as any other civil action.

Act of Aug. 3, 2009, ch. 401, sec. 7, 2009 N.C. Sess. Laws 780, 784 (captioned "An Act to Revise the Laws Relating to the Asheville Civil Service Board").

The City argues that the General Assembly intended only the petitioner to have the right to a jury trial because section 8(g) says that, "[i]f the petitioner desires a trial by jury, the petition shall so state." The City maintains that this specific instruction for how a petitioner can exercise the right to a jury trial without an equally specific instruction for a respondent implies that a respondent does not have the right to a jury trial. This conclusion might make sense if section 8(g) said, for example, that "the petitioner has the right to a jury trial." Then we might infer that, by expressly saying that one party has the right, section 8(g) was implying that the other party does not. But the sentence in question does not say that. It says only that, "[i]f the petitioner desires a trial by jury, the petition shall so state." In other words, it says *how* a petitioner can request a jury trial. One can, of course, infer that a petitioner has the right to a jury trial; it would not make any sense to specify how to assert a right that does not exist. But it is wrong to infer the opposite—that is, to infer that a respondent *lacks* the right to a jury trial—from the fact that this sentence speaks only about a petitioner.

When read in its statutory context, moreover, this sentence does not indicate that the right belongs to a petitioner only. In interpreting a statute, a court must consider the statute as a whole and determine its meaning by reading it in its proper context and giving its words their ordinary meaning. *See State v. Jones*, 305 N.C. 520, 531, 290 S.E.2d 675, 681 (1982). Within section 8(g), the sentence that requires a petitioner to request a jury trial in its petition sits in the middle of three other sentences about the petition. The sentence right before the sentence in question tells the petitioner how to file the appeal and what to include in the petition. The

two sentences right after the sentence in question describe how parties will be served with the petition and the accompanying summons. So it makes sense that the sentence in question is likewise about—and only about—the petitioner and the petition. Conversely, it would *not* make sense, given where the sentence appears in section 8(g), to say anything about a respondent, a respondent's pleading, or a respondent's demand for a jury trial. It is no surprise, then, that this sentence says nothing about how a respondent can request a jury trial, and it would be illogical to infer from this sentence that a respondent does not have the right to a jury trial.

Of course, it is not enough to say that a respondent is not barred from having the right to a jury trial. For Officer Frost to prevail in this appeal, the law must actually confer that right on a respondent. As we have already said, the parties agree (and they are correct in agreeing) that there is no constitutional right to a jury trial in this case. So Officer Frost must have a statutory right to a jury trial in order to prevail.

And he does. Considering section 8(g) as a whole and reading its sentences in context with one another, section 8(g) effectively grants a respondent the right to a jury trial.

The final sentence of section 8(g) states that "the matter shall proceed to trial as any other civil action." A civil action is governed by the North Carolina Rules of Civil Procedure, so section 8(g) incorporates, among other things, Rule 38(b) of those Rules. Rule 38(b) does not confer any substantive right to a jury trial in any particular case; that right must come from somewhere else. But under Rule 38(b), the right to a jury trial is generally determined by the type of issue that a lawsuit presents, not by which party is requesting the jury trial. *See* N.C. R. Civ. P. 38(b) ("Any party may demand a trial by jury of any *issue* triable of right by a jury . . . ." (emphasis added)).

Section 8(g) indicates that issues arising in section 8(g) appeals are indeed issues on which a party may demand a jury trial. As we have already discussed, by saying that, "[i]f the petitioner desires a trial by jury, the petition shall so state," section 8(g) makes it clear that a petitioner has the right to a jury trial. Because section 8(g) allows "either party" to appeal an Asheville Civil Service Board decision, the petitioner in any given appeal could be either the City or the employee. The issue being appealed could therefore be an issue that either the City or the employee wishes to appeal. This means that any issue related to an Asheville Civil Service Board decision is an "issue triable of right by a jury" in an appeal to superior court. Under Rule 38(b), moreover, "*[a]ny*

party may demand a trial by jury of any issue triable of right by a jury." (Emphasis added.)

Thus, a respondent, just as much as a petitioner, may demand a jury trial in a superior court appeal of an Asheville Civil Service Board decision. We therefore reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for further remand to the superior court for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

IN THE MATTER OF THE FORECLOSURE UNDER THE POWERS GRANTED IN CHAPTER 47F OF THE NORTH CAROLINA GENERAL STATUTES AND IN THE DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR ADDISON RESERVE AT THE PARK AT PERRY CREEK SUBDIVISION RECORDED AT BOOK 9318, PAGE 369, ET SEQ., WAKE COUNTY REGISTRY CONCERNING GINA A. ACKAH

No. 334A17

Filed 6 April 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 794 (2017), affirming in part, reversing in part, and remanding an order setting aside a foreclosure sale issued by Judge Kendra D. Hill, and reversing an order for possession of real property issued by an Assistant Clerk of Superior Court, both entered on 30 December 2015 in Superior Court, Wake County. Heard in the Supreme Court on 14 March 2018.

No brief for petitioner-appellee Addison Reserve Homeowners Association, Inc.

Adams, Howell, Sizemore & Lenfestey, P.A., by Ryan J. Adams, for respondent-appellant Gina Ackah.

Law Office of Edward Dilone, PLLC, by Edward D. Dilone, for third-party appellee Jones Family Holdings, LLC.

PER CURIAM.

AFFIRMED.

IN RE SHIPLEY

[370 N.C. 595 (2018)]

IN RE INQUIRY CONCERNING A DEPUTY COMMISSIONER, NO. 15-057
WILLIAM HENRY SHIPLEY, RESPONDENT

No. 425A17

Filed 6 April 2018

Attorneys—disciplinary hearing—public reprimand—conduct prejudicial to administrative of justice

A deputy commissioner of the North Carolina Industrial Commission was publicly reprimanded for conduct in violation of Canons 1 and 2A of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brought the judicial office into disrepute in violation of N.C.G.S. § 7A-376.

This matter is before the Court pursuant to N.C.G.S. §§ 7A-376 and -377 upon a recommendation by the Judicial Standards Commission entered 29 November 2017 that Respondent William Henry Shipley, a Deputy Commissioner of the North Carolina Industrial Commission, be publicly reprimanded for conduct in violation of Canons 1 and 2A of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376.[1] This matter was calendared for argument in the Supreme Court on 10 January 2018 but determined on the record without briefs or oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure and Rule 3(c) of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission.

No counsel for Judicial Standards Commission or Respondent.

ORDER

The issue before this Court is whether Deputy Commissioner William Henry Shipley (Respondent) should be publicly reprimanded for violations of Canons 1 and 2A of the North Carolina Code of Judicial Conduct amounting to conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S.

1. Pursuant to N.C.G.S. § 97-78.1, "[t]he Code of Judicial Conduct for judges of the General Court of Justice and the procedure for discipline of judges in Article 30 of Chapter 7A of the General Statutes shall apply to commissioners and deputy commissioners" of the North Carolina Industrial Commission. N.C.G.S. § 97-78.1 (2017).

§ 7A-376(b). Respondent has not challenged the findings of fact made by the Judicial Standards Commission (the Commission) or opposed the Commission's recommendation that he be publicly reprimanded by this Court.

On 10 February 2017, the Commission Counsel filed a Statement of Charges against Respondent alleging that he had "engaged in conduct inappropriate to his office when, on April 2, 2015, Respondent wrecked his vehicle while driving under the influence of an impairing substance, putting at risk his own life and the lives of others." According to the allegations in the Statement of Charges, on that night Respondent's vehicle struck another moving vehicle after Respondent failed to yield the right of way when attempting to turn left. Neither Respondent nor the other driver appeared injured; both declined EMS attention. The Statement of Charges further stated that Respondent registered a blood alcohol level of .08 when tested at the local detention center. He was charged with driving while impaired and failing to yield, charges which were later dismissed. Respondent voluntarily reported these charges to the Commission and fully cooperated with the Commission's inquiry into this matter. In the Statement of Charges, the Commission Counsel asserted that Respondent's actions on 2 April 2015 "constitute[d] conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or otherwise constitutes grounds for disciplinary proceedings pursuant to Chapter 7A, Article 30 and Chapter 97, Article 1 of the General Statutes of North Carolina."

On 24 March 2017, Respondent filed an answer in which he admitted in part and denied in part the allegations in the Statement of Charges. Specifically, he denied that he had failed to yield the right of way when turning left and that his blood alcohol level had been .08. On 2 October 2017, Respondent and the Commission Counsel filed a number of joint evidentiary, factual, and disciplinary stipulations as permitted by Commission Rule 22 that tended to support a decision to publicly reprimand Respondent. On 13 October 2017, the Commission heard this matter.

On 29 November 2017, the Commission filed a Recommendation of Judicial Discipline, in which it made the following findings of fact:

> 1. Around 9:00 p.m. on 2 April 2015, Respondent was travelling northbound on U.S. Route 70 (Glenwood Avenue), a public street/highway in Raleigh, North Carolina. As Respondent reached the area of Glenwood Avenue north of downtown Raleigh known as Five

Points, he attempted a left-hand turn onto Fairview Road. While engaged in the turn, another vehicle travelling on Glenwood Avenue collided with Respondent's vehicle.

2. Shortly after the vehicle collision occurred, Deputy Sheriff Josh Legan of the Wake County Sheriff's [Office] arrived at the scene. After Respondent voluntarily submitted to several standardized field sobriety tests, Deputy Legan formed the opinion that Respondent had consumed a sufficient quantity of alcohol so that his mental and physical faculties were appreciably impaired.

3. At the local detention center, Respondent submitted to two (2) Intoximeter Intox EC/IR II tests. Respondent's alcohol concentration was reported as .08 grams of alcohol per 210 liters of breath. Deputy Legan then cited Respondent for driving while impaired and failing to yield the right of way.

4. On 7 April 2015, Respondent voluntarily reported the charges to the Commission and fully cooperated with the Commission's inquiry into this matter.

5. Respondent's charges were set for trial in Wake County District Court on 8 September 2016. The prosecution failed to produce Deputy Legan as a witness, and Respondent's charges were dismissed by the Wake County District Attorney's Office after their motion to continue was denied by the presiding judge.

(Citations omitted.) Based upon these findings of fact, the Commission concluded as a matter of law that:

1. Canon 1 of the Code of Judicial Conduct sets forth the broad principle that "[a] judge should uphold the integrity and independence of the judiciary." To do so, Canon 1 requires that a "judge should participate in establishing, maintaining, and enforcing, and should personally observe, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved."

2. Canon 2 of the Code of Judicial Conduct generally mandates that "[a] judge should avoid impropriety in all the judge's activities." Canon 2A specifies that "[a] judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes

public confidence in the integrity and impartiality of the judiciary."

3. The Commission's findings of fact show that Respondent was involved in a vehicle accident on 2 April 2015, after which breath alcohol testing resulted in a report showing that Respondent's alcohol concentration was .08 grams of alcohol per 210 liters of breath. As a result, Respondent was cited for driving under the influence of an impairing substance and failing to yield the right of way in connection with that accident, although the criminal case was ultimately dismissed for procedural reasons.

4. The Commission concludes that by driving under the influence of an impairing substance and thereafter becoming involved in a vehicle accident, Respondent put his own life and the lives of others at risk, and thus failed to personally observe appropriate standards of conduct necessary to preserve the integrity of the judiciary in violation of Canon 1 of the North Carolina Code of Judicial Conduct and failed to comply with the law and conduct himself in a manner that promotes public confidence in the integrity of the judiciary in violation of Canon 2A of the North Carolina Code of Judicial Conduct.

5. Upon the agreement of Respondent and the Commission's independent review of the Stipulation and the record, the Commission further concludes that Respondent's violations of Canon 1 and Canon 2A of the Code of Judicial Conduct amount to conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of N.C. Gen. Stat. § 7A- 376(b).

(Brackets in original and citations omitted.) Based upon these findings of fact and conclusions of law, the Commission recommended that this Court publicly reprimand Respondent for "driving under the influence of an impairing substance and thereafter becoming involved in a vehicle accident." The Commission based this recommendation on the Commission's earlier findings and conclusions and the following additional dispositional determinations:

1. Respondent agreed to enter into the Stipulation and Agreement for Stated Disposition to bring closure to

this matter and because of his concern for protecting the integrity of the judiciary and the Industrial Commission.

2. Respondent has a good reputation in his community.

3. Respondent voluntarily completed an alcohol education program.

4. The actions identified by the Commission as misconduct by Respondent appear to be isolated and do not form any sort of recurring pattern of misconduct.

5. Respondent self-reported the incident of 2 April 2015 to the Commission and has been fully cooperative with the Commission's investigation, voluntarily providing information about the incident.

6. Respondent's record of service to the Industrial Commission, the profession, and the community at large is otherwise exemplary.

7. Respondent agrees to accept a recommendation from the Commission that the North Carolina Supreme Court publicly reprimand him for his conduct and acknowledges that the conduct set out in the Stipulation establishes by clear and convincing evidence that his conduct is in violation of the North Carolina Code of Judicial Conduct and is prejudicial to the administration of justice that brings the judicial office into disrepute in violation of North Carolina General Statute § 7A-376(b).

8. Pursuant to N.C. Gen. Stat. § 7A-377(a5), which requires that at least five members of the Commission concur in a recommendation of public discipline to the Supreme Court, all six Commission members present at the hearing of this matter concur in this recommendation to **publicly reprimand** Respondent.

(Citations omitted.)

When reviewing a recommendation from the Commission in a judicial discipline proceeding, "the Supreme Court 'acts as a court of original jurisdiction, rather than in its typical capacity as an appellate court.' " *In re Mack*, 369 N.C. 236, 249, 794 S.E.2d 266, 273 (2016) (order) (quoting *In re Hartsfield*, 365 N.C. 418, 428, 722 S.E.2d 496, 503 (2012) (order)). In

conducting an independent evaluation of the evidence, "[w]e have discretion to 'adopt the Commission's findings of fact if they are supported by clear and convincing evidence, or [we] may make [our] own findings.' " *Id.* at 249, 794 S.E.2d at 273 (quoting *In re Hartsfield*, 365 N.C. at 428, 722 S.E.2d at 503 (second and third sets of brackets in original)). "The scope of our review is to 'first determine if the Commission's findings of fact are adequately supported by clear and convincing evidence, and in turn, whether those findings support its conclusions of law.' " *Id.* at 249, 794 S.E.2d at 274 (quoting *In re Hartsfield*, 365 N.C. at 429, 722 S.E.2d at 503).

After careful review, this Court concludes that the Commission's findings of fact, including the dispositional determinations set out above, are supported by clear, cogent, and convincing evidence in the record. In addition, we conclude that the Commission's findings of fact support its conclusions of law. As a result, we accept the Commission's findings and conclusions and adopt them as our own. Based upon those findings and conclusions and the recommendation of the Commission, we conclude and adjudge that Respondent should be publicly reprimanded.

Therefore, pursuant to N.C.G.S. §§ 7A-376(b) and -377(a5), it is ordered that Respondent William Henry Shipley be PUBLICLY REPRIMANDED for violations of Canons 1 and 2A of the North Carolina Code of Judicial Conduct amounting to conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b).

By order of the Court in Conference, this the 6th day of April, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of April, 2018.

Amy Funderburk
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

THOMAS JACKSON AND KORLETTER HORNE JACKSON
v.
CENTURY MUTUAL INSURANCE COMPANY

No. 337A17

Filed 6 April 2018

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 868 (2017), affirming an order of summary judgment entered on 3 June 2016 by Judge Susan E. Bray in Superior Court, Forsyth County. Heard in the Supreme Court on 12 March 2018.

Botros Law, PLLC, by Tony S. Botros, for plaintiff-appellants.

Cranfill Sumner & Hartzog LLP, by Susan K. Burkhart, for defendant-appellee.

PER CURIAM.

AFFIRMED.

MICHAEL KRAWIEC, JENNIFER KRAWIEC, AND HAPPY DANCE, INC./CMT DANCE, INC. (D/B/A FRED ASTAIRE FRANCHISED DANCE STUDIOS)
v.
JIM MANLY, MONETTE MANLY, METROPOLITAN BALLROOM, LLC, RANKO BOGOSAVAC, AND DARINKA DIVLJAK

No. 252A16

Filed 6 April 2018

1. Torts, Other—tortious interference with contract—knowledge of contract

Where plaintiffs, who owned a dance studio, allegedly entered into contracts with defendant dancers pursuant to which plaintiffs procured visas for defendant dancers in exchange for the dancers' express promise to work exclusively for plaintiffs, and thereafter defendant dancers began working for defendant dance studio, the N.C. Business Court did not err by dismissing plaintiffs' claim against defendant dance studio for tortious interference with contract. None of the factual allegations in plaintiffs' amended complaint demonstrated how the defendant dance studio could have known of the alleged exclusive employment agreement.

2. Trade Secrets—misappropriation of—sufficient particularity in pleadings

Where plaintiffs, who owned a dance studio, allegedly entered into contracts with defendant dancers pursuant to which plaintiffs procured visas for defendant dancers in exchange for the dancers' express promise to work exclusively for plaintiffs, and thereafter defendant dancers began working for defendant dance studio, the N.C. Business Court did not err by dismissing plaintiffs' claim against defendants for misappropriation of trade secrets. Plaintiffs' description in their amended complaint of their trade secrets as their "original ideas and concepts for dance productions, marketing strategies and tactics, as well as student, client and customer lists and their contact information" failed to provide sufficient particularity to enable defendants to delineate what they were accused of misappropriating and a court to determine whether misappropriation had or was threatened to occur.

3. Unfair Trade Practices—underlying claims dismissed

Where plaintiffs, who owned a dance studio, allegedly entered into contracts with defendant dancers pursuant to which plaintiffs procured visas for defendant dancers in exchange for the dancers'

express promise to work exclusively for plaintiffs, and thereafter defendant dancers began working for defendant dance studio, the N.C. Business Court did not err by dismissing plaintiffs' claim against defendants for unfair and deceptive practices (UDP). Because plaintiffs failed to state a valid claim for tortious interfere with contact or misappropriation of trade secrets, plaintiffs necessarily also failed to adequately state a claim for UDP.

4. Torts, Other—civil conspiracy—dismissed

Where plaintiffs, who owned a dance studio, allegedly entered into contracts with defendant dancers pursuant to which plaintiffs procured visas for defendant dancers in exchange for the dancers' express promise to work exclusively for plaintiffs, and thereafter defendant dancers began working for defendant dance studio, the N.C. Business Court did not err by dismissing plaintiffs' claims against defendants for civil conspiracy. Plaintiffs' amended complaint lacked sufficient detail to state a claim for civil conspiracy based on defendants' unlawful behavior, and the other acts alleged were held by the N.C. Supreme Court to be pled insufficiently.

5. Unjust Enrichment—benefit of work visa

Where plaintiffs, who owned a dance studio, allegedly entered into contracts with defendant dancers pursuant to which plaintiffs procured visas for defendant dancers in exchange for the dancers' express promise to work exclusively for plaintiffs, and thereafter defendant dancers began working for defendant dance studio, the N.C. Business Court did not err by dismissing plaintiffs' claims against defendant dance studio for unjust enrichment. While plaintiffs' amended complaint alleged that defendant dance studio received the benefit of plaintiffs' procurement of their O1-B work visas for defendant dancers, this allegation was contradicted by documents attached to plaintiffs' amended complaint that indicated that the visas authorized defendant dancers to be employed only by plaintiffs.

6. Corporations—piercing the veil—not a theory of liability

Where plaintiffs, who owned a dance studio, allegedly entered into contracts with defendant dancers pursuant to which plaintiffs procured visas for defendant dancers in exchange for the dancers' express promise to work exclusively for plaintiffs, and thereafter defendant dancers began working for defendant dance studio, the Supreme Court rejected plaintiffs' argument that defendant dance studio owners (the Manlys) could be held liable in their individual

capacities for the tort claims brought against defendant dance studio (Metropolitan Ballroom). Because plaintiffs failed to state a valid, underlying claim against defendants, it was immaterial whether Metropolitan Ballroom or the Manlys, in their individual capacities, would be liable for those claims.

Justice BEASLEY dissenting.

Appeal pursuant to N.C.G.S. § 7A-27(a)(3)(a) from an order dated 22 January 2016 entered by Judge Louis A. Bledsoe, III, Special Superior Court Judge for Complex Business Cases appointed by the Chief Justice pursuant to N.C.G.S. § 7A-45.4, in Superior Court, Mecklenburg County. Heard in the Supreme Court on 30 August 2017.

Hatcher Legal, PLLC, by Erin B. Blackwell and Nichole M. Hatcher, for plaintiff-appellants.

Brock & Scott, PLLC, by Renner St. John, for defendant-appellees.

JACKSON, Justice.

In this case we consider whether plaintiffs have stated claims for tortious interference with contract, misappropriation of trade secrets, unfair and deceptive practices, civil conspiracy, and unjust enrichment sufficient to survive defendants' motions to dismiss pursuant to North Carolina Rule of Civil Procedure 12(b)(6). *See* N.C.G.S. § 1A-1, Rule 12(b)(6) (2017). Because we conclude that plaintiffs' amended complaint reveals the absence of law or facts essential to these claims, or alleges facts that necessarily defeat these claims, we affirm the portions of the North Carolina Business Court's 22 January 2016 Order and Opinion on Defendants' Motions to Dismiss Amended Complaint dismissing the claims listed above.

According to the factual allegations in plaintiffs' amended complaint, which we take as true for purposes of reviewing an order on a motion to dismiss pursuant to Rule 12(b)(6), *see State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 442, 666 S.E.2d 107, 114 (2008) (quoting *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 325, 626 S.E.2d 263, 266 (2006)), plaintiffs Michael Krawiec and Jennifer Krawiec are residents and citizens of North Carolina who own plaintiff Happy Dance, Inc./CMT Dance, Inc. (Happy Dance)—a North Carolina corporation doing business as Fred Astaire Franchised Dance Studios in Forsyth County. Defendants Jim Manly and Monette Manly own

defendant Metropolitan Ballroom, LLC (Metropolitan Ballroom) (collectively, the Metropolitan defendants), which is a North Carolina limited liability company doing business in Mecklenburg County. Defendants Ranko Bogosavac, a citizen of Bosnia and Herzegovina, and Darinka Divljak, a Serbian citizen, (the dancer defendants) were employed by plaintiffs pursuant to O1-B nonimmigrant work visas.

On or about 18 July 2011, plaintiffs entered into contracts with Bogosavac and Divljak pursuant to which plaintiffs procured the visas in exchange for each dancer's express promise to work exclusively for plaintiffs as a dance instructor and performer. Bogosavac, who previously had been employed by plaintiffs, was to work exclusively for plaintiffs from 31 January 2012 to 3 January 2013, and Divljak was to do the same from 1 September 2011 to 31 August 2014. The dancer defendants also agreed not to work for any other company that offered dance instruction or competed against Happy Dance for one year after either the expiration or termination of their employment with Happy Dance.

On or about 7 February 2012, the dancer defendants began working as dance instructors for the Metropolitan defendants in violation of their respective employment agreements with plaintiffs. In support of this allegation, plaintiffs attached to their amended complaint copies of Bogosavac's and Divljak's biographies as they appeared on a list of Metropolitan Ballroom's staff on Metropolitan Ballroom's website on 7 February 2012. In addition, according to plaintiffs, the dancer defendants shared confidential information with the Metropolitan defendants, specifically, plaintiffs' "ideas and concepts for dance productions, marketing strategies and tactics, as well as . . . customer lists [containing] contact information." From this information, the Metropolitan defendants produced and marketed plaintiffs' dance shows as their own, original productions. The dancer defendants also lured away plaintiffs' customers, resulting in a significant loss of revenue for plaintiffs.

Based on these factual allegations, plaintiffs asserted various causes of action against all defendants. The Metropolitan defendants and dancer defendants all filed motions to dismiss the amended complaint in its entirety pursuant to Rule 12(b)(6). In its order and opinion regarding the motions to dismiss, the Business Court granted defendants' motions as to all of plaintiffs' claims except for plaintiffs' claims for breach of contract, fraudulent misrepresentation, unjust enrichment, and punitive damages against the dancer defendants. Plaintiffs filed a notice of appeal from the Business Court's order and opinion to this Court pursuant to N.C.G.S. § 7A-27(a)(2)-(3). In their appeal, plaintiffs challenge the Business Court's dismissal of their claims against the Metropolitan

defendants for tortious interference with contract, misappropriation of trade secrets, unfair and deceptive practices, civil conspiracy, and unjust enrichment. Plaintiffs also contest the Business Court's dismissal of their claims against the dancer defendants for misappropriation of trade secrets and civil conspiracy. We consider each of plaintiffs' dismissed claims in turn.

On appeal from an order dismissing an action pursuant to Rule 12(b)(6), we conduct de novo review. *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 8 (2015) (citing *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013)). A Rule 12(b)(6) dismissal "is appropriate when the complaint 'fail[s] to state a claim upon which relief can be granted.' " *Id.* at 448, 781 S.E.2d at 7 (alteration in original) (quoting N.C.G.S. § 1A-1, Rule 12(b)(6) (2013)). We have determined that a complaint fails in this manner when: "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citing *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985)). "When reviewing a complaint dismissed under Rule 12(b)(6), we treat a plaintiff's factual allegations as true." *Ridgeway Brands*, 362 N.C. at 442, 666 S.E.2d at 114 (quoting *Stein*, 360 N.C. at 325, 626 S.E.2d at 266). In conducting our analysis, we also consider any exhibits attached to the complaint because "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." N.C.G.S. § 1A-1, Rule 10(c) (2017).

[1] The Business Court dismissed plaintiffs' claim against the Metropolitan defendants for tortious interference with contract on the basis that plaintiffs failed to allege that the Metropolitan defendants knew of the exclusive employment agreement between plaintiffs and the dancer defendants. Plaintiffs contend that the Business Court was in error because plaintiffs' factual allegations included the statement that the Metropolitan defendants had "knowledge of the contracts." We disagree.

Whether plaintiffs sufficiently alleged that the Metropolitan defendants had knowledge of the exclusivity agreement is essential because a claim for tortious interference with contract requires proof of five elements:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right

> against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

United Labs., Inc. v. Kuykendall, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988) (citing *Childress v. Abeles*, 240 N.C. 667, 674, 84 S.E.2d 176, 181-82 (1954)).

The entirety of the relevant allegation in plaintiffs' amended complaint is that "Defendants Metropolitan and Manlys, as well as Defendants Bogosavac and Divljak, all had knowledge and/or should have had knowledge of the existing contracts pursuant to the O1-B work visas between Plaintiffs and Defendants Bogosavac and Divljak." That the Metropolitan defendants allegedly knew of the existing contract "pursuant to the O1-B work visas" does not satisfy plaintiffs' Rule 12(b)(6) burden because the amended complaint is devoid of any allegation that the work visas themselves constituted or contained any reference to an exclusivity agreement. In fact, elsewhere in the amended complaint, plaintiffs only alleged that "[p]ursuant to the second I-129 Petition . . . Defendant Bogosavac agreed to work exclusively for Plaintiffs . . . . The agreement did not authorize Defendant Bogosavac to engage in other part-time or concurrent work with other dance studios." Regarding Divljak, plaintiffs stated, in even more general terms, "Pursuant to the contract with Plaintiffs, Defendant Divljak was to work exclusively for Plaintiffs . . . . The agreement did not authorize Defendant Divljak to engage in other part-time or concurrent work with other dance studios." Neither of these factual allegations demonstrates how the Metropolitan defendants could have known of the alleged exclusive employment agreement through knowledge of the O1-B work visas. Therefore, we conclude that "the complaint on its face reveals the absence of facts sufficient to make a good claim" for tortious interference with contract because the plaintiffs failed to allege that the Metropolitan defendants had knowledge of the exclusivity provision. *Wood*, 355 N.C. at 166, 558 S.E.2d at 494 (citing *Oates*, 314 N.C. at 278, 333 S.E.2d at 224).

[2] We now turn to plaintiffs' claims for misappropriation of trade secrets against all defendants. The Business Court dismissed these claims on the basis that plaintiffs both failed to identify the alleged trade secrets with sufficient particularity and to allege the specific acts of misappropriation in which defendants engaged. On appeal, plaintiffs contend that their description of their trade secrets as "original ideas and concepts for dance productions, marketing strategies and tactics, as

well as student, client and customer lists and their contact information," was legally sufficient. Plaintiffs also argue that customer lists and contact information are protectable trade secrets as a matter of law. Finally, plaintiffs maintain that they adequately described the act of misappropriation by stating that the dancers learned of the pertinent information in confidence while employed by plaintiffs, that the dancers shared that information with the Metropolitan defendants without plaintiffs' consent, and the Metropolitan defendants used that information to benefit their own business. Consequently, plaintiffs contend that the Business Court erred in dismissing their claim. We disagree with plaintiffs and reach the same conclusion as the Business Court, albeit based upon a somewhat different rationale.

Section 66-153 of the General Statutes provides that an "owner of a trade secret shall have remedy by civil action for misappropriation of his trade secret." N.C.G.S. § 66-153 (2017). For purposes of the Trade Secrets Protection Act, misappropriation is the "acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret." *Id.* § 66-152(1) (2017). A trade secret consists of

> business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
>
> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Id. § 66-152(3) (2017). As to the burden of proof, the General Statutes further direct:

> Misappropriation of a trade secret is prima facie established by the introduction of substantial evidence that the person against whom relief is sought both:
>
> (1) Knows or should have known of the trade secret; and

(2) Has had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner.

Id. § 66-155 (2017).

This Court has not considered the requirements for pleading a claim for misappropriation of trade secrets previously, but we conclude that the reasoning of our Court of Appeals, which mirrors the notice-pleading standard set forth in North Carolina Rule of Civil Procedure 8,[1] is persuasive on this topic. The Court of Appeals has stated, "To plead misappropriation of trade secrets, a plaintiff must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur." *Washburn v. Yadkin Valley Bank & Tr. Co.*, 190 N.C. App. 315, 326, 660 S.E.2d 577, 585 (2008) (quoting *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 510-11, 606 S.E.2d 359, 364 (2004)) (internal quotation marks omitted), *disc. rev. denied*, 363 N.C. 139, 674 S.E.2d 422 (2009); *see Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 897 (Del. 2002) (concluding that a defendant had sufficient notice of a claim for misappropriation of trade secrets to survive a motion to dismiss when the court could identify the trade secret as "the allegedly unique combination of marketing strategies and processes for the implementation of a program under which consumers would be able to use rebates from their qualified purchases to fund a 529 Plan"); *see also SmithKline Beecham Pharm. Co. v. Merck & Co.*, 766 A.2d 442, 447 (Del. 2000) (noting that a plaintiff "must disclose the allegedly misappropriated trade secrets with reasonable particularity" in order to, *inter alia*, "ensure that defendants are put on notice of the claimed trade secrets early in the litigation, preventing defendants from being subject to unfair surprise on the eve of trial"). This standard also has been applied by federal courts in our state. *See Prometheus Grp. Enters. v. Viziya Corp.*, No. 5:14-CV-32-BO, 2014 WL 3854812, at *7 (E.D.N.C. Aug. 5, 2014) ("In order to adequately plead misappropriation of trade secrets, a plaintiff 'must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether misappropriation has or is threatened

1. Rule 8(a)(1) requires "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief." N.C.G.S. § 1A-1, Rule 8(a)(1) (2017).

to occur.' " (quoting *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 468, 579 S.E.2d 449, 453 (2003))); *Asheboro Paper & Packaging, Inc. v. Dickinson*, 599 F. Supp. 2d 664, 676 (M.D.N.C. 2009) ("The alleged trade secret information must be identified 'with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur.' " (quoting *Analog Devices*, 157 N.C. App. at 468, 579 S.E.2d at 453)). In contrast, "a complaint that makes general allegations in sweeping and conclusory statements, without specifically identifying the trade secrets allegedly misappropriated, is 'insufficient to state a claim for misappropriation of trade secrets.' " *Washburn*, 190 N.C. App. at 327, 660 S.E.2d at 585-86 (quoting *VisionAIR*, 167 N.C. App. at 511, 606 S.E.2d at 364).

Provided that the information meets the two requirements for a trade secret as defined in subsection 66-152(3), we agree with the determination of the Court of Appeals that "[i]nformation regarding customer lists, pricing formulas and bidding formulas can qualify as a trade secret under G.S. § 66-152(3)." *Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc.*, 160 N.C. App. 520, 525, 586 S.E.2d 507, 511 (2003) (citation omitted). We are persuaded by the fact that other jurisdictions have reached the same conclusion. *See, e.g.*, *Home Pride Foods, Inc. v. Johnson*, 262 Neb. 701, 709, 634 N.W.2d 774, 781 (2001) ("We agree [with other cited jurisdictions] and hold that a customer list can be included in the definition of a trade secret . . . ."); *Ed Nowogroski Ins., Inc. v. Rucker*, 137 Wash. 2d 427, 440, 971 P.2d 936, 943 (1999) (en banc) ("A customer list is one of the types of information which can be a protected trade secret if it meets the criteria of the Trade Secrets Act." (citing *Am. Credit Indem. Co. v. Sacks*, 213 Cal. App. 3d 622, 262 Cal. Rptr. 92 (1989))); *Fred's Stores of Miss., Inc. v. M & H Drugs, Inc.*, 96-CA-00620-SCT, 96-CA-00633-SCT (¶¶ 21, 28), 725 So. 2d 902, 910-11 (1998) (en banc) (holding that the information on a customer list qualified as a trade secret when evidence showed that it had independent economic value, was not known or readily ascertainable, and was subject to reasonable efforts to maintain its secrecy). However, in light of the requirements of subsection 66-152(3), a customer database did not constitute a trade secret when "the record show[ed] that defendants could have compiled a similar database through public listings such as trade show and seminar attendance lists." *Combs & Assocs. v. Kennedy*, 147 N.C. App. 362, 370, 555 S.E.2d 634, 640 (2001) (citation omitted). Similarly, a plaintiff failed to allege sufficiently that its "customer lists and other compilations of customer data" were protected trade secrets when it "ha[d] not come forward with any evidence to show that the company took any special

precautions to ensure the confidentiality of its customer information" and "any information used to contact the clients would have been easily accessible to defendant through a local telephone book." *NovaCare Orthotics & Prosthetics E., Inc. v. Speelman*, 137 N.C. App. 471, 478, 528 S.E.2d 918, 922 (2000); *see also Asheboro Paper*, 599 F. Supp. 2d at 676 (noting that "[c]ustomer names and addresses may not be protected as a 'trade secret' inasmuch as they can be readily ascertained through independent development" (citing *UBS PaineWebber, Inc. v. Aiken*, 197 F. Supp. 2d 436 (W.D.N.C. 2002))).

In their amended complaint, plaintiffs described their trade secrets only as their "original ideas and concepts for dance productions, marketing strategies and tactics, as well as student, client and customer lists and their contact information." Plaintiffs provided no further detail about these ideas, concepts, strategies, and tactics sufficient to put defendants on notice as to the precise information allegedly misappropriated. In addition, plaintiffs' failure to describe a specific idea, concept, strategy, or tactic with respect to their marketing plan or to provide any detail about their dance productions renders their claim too general for this Court to determine—even taking plaintiffs' factual allegations as true—whether there is a "formula, pattern, program, device, compilation of information, method, technique, or process" at issue that "[d]erives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering." N.C.G.S. § 66-152(3)(a). Similarly, plaintiffs' amended complaint, on its face, does not show that plaintiffs' customer lists constituted a protected trade secret because plaintiffs failed to allege that the lists contained any information that would not be readily accessible to defendants. Like the Ohio Court of Common Pleas in an often cited case involving a dispute between a dance studio and its former employee, we recognize that "[t]here is no presumption that a thing is a secret," and emphasize the shortcomings of "general allegations" in making a case for misappropriation of trade secrets. *Arthur Murray Dance Studios of Cleveland, Inc. v. Witter*, 105 N.E.2d 685, 709-10 (Ohio Ct. Com. Pl. 1952) (citing *Super Maid Cook-Ware Corp. v. Hamil*, 50 F.2d 830, 832 (5th Cir. 1931)).

In light of the concern inherent in any misappropriation of trade secrets claim that, in pursuing litigation, the alleged trade secret not be revealed in a public document such as the complaint, *see Glaxo Inc. v. Novopharm Ltd.*, 931 F. Supp. 1280, 1301 (E.D.N.C. 1996), we note at this point that our analysis of plaintiffs' claim is entirely dependent upon the extremely general nature of plaintiffs' allegations. There exists a wide

gulf between plaintiffs' description of its alleged trade secrets as "original ideas and concepts for dance productions" and "marketing strategies and tactics," and exposure or compromise of the critical details of those alleged trade secrets. If plaintiffs had provided additional descriptors to put defendants and the courts on notice as to which "original ideas and concepts for dance productions" and "marketing strategies and tactics," were allegedly misappropriated, then we would have a different claim before us with the potential for a different outcome.

Additionally, the only allegation of secrecy in plaintiffs' amended complaint is that "Plaintiffs shared this information with Defendants Bogosavac and Divljak in confidence." That plaintiff shared the information at issue with the dancer defendants with nothing more than an expectation of confidentiality is insufficient to establish that the information was the "subject of efforts that [were] reasonable under the circumstances to maintain its secrecy." *Id.* § 66-152(3)(b). Plaintiffs' amended complaint is devoid of any allegation of a method, plan, or other act by which they attempted to maintain the secrecy of the alleged trade secrets. For all of these reasons, plaintiffs failed to allege the existence of a trade secret in their amended complaint.

[3] We next address the Metropolitan defendants' motion to dismiss plaintiffs' claim for unfair and deceptive practices (UDP). The Business Court concluded that plaintiffs failed to allege egregious or aggravating circumstances essential to the claim because plaintiffs did not sufficiently plead their claim for tortious interference with contract or misappropriation of trade secrets. On appeal from the dismissal of their UDP claim, plaintiffs argue only that the Business Court should not have dismissed the claim because they pleaded valid claims for tortious interference with contract and misappropriation of trade secrets. We disagree.

We have recognized an action for UDP based on the provision of the General Statutes that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." *Id.* § 75-1.1(a) (2017); *see Dalton v. Camp*, 353 N.C. 647, 655-56, 548 S.E.2d 704, 710 (2001). To plead a valid claim for UDP, "a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton*, 353 N.C. at 656, 548 S.E.2d at 711 (citing *Spartan Leasing Inc. v. Pollard*, 101 N.C. App. 450, 461, 400 S.E.2d 476, 482 (1991)). "The determination of whether an act or practice is an unfair or deceptive practice that violates N.C.G.S. § 75-1.1 is a question of law for the court." *Gray*

v. N.C. Ins. Underwriting Ass'n, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000) (citing *Ellis v. N. Star Co.*, 326 N.C. 219, 226, 388 S.E.2d 127, 131 (1990)).

Here the unfair or deceptive acts alleged in the amended complaint were that the Metropolitan defendants had "maliciously, deliberately, secretly, wantonly, recklessly, and unlawfully solicit[ed] and subsequently hir[ed] Plaintiffs' employees, Bogosavac and Divljak, and misappropriat[ed] Plaintiffs' trade secrets for their own benefit." Plaintiffs made no further allegations of specific unfair or deceptive acts. Because we determined that plaintiffs failed to state a valid claim for tortious interference with contract or misappropriation of trade secrets, we necessarily must conclude that plaintiffs also failed to adequately allege that the Metropolitan defendants "committed an unfair or deceptive act or practice." *Dalton*, 353 N.C. at 656, 548 S.E.2d at 711. Consequently, plaintiffs have not stated a valid claim for UDP.

[4] We turn next to plaintiffs' claims for civil conspiracy against all defendants. The Business Court dismissed the claim against the dancer defendants on the grounds that a civil conspiracy claim must be based on an underlying claim and the underlying claim for fraudulent misrepresentation—the only applicable, surviving claim—was based on allegations of fraud completely unrelated to the alleged, conspiratorial agreement between the dancer defendants and Metropolitan defendants. The Business Court then dismissed the civil conspiracy claim against the Metropolitan defendants on the grounds that all underlying tort claims against the Metropolitan defendants also had been dismissed. On appeal, plaintiffs argue that they pleaded a valid claim for civil conspiracy because that claim rested on plaintiffs' legitimate claims against all defendants based on the underlying tort of misappropriation of trade secrets. We disagree.

"A civil action for conspiracy is an action for damages resulting from acts committed by one or more of the conspirators pursuant to the formed conspiracy, rather than the conspiracy itself." *Burton v. Dixon*, 259 N.C. 473, 476, 131 S.E.2d 27, 30 (1963). "To create civil liability for conspiracy there must have been a wrongful act resulting in injury to another committed by one or more of the conspirators pursuant to the common scheme and in furtherance of the objective." *Ridgeway Brands*, 362 N.C. at 444, 666 S.E.2d at 115 (quoting *Henry v. Deen*, 310 N.C. 75, 87, 310 S.E.2d 326, 334 (1984)). This is because a "conspiracy charged does no more than associate the defendants together and perhaps liberalize the rules of evidence to the extent that under the proper circumstances the acts of one may be admissible against all." *Henry*, 310 N.C. at 87, 310 S.E.2d at 334 (first citing *Shope v. Boyer*, 268 N.C. 401, 150

S.E.2d 771 (1966); then citing *Muse v. Morrison*, 234 N.C. 195, 66 S.E.2d 783 (1951)). Therefore, we have determined that a complaint sufficiently states a claim for civil conspiracy when it alleges "(1) a conspiracy, (2) wrongful acts done by certain of the alleged conspirators in furtherance of that conspiracy, and (3) injury as a result of that conspiracy." *Ridgeway Brands*, 362 N.C. at 444, 666 S.E.2d at 115 (citing *Muse*, 234 N.C. at 198, 66 S.E.2d at 785).

Two examples from our case law are instructive. We have held that a plaintiff "fail[ed] to allege any overt, tortious, or unlawful act which any defendant committed in furtherance of the conspiracy" when the defendants' attempt to bankrupt the plaintiff by "subscribing to stock" from a third-party supplier did not breach their agreement to "from time to time [ ] purchase *some* of [their] requirements of such parts and other articles as are warehoused and sold by [plaintiff]." *Shope*, 268 N.C. at 404-05, 150 S.E.2d at 773. In contrast, we also have held that a plaintiff sufficiently pleaded a cause of action for civil conspiracy when the plaintiff specifically alleged that the parties to the conspiracy concealed and falsified medical records—acts that "would amount to the common law offense of obstructing public justice." *Henry*, 310 N.C. at 87, 310 S.E.2d at 334 (citation omitted).

Plaintiffs here alleged in their amended complaint that the Metropolitan defendants reached an agreement with the dancer defendants according to which the latter "would unlawfully leave Plaintiffs' dance studio to come work for Defendants Metropolitan and Manlys, unlawfully solicit Plaintiffs' customers, and unlawfully disclose Plaintiffs' trade secrets to Metropolitan and Manlys in order to cripple or eliminate Plaintiffs as a competitor in the dance industry." Plaintiffs asserted that, as a result of the conspiracy, "Plaintiffs' business and reputation were significantly damaged."

Regarding the allegations that the dancer defendants unlawfully left plaintiffs to work for the Metropolitan defendants and that all defendants unlawfully solicited plaintiffs' customers, plaintiffs' amended complaint must fail because it lacks sufficient detail. It is unclear from the face of the amended complaint which laws were allegedly violated and how defendants violated them. To the extent these allegations of unlawfulness may be read to invoke plaintiffs' claim for tortious interference with contract as to the dancer defendants' alleged exclusive employment agreement and plaintiffs' claim for misappropriation of trade secrets as to the customer lists, we already have determined that plaintiffs failed to plead either of those claims sufficiently. The only remaining allegation of a wrongful act in furtherance of the conspiracy

is that the dancer defendants unlawfully disclosed plaintiffs' trade secrets to the Metropolitan defendants. As we have already determined that plaintiffs failed to allege a viable claim for misappropriation of trade secrets, we now conclude that plaintiffs did not plead any wrongful acts that were done in furtherance of the alleged conspiracy. Accordingly, the claims for civil conspiracy against all defendants necessarily fail.

[5] Next, we consider plaintiffs' claim for unjust enrichment against the Metropolitan defendants. The Business Court dismissed plaintiffs' unjust enrichment claim against the Metropolitan defendants on two grounds. First, the Business Court determined that plaintiffs could not seek a remedy in equity through their unjust enrichment claim while seeking the exact same damages at law through their breach of contract claim against the dancer defendants—a claim that survived defendants' motions to dismiss. Second, the Business Court determined that plaintiffs failed to plead that the Metropolitan defendants took any action to solicit or induce plaintiffs to incur the expenses alleged, which the Business Court found to be a necessary element of an unjust enrichment claim. On appeal, plaintiffs argue that they adequately stated a claim for unjust enrichment by alleging that the Metropolitan defendants accepted the benefit of employing the dancers without obtaining new visas and that plaintiffs did not procure the visas gratuitously. We disagree with plaintiffs' argument, and although we agree with the conclusion the Business Court reached, we base our decision on different grounds.

"The general rule of unjust enrichment is that where services are rendered and expenditures made by one party to or for the benefit of another, without an express contract to pay, the law will imply a promise to pay a fair compensation therefor." *Atl. Coast Line R.R. Co. v. State Highway Comm'n*, 268 N.C. 92, 95-96, 150 S.E.2d 70, 73, (1966) (first citing *Beacon Homes, Inc. v. Holt*, 266 N.C. 467, 146 S.E.2d 434 (1966); then citing *Dean v. Mattox*, 250 N.C. 246, 108 S.E.2d 541 (1959)). A claim for unjust enrichment "is neither in tort nor contract but is described as a claim in quasi contract or a contract implied in law." *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988). "The claim is not based on a promise but is imposed by law to prevent an unjust enrichment." *Id.* at 570, 369 S.E.2d at 556. "In order to establish a claim for unjust enrichment, a party must have conferred a benefit on the other party," and "[t]he benefit must not be gratuitous and it must be measurable." *Id.* at 570, 369 S.E.2d at 556 (citing *Britt v. Britt*, 320 N.C. 573, 359 S.E.2d 467 (1987)).

Plaintiffs stated in their amended complaint that "Defendants Metropolitan and Manlys have [ ] received the benefit of Plaintiffs' procurement of the O1-B work visas for Defendants Bogosavac and Divljak,

because they were able to employ Defendants Bogosavac and Divljak, though unlawfully, without paying for their O1-B work visas." This allegation is contradicted by the Form I-797A and Form I-797B from the United States Citizenship and Immigration Services, which plaintiffs attached to their amended complaint. Both forms indicate that petition approval for a nonimmigrant worker visa applies only to the employment outlined in the petition and that any change in a nonimmigrant worker's employment requires the filing of a new I-129 visa petition. Accordingly, if the Metropolitan defendants employed the dancer defendants without filing new petitions, no benefit was conferred on the Metropolitan defendants by plaintiffs because their petitions did not authorize the dancers' employment with the Metropolitan defendants. As a conferred benefit is a necessary element of a claim for unjust enrichment, plaintiffs' "complaint discloses some fact that necessarily defeats the plaintiff[s'] claim." *Wood*, 355 N.C. at 166, 558 S.E.2d at 494 (citing *Oates*, 314 N.C. at 278, 333 S.E.2d at 224).

[6] Finally, plaintiffs argue on appeal that the Manlys can be held liable in their individual capacities for the tort claims brought against Metropolitan Ballroom as a corporate entity. In the order and opinion below, the Business Court dismissed all claims against the Manlys that were based on the theory of piercing the corporate veil. Citing to our decision in *Green v. Freeman*, the Business Court correctly observed that "[t]he doctrine of piercing the corporate veil is not a theory of liability," 367 N.C. 136, 146, 749 S.E.2d 262, 271 (2013), and consequently that the theory is rendered inapposite when, as here, all underlying claims have been or should be dismissed. Indeed, in the absence of an underlying claim, "evidence of domination and control is insufficient to establish liability." *Id.* at 146, 749 S.E.2d at 271. Because plaintiffs have failed to state a valid, underlying claim for relief against the Metropolitan defendants, we agree with the Business Court that it is immaterial whether Metropolitan Ballroom or the Manlys, in their individual capacities, would be liable for those claims.

Pursuant to Rule 12(b)(6), we dismiss a complaint or any claim therein when the plaintiff "fail[s] to state a claim upon which relief can be granted." *Arnesen*, 368 N.C. at 448, 781 S.E.2d at 7 (alteration in original) (quoting N.C.G.S. § 1A-1, Rule 12(b)(6)). For the reasons stated above, we hold that plaintiffs failed to state valid claims for tortious interference with contract, unfair and deceptive practices, and unjust enrichment against the Metropolitan defendants. We also hold that plaintiffs failed to state valid claims for misappropriation of trade secrets and civil conspiracy against all defendants. Accordingly, we affirm, as modified

herein, the portions of the Business Court's order and opinion dismissing those claims and remand this case to that court for further proceedings consistent with this Court's opinion.

MODIFIED AND AFFIRMED; REMANDED.

Justice BEASLEY dissenting.

I dissent from the majority opinion to specifically highlight the problematic and muddled standards for North Carolina plaintiffs seeking to properly plead a claim for misappropriation of trade secrets. In this case this Court considered whether plaintiffs' description of their trade secrets as "original ideas and concepts for dance productions, marketing strategies and tactics, as well as student, client and customer lists and their contact information" was sufficient to put defendants on notice of trade secrets allegedly misappropriated. I believe that a complaint alleging the above is sufficient under our liberal pleading standards to put defendants on notice of the transactions and occurrences at issue.

The majority's reasoning and reliance on various authority conflate the North Carolina standards for Rule 12(b)(6) motions to dismiss, motions for preliminary injunction, and motions for summary judgment as well as other jurisdictions' standards regarding discovery. Notably, the majority relies on cases that are in various procedural postures, and in doing so, the majority validates a heightened pleading standard for a claim in which public disclosure of confidential information is a real concern for plaintiffs. Further, the majority's erroneous affirmation of the trial court's dismissal of this single claim is also the basis for the majority's affirmation of the trial court's dismissal of plaintiffs' unfair and deceptive trade practices and civil conspiracy claims against Metropolitan Ballroom and the Manlys in their individual capacities.[1] Therefore, I respectfully dissent.

The sufficiency of a claim for misappropriation of trade secrets is a matter of first impression for this Court. Generally, the North Carolina pleading standards require a "*short and plain* statement of the claim sufficiently particular to give the court and the parties *notice* of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief." N.C.G.S. § 1A-1, Rule 8(a)(1) (2017) (emphases added). This is not a difficult standard

1. Even if the misappropriation of trade secrets claim was sufficiently pleaded, I express no opinion regarding the sufficiency of the pleadings for these additional claims.

for plaintiffs to meet: "The complaint is construed liberally," *U.S. Bank Nat'l Ass'n v. Pinkney*, 369 N.C. 723, 726, 800 S.E.2d 412, 415 (2017), "view[ing] the allegations as true and . . . in the light most favorable to the non-moving party," *id.* at 726, 800 S.E.2d at 415 (alterations in original) (quoting *Kirby v. NC DOT*, 368 N.C. 847, 852, 786 S.E.2d 919, 923 (2016)), and the claim is not dismissed "unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief," *Holloman v. Harrelson*, 149 N.C. App. 861, 864, 561 S.E.2d 351, 353 (2002) (alteration in original) (quoting *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987)), *disc. rev. denied*, 355 N.C. 748, 565 S.E.2d 665 (2002). Rule 12(b)(6) "generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery," *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 166 (1970) (quoting *Am. Dairy Queen Corp. v. Augustyn*, 278 F. Supp. 717, 721 (N.D. Ill. 1967)), such as "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim," *Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted).

To sufficiently plead a prima facie claim for misappropriation of trade secrets, a plaintiff must allege defendant (1) "[k]nows or should have known of the trade secret," and (2) "[h]as had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner." N.C.G.S. § 66-155 (2017). There is no statutory heightened pleading standard for misappropriation of trade secrets, *see id.* § 1A-1, Rule 9 (2017), and additional guidance from the Court of Appeals on pleading this particular claim rests on cases evaluating the issue from an entirely different procedural posture than a motion to dismiss. In *Washburn v. Yadkin Valley Bank & Trust*, our Court of Appeals quoted language from *VisionAIR, Inc. v. James* to establish a pleading standard now propounded by the majority of this Court: "a plaintiff must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating," " *Washburn*, 190 N.C. App. 315, 326, 660 S.E.2d 577, 585 (2008) (quoting *VisionAIR*, 167 N.C. App. 504, 510, 606 S.E.2d 359, 364 (2004)), *disc. rev. denied*, 363 N.C. 139, 674 S.E.2d 422 (2009), and "a complaint that makes general allegations in sweeping and conclusory statements, without specifically identifying the trade secrets allegedly misappropriated, is 'insufficient to state a claim for misappropriation of trade secrets,' " *id.* at 327, 660 S.E.2d at 585-86 (quoting *VisionAIR*, 167 N.C. App. at 511, 606 S.E.2d at 364).

There are two problems with relying on this language from *Washburn* to establish a pleading standard: (1) this language from *VisionAIR* is dicta because *VisionAIR* evaluated the merits of the misappropriation of trade secrets claim for the purposes of issuing a preliminary injunction, *see VisionAIR*, 167 N.C. App. at 510-11, 606 S.E.2d at 364, and (2) this language from *VisionAIR* quotes another preliminary injunction case for this proposition, *see id.* at 511, 606 S.E.2d at 364 (citing *Analog Devices, Inc. v. Michalksi*, 157 N.C. App. 462, 468-70, 579 S.E.2d 449, 453-54 (2003)).

It is important to note that

> [t]he standards under Rule 12(b)(6) are dramatically different than those for issuance of a preliminary injunction. While a motion for a preliminary injunction requires a showing of a likelihood of success on the merits, requiring more than conclusory allegations, it is well established that "[w]ith the adoption of 'notice pleading,' mere vagueness or lack of detail is no longer ground for allowing a motion to dismiss."

Barbarino v. Cappuccine, Inc., 219 N.C. App. 400, 722 S.E.2d 211, 2012 WL 698373, at *4 (unpublished) (second alteration in original) (quoting *Gatlin v. Bray*, 81 N.C. App. 639, 644, 344 S.E.2d 814, 817 (1986)), *aff'd per curiam*, 366 N.C. 330, 734 S.E.2d 570 (2012). Yet much of the majority's reasoning on this issue conflates not only these two standards, but its reasoning also conflates cases evaluating motions for summary judgment with the issue at hand. *See VisionAIR*, 167 N.C. App. at 510-11, 606 S.E.2d at 364 (evaluating whether a plaintiff was likely to succeed on the merits of its misappropriation of trade secrets claim in an appeal from an order denying a preliminary injunction); *see also Asheboro Paper & Packaging, Inc. v. Dickinson*, 599 F. Supp. 2d 664, 676-78 (M.D.N.C. 2009) (preliminary injunction); *UBS PaineWebber, Inc. v. Aiken*, 197 F. Supp. 2d 436, 446-48 (W.D.N.C. 2002) (preliminary injunction); *Washburn*, 190 N.C. App. at 325-27, 660 S.E.2d at 585-86 (applying standard from *VisionAIR* to a Rule 12(b)(6) motion to dismiss); *Analog Devices*, 157 N.C. App. at 468-70, 472, 579 S.E.2d at 453-54, 455 (preliminary injunction); *Combs & Assocs., v. Kennedy*, 147 N.C. App. 362, 370-71, 555 S.E.2d 634, 640 (2001) (summary judgment); *NovaCare Orthotics & Prosthetics E., Inc. v. Speelman*, 137 N.C. App. 471, 477-78, 528 S.E.2d 918, 922 (2000) (preliminary injunction). Beyond announcing a heightened pleading requirement, the majority now requires *evidence* at the pleading stage showing the plaintiff took steps to keeps its trade secrets confidential. That has never been the law in North Carolina; the only

cases requiring a plaintiff to affirmatively *prove* efforts to maintain the secrecy of a trade secret were decided at the preliminary injunction or summary judgment stage.

Succeeding on motions for both summary judgment and preliminary injunction require *proof* on the merits of the claim, while our pleading standards merely require a plaintiff to allege a "short and plain statement of the claim" giving the trial court and the defendant *notice* of the transactions or occurrences the plaintiff *intends to prove*. *Compare* N.C.G.S. § 1A-1, Rule 8(a)(1) *with id.* § 1A-1, Rule 56(c) (2017) (stating summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law"), *and Ridge Cmty. Inv'rs, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (explaining a preliminary injunction will issue only upon the movant's showing a "*likelihood* of success on the merits of his case").

By definition, trade secrets are

> business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that . . . [d]erives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use[,] and . . . [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.C.G.S. § 66-152(3) (2017). Our Court of Appeals has held that "customer lists and their contact information" constitute trade secrets under the definition established in subsection 66-152(3). *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 174 N.C. App. 49, 55, 620 S.E.2d 222, 227 (2005) (stating that "customer information, preferred customer pricing, employees' salaries, equipment rates, fleet mix information, budget information and structure of the business" constitute trade secrets under the Trade Secrets Protection Act), *petition for disc. rev. dismissed*, 360 N.C. 296, 629 S.E.2d 289 (2006); *Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc.*, 160 N.C. App. 520, 525, 586 S.E.2d 507, 511 (2003) (noting that "information regarding customer lists, pricing formulas and bidding formulas can qualify as" a trade secret); *State ex rel. Utils. Comm'n v. MCI Telecomms. Corp.*, 132 N.C. App. 625, 634, 514 S.E.2d 276, 282 (1999) (concluding that a "compilation of information"

involving customer data and business operations which has "actual or potential commercial value from not being generally known" is sufficient to constitute a trade secret); *Drouillard v. Keister Williams Newspaper Servs.*, 108 N.C. App. 169, 174, 423 S.E.2d 324, 327 (1992) (concluding customer lists and pricing and bidding formulas can constitute trade secrets), *disc. rev. denied and cert. dismissed*, 333 N.C. 344, 427 S.E.2d 617 (1993). Because these decisions have recognized that customer lists can constitute trade secrets, it is unreasonable to conclude that a plaintiff cannot rely on these holdings to plead its claims. Nonetheless, the majority again conflates the summary judgment standard, *see Combs & Assocs., Inc.*, 147 N.C. App. at 368-71, 555 S.E.2d at 639-40, and the preliminary injunction standard, *see NovaCare Orthotics*, 137 N.C. App. at 477-78, 528 S.E.2d at 922, with the Rule 12(b)(6) motion to dismiss standard by requiring plaintiffs to "come forward with . . . evidence to show that [they] took . . . special precautions to ensure the confidentiality of [their] customer information."

Further, the Court of Appeals, North Carolina business bourts, and federal courts exercising diversity jurisdiction applying North Carolina law have also treated "marketing" strategies as trade secrets. *See Med. Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 658-59, 670 S.E.2d 321, 328-29 (2009); *Bldg. Ctr., Inc. v. Carter Lumber, Inc.*, No. 16 CVS 4186, 2016 WL 6142993, at *4 (N.C. Super. Ct. Mecklenburg County (Bus. Ct.) Oct. 21, 2016) (unpublished); *see also Olympus Managed Health Care, Inc. v. Am. Housecall Physicians, Inc.*, 853 F. Supp. 2d 559, 572 (W.D.N.C. 2012); *Merck & Co. v. Lyon*, 941 F. Supp. 1443, 1456-57 (M.D.N.C. 1996). The majority's dismissal of this part of the allegation without additional consideration of these cases is error.

Though there is no support in North Carolina for the premise that "original ideas and concepts for dance productions" constitute trade secrets, there is no authority that they are decidedly not, and similar information has been valued and protected when former employees accept similar employment from competitors. *See Amdar, Inc. v. Satterwhite*, 37 N.C. App. 410, 413, 416, 246 S.E.2d 165, 166, 168, *disc. rev. denied*, 295 N.C. 645, 248 S.E.2d 249 (1978) (affirming trial court's award of preliminary injunctive relief prohibiting defendant-dance instructor from accepting employment in any capacity in any dance studio or school, giving instruction on dancing in any form whatsoever, and from competing with the business of the plaintiff in any other way, which included prohibiting the defendant from using or disclosing the plaintiff's trade secrets which included teaching techniques and sales methods). A forecast of the merits of a case like this reveals that

performers and businessmen in the variety arts are not likely to receive protection under the Trade Secrets Protection Act because once performed, the productions can be re-created through reverse engineering and are observable by the public. *See* N.C.G.S. § 66-155; *see also* Sara J. Crasson, *The Limited Protections of Intellectual Property Law for the Variety Arts: Protecting Zacchini*, *Houdini*, *and Cirque du Soleil*, 19 Vill. Sports & Ent. L.J. 73, 77, 111-12 (2012). But in liberally construing the complaint in this case, there is no indication that these productions had actually been performed. The majority is correct that "[t]here is no presumption that a thing is a secret," *Arthur Murray Dance Studios of Cleveland*, *Inc. v. Witter*, 105 N.E.2d 685, 709 (Ohio Ct. Com. Pl. 1952); however, there is also no presumption that any particular idea has been disclosed.

In *Washburn*, a case cited by the majority that actually evaluated a complaint under a Rule 12(b)(6) standard (though a heightened standard as per its reliance on *VisionAIR*), the complaint's description of trade secrets that led the court to conclude that the claim was not pleaded with sufficient particularity consisted of "confidential client information" and "confidential business information." *Washburn*, 190 N.C. App. at 327, 660 S.E.2d at 586. These are examples of "sweeping and conclusory" statements that the court intended to fail under Rule 12(b)(6). In contrast, the allegations here provided more specific details regarding both client and business information to more particularly describe the trade secrets as "original ideas and concepts for dance productions, marketing strategies and tactics, as well as student, client and customer lists and their contact information." Because this description is sufficient to put defendants on notice of the transactions and occurrences at issue, I cannot join the majority.

With this case this Court had an opportunity to correct the faulty logic that for over a decade has resulted in the substitution of a preliminary injunction standard for our general pleading standard governing this particular claim. Instead, the majority has validated a heightened pleading standard for a misappropriation of trade secrets claim with no discussion as to why it believes it is necessary to do so. " '[T]he term trade secret is one of the most elusive and difficult concepts in the law to define' and the "question of whether an item taken . . . constitutes a trade secret is of the type normally resolved by a fact finder after a full presentation of evidence from each side.' " Eric D. Welsh, *Betwixt and Between: Finding Specificity in Trade Secret Misappropriation Cases* (Am. Bar Ass'n, Aug. 20, 2015), http://apps.americanbar.org/litigation/committees/businesstorts/articles/

summer2015-0815-specificity-trade-secret-misappropriation-cases.html [hereinafter *Betwixt and Between*] (ellipses in original) (quoting *Furmanite Am., Inc. v. T.D. Williamson, Inc.*, 506 F. Supp. 2d 1134, 1141 (M.D. Fla. 2007) (internal quotation marks omitted). Because I believe we should not reject plaintiffs' misappropriation of trade secrets claim at this early stage in the proceeding given our notice pleading standard,[2] I respectfully dissent.

2. An alternative to requiring a heightened pleading standard to protect defendants from unwarranted discovery, while also allowing plaintiffs to proceed with their claim at this early stage, may be to require plaintiffs to identify the trade secret with more specificity prior to discovery. Instead of using Rule 12(b)(6), defendants could challenge the claim "either through a re-sequencing of discovery or a motion for a more definite statement coupled with a stay of discovery." *Betwixt and Between*.

TATITA M. SANCHEZ	)	
	)	
v.	)	From Johnston County
	)	
COBBLESTONE HOMEOWNERS ASSOCIATION OF CLAYTON, INC., A NORTH CAROLINA NON-PROFIT CORPORATION	)	
_____	)	
	)	
FRANK CHRISTOPHER	)	
	)	
v.	)	From Johnston County
	)	
COBBLESTONE HOMEOWNERS ASSOCIATION OF CLAYTON, INC., A NORTH CAROLINA NON-PROFIT CORPORATION	)	
_____	)	
	)	
VINCENT FRANKS, JR.	)	
	)	
v.	)	From Johnston County
	)	
COBBLESTONE HOMEOWNERS ASSOCIATION OF CLAYTON, INC., A NORTH CAROLINA NON-PROFIT CORPORATION	)	
_____	)	
	)	
ROBERT SAIN AND JENNIFER SAIN	)	
	)	
v.	)	From Johnston County
	)	
COBBLESTONE HOMEOWNERS ASSOCIATION OF CLAYTON, INC., A NORTH CAROLINA NON-PROFIT CORPORATION	)	
_____	)	
	)	
DENNIS DRAUGHON AND MEGAN DRAUGHON	)	
	)	
v.	)	From Johnston County
	)	
COBBLESTONE HOMEOWNERS ASSOCIATION OF CLAYTON, INC., A NORTH CAROLINA NON-PROFIT CORPORATION	)	

Appeal and Error—sparse record—Supreme Court's constitutional and inherent authority—Court of Appeals decision—no precedential value

Where the record in a case was too sparse for adequate judicial review, the Supreme Court expressed no opinion on the merits of the case and exercised its constitutional and inherent authority to order that the decision of the Court of Appeals in the case had no precedential value.

No. 374A16

ORDER

The Court determines that the record in this case is too sparse for adequate judicial review and provides an insufficient basis upon which to create binding precedent. We note that appellants have not challenged any of the trial court's findings of fact, and we decline to upset the ruling of the trial court on this record. We express no opinion on the merits of the issues presented in this case but instead dismiss the appeal and exercise our constitutional and inherent authority to order that the decision of the Court of Appeals in this case, *Sanchez v. Cobblestone Homeowners Ass'n of Clayton, Inc.*, ___ N.C. App. ___, 791 S.E.2d 238 (2016), has no precedential value.

By order of the Court in Conference, this the 6th day of April, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of April, 2018.

s/Amy Funderburk

AMY FUNDERBURK
Clerk of the Supreme Court

STATE OF NORTH CAROLINA
v.
DYQUAON KENNER BRAWLEY

No. 370A17

Filed 6 April 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. ___, 807 S.E.2d 159 (2017), vacating a judgment entered on 21 September 2016 by Judge Christopher W. Bragg in Superior Court, Rowan County. Heard in the Supreme Court on 12 March 2018.

Joshua H. Stein, *Attorney General*, *by Teresa M. Postell*, *Assistant Attorney General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by Amanda S. Zimmer*, *Assistant Appellate Defender*, *for defendant-appellee.*

PER CURIAM.

The decision of the Court of Appeals is reversed for the reasons stated in the dissenting opinion, and this case is remanded to the Court of Appeals for consideration of defendant's argument regarding the restitution ordered by the trial court.

REVERSED AND REMANDED.

STATE v. CHINA

[370 N.C. 627 (2018)]

STATE OF NORTH CAROLINA
v.
NATHANIEL MALONE CHINA

No. 95A17

Filed 6 April 2018

Kidnapping—restraint—actions after sexual assault

The trial court did not err by denying defendant's motion to dismiss a second-degree kidnapping charge, because there was sufficient evidence of restraint that was separate and apart from that inherent in the commission of the first-degree sex offense to support the kidnapping conviction. Taken in the light most favorable to the State, the evidence showed that defendant positioned himself on top of the victim on a bed, punched him until he was stunned, and penetrated him. The victim then swung and kicked at the defendant, defendant jumped off the victim, grabbed him by the ankles, yanked him off the bed, and kicked and stomped the victim with an accomplice without a further attempt at sexual assault. Defendant's actions after the victim swung at him constituted an additional restraint.

Justice BEASLEY dissenting.

Justice MORGAN dissenting.

Justice BEASLEY joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 797 S.E.2d 324 (2017), finding no error in part and vacating and remanding in part judgments entered on 5 February 2016 by Judge Henry W. Hight, Jr. in Superior Court, Durham County. Heard in the Supreme Court on 12 December 2017.

Joshua H. Stein, Attorney General, by Grady L. Balentine, Jr., Special Deputy Attorney General, for the State-appellant.

Richard Croutharmel for defendant-appellee.

HUDSON, Justice.

Defendant Nathaniel Malone China was convicted by a jury on 1 February 2016 of a number of offenses, including felonious breaking or entering, first-degree sexual offense, second-degree kidnapping, misdemeanor assault inflicting serious injury, and intimidating a witness. Here we must decide whether there was sufficient evidence of restraint that was separate and apart from that inherent in the commission of the first-degree sex offense to support the kidnapping conviction. The Court of Appeals concluded that there was not and vacated defendant's conviction for second-degree kidnapping. *State v. China*, ___ N.C. App. ___, ___, 797 S.E.2d 324, 328-30 (2017). Because we conclude that the evidence of restraint beyond that inherent in the commission of the sex offense did suffice, we reverse the decision of the Court of Appeals.

Factual and Procedural Background

In 2008 defendant began a romantic relationship with Nichelle Brooks. At some point thereafter, defendant was sent to prison. During his incarceration, until the summer of 2013, defendant continued to talk occasionally with Ms. Brooks by telephone. On one of these phone calls, Ms. Brooks, who was then involved with Mark,[1] informed defendant that she had begun a new relationship. Nonetheless, defendant called Ms. Brooks after his release from prison seeking to resume their prior relationship. Ms. Brooks agreed to meet with defendant at her apartment, hoping to make clear that their relationship was over. Later that day, defendant met Ms. Brooks at her apartment, spent the night, and then left the following morning.

During this time, Ms. Brooks asked Mark not to visit her for a few days so that she could "get things in order" with defendant. Believing that she had successfully ended her relationship with defendant, Ms. Brooks told Mark that he could return to her apartment. Mark visited Ms. Brooks on 14 October 2013 and spent the night at her apartment. The following morning, 15 October, Mark was still asleep when Ms. Brooks left to take her daughter to the bus stop and to go to school at Durham Beauty Academy.

Mark awoke when he heard people outside of the apartment. He looked out the window and, not seeing anything of concern, returned to bed. Moments later, Mark heard a knock; he went to the door, looked through the peephole, and saw two men he did not recognize. At trial, Mark identified one of these men as defendant. As Mark made his way

1. Like the Court of Appeals, we refer to the victim here by the pseudonym "Mark" for simplicity and to protect his privacy.

back to the bedroom, he heard banging on the door, enough to cause the door to shake. Mark began to dress in his work uniform, when he heard a loud boom as the door was kicked in.

Defendant rushed into the apartment and ran towards the bedroom, cursing at Mark. Before Mark had a chance to defend himself, defendant punched him in the face, knocking him sideways onto the bed. Defendant then got on the bed and on top of Mark, continuing to curse and strike Mark in the face with his fist. Defendant was hitting Mark solely in the face up to this point, and the last blow caused Mark to roll over completely onto his stomach. At that point, defendant punched Mark in the back of the head, stunning him. Defendant then pulled down Mark's pants and anally penetrated him three times with his penis.

Mark then swung his right arm to get defendant off of him, and defendant "jumped off of" Mark. While Mark was "kicking away" at defendant, defendant grabbed him by the ankles, yanking him off the bed and causing the back of Mark's head to hit the floor. Defendant called to his companion, who came into the room; together they began "kicking and stomping" Mark, who was on the floor with his back pressed against a dresser. Mark testified that the two men were kicking and stomping "[m]y face, my head, my back, my ribs, my legs, my knees. . . . It was everywhere." During this time, Mark "was balling [his body] up" trying to protect himself. Eventually, defendant and the other man stopped kicking, and Mark quickly got up and ran out of the apartment. Mark still had his keys in his pocket, and although he was dizzy and bleeding badly, he ran to his car and was able to drive to his place of employment for help. Mark woke up at Duke Hospital in a significant amount of pain. In addition to the injuries to his face, Mark testified that his "ribs were really sore" and his knees were "really messed up," that he "couldn't walk, really," and that he was forced "to crawl to the bathroom at home to go to the bathroom" for the next two to three weeks. Mark also suffered emotional injuries as a result of the incident.

On 4 November 2013, defendant was indicted in Durham County on charges of felonious breaking or entering, felonious assault inflicting serious bodily injury, and first-degree kidnapping. The indictment for kidnapping alleged that defendant "unlawfully, willfully and feloniously did kidnap [Mark], a person over the age of sixteen years, without his consent, by unlawfully restraining him for the purpose of facilitating the commission of a felony, doing serious bodily harm to [Mark], and terrorizing [Mark]." On 7 April 2014, defendant was indicted on charges of first-degree sexual offense, crime against nature, and intimidating a witness. A separate indictment on 1 June 2015 charged defendant as

an habitual felon. The district attorney dismissed the indictment for intimidating a witness, and defendant agreed to proceed on that charge under a criminal bill of information. Additionally, the State dismissed the charge of crime against nature before trial.

Defendant was tried in the Superior Court in Durham County during the criminal session that began on 26 January 2016 before Judge Henry W. Hight, Jr. At trial, the State chose to proceed on second-degree kidnapping instead of first-degree kidnapping. At the close of the State's evidence, defendant moved for dismissal of the charges. The trial court agreed to submit to the jury the charge of misdemeanor assault inflicting serious injury, as opposed to felonious assault inflicting serious bodily injury, and denied defendant's motion with respect to the other charges. On the charge of kidnapping, the trial court instructed the jury:

> Count number three. Under counter [sic] number three, the Defendant has been charged with second degree kidnaping. For you to find the Defendant guilty of this offense, the State must prove three things beyond a reasonable doubt.
>
> First, that the Defendant unlawfully restrained [Mark], that is, restricted his freedom of movement,
>
> Second, that [Mark] did not consent to this restraint,
>
> And, third, the Defendant did this for the purpose of terrorizing [Mark]. Terrorizing means more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension.

On 1 February 2016, the jury found defendant guilty of felonious breaking or entering, misdemeanor assault inflicting serious injury, second-degree kidnapping, first-degree sexual offense, and intimidating a witness. Defendant then admitted to having attained habitual felon status. Judge Hight sentenced defendant to consecutive terms of 150 days for misdemeanor assault inflicting serious injury, 78 to 106 months for breaking and entering, 88 to 118 months for second-degree kidnapping, 336 to 416 months for first-degree sex offense, and 88 to 118 months for intimidating a witness. At the State's request, the trial court conducted a resentencing proceeding on 5 February 2016, at which Judge Hight arrested judgment on the misdemeanor assault inflicting serious injury conviction. Defendant appealed to the Court of Appeals.

At the Court of Appeals, defendant first argued that the trial court erred in allowing the jury to hear that he had been recently released from prison. *China*, ___ N.C. App. at ___, 797 S.E.2d at 327. The panel unanimously held that defendant did not preserve that issue for appeal; therefore, they did not reach the merits of his argument on that issue. *Id.* at ___, ___, 797 S.E.2d at 327-28, 330.

Defendant next argued that the trial court erred in denying his motion to dismiss the kidnapping charge because the evidence was insufficient to prove that any confinement or restraint was separate and apart from the force necessary to facilitate the sex offense. The Court of Appeals majority agreed, noting that this Court has previously opined that "certain felonies . . . cannot be committed without some restraint of the victim" and the statutory offense of kidnapping "was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes." *Id.* at ___, 797 S.E.2d at 329 (quoting *State v. Ripley*, 360 N.C. 333, 337, 626 S.E.2d 289, 292 (2006)). The majority concluded that the evidence here "describe[d] a sudden attack" that "took no more than a few minutes." *Id.* at ___, 797 S.E.2d at 329. Further, the majority rejected the State's contention that removal of the victim from the bed to the floor and the subsequent stomping and kicking of Mark was an action separate from the assaults themselves. *Id.* at ___, 797 S.E.2d at 329. The majority then concluded that "there is no evidence in the record that Mark was subjected to any restraint beyond that inherent in defendant's commission of first-degree sex offense and misdemeanor assault inflicting serious injury." *Id.* at ___, 797 S.E.2d at 329. Accordingly, the majority concluded that the trial court erred by denying defendant's motions to dismiss the kidnapping charge. *Id.* at ___, 797 S.E.2d at 329. The majority instructed the trial court on remand to vacate defendant's conviction for second-degree kidnapping and correct the judgments to retain defendant's consecutive sentences for his remaining convictions. *Id.* at ___, 797 S.E.2d at 329-30.

Writing separately, Judge Dillon concurred in part and dissented in part; he disagreed with the majority that there was insufficient evidence that defendant "restrained the victim *beyond* the restraint inherent to the sexual assault." *Id.* at ___, 797 S.E.2d at 330 (Dillon, J., concurring in part and dissenting in part). Judge Dillon noted that the removal of the victim from the bed to the floor occurred after defendant completed his sexual assault on the victim. *Id.* at ___, 797 S.E.2d at 330. Judge Dillon added, "*Then*, while the victim was on the floor, Defendant restrained the victim by beating and kicking the victim, preventing the victim

from getting up." *Id.* at ___, 797 S.E.2d at 330. In his dissent, Judge Dillon opined, "Granted, this separate restraint did not last long. But this restraint which occurred while the victim was on the floor was *not* inherent to the sexual assault which was completed while the victim was on the bed." *Id.* at ___, 797 S.E.2d at 330. The dissenting opinion also noted that while defendant was also convicted of assault, the trial court arrested judgment on the assault conviction. *Id.* at ___, 797 S.E.2d at 330 n.3. Accordingly, Judge Dillon would have held that the verdict and judgment for kidnapping should stand. *Id.* at ___, 797 S.E.2d at 330.

The State filed its appeal of right based on the dissent.

Analysis

The State argues that the trial court did not err in denying defendant's motion to dismiss the kidnapping charge because there was sufficient evidence of restraint that was separate and apart from that inherent in the commission of the sex offense. We agree.

When ruling on a defendant's motion to dismiss for sufficiency of the evidence, the trial court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (first citing *State v. Roseman*, 279 N.C. 573, 580, 184 S.E.2d 289, 294 (1971); then citing *State v. Mason*, 279 N.C. 435, 439, 183 S.E.2d 661, 663 (1971)). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Turnage*, 362 N.C. 491, 493, 666 S.E.2d 753, 755 (2008) (quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)). Furthermore, "the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009) (citing *State v. McCullers*, 341 N.C. 19, 28-29, 460 S.E.2d 163, 168 (1995)). Whether the State has presented substantial evidence is a question of law, which we review de novo. *State v. Cox*, 367 N.C. 147, 150-51, 749 S.E.2d 271, 274-75 (2013) (citations omitted).

The elements of kidnapping are defined by statute. *See Ripley*, 360 N.C. at 337, 626 S.E.2d at 292 ("The offense of kidnapping, as it is now codified in N.C.G.S. § 14-39, did not take form until 1975, when the General Assembly amended section 14-39 and abandoned the traditional common law definition of kidnapping for an element-specific definition."). Section 14-39 now provides, in relevant part:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . . .
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person[.]

N.C.G.S. § 14-39 (2017). Accordingly, to obtain a conviction for second-degree[2] kidnapping the State is required to prove that a defendant (1) confined, restrained, or removed from one place to another any other person, (2) unlawfully, (3) without consent, and (4) for one of the statutorily enumerated purposes.

Following the 1975 amendment to N.C.G.S. § 14-39, this Court addressed in *State v. Fulcher* whether application of the statute on the theory of "restraint" could result in a violation of the constitutional prohibition against double jeopardy. 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). There the Court explained:

> Such restraint, however, is not kidnapping unless it is . . . for one of the purposes specifically enumerated in the statute. One of those purposes is the facilitation of the commission of a felony.
>
> It is self-evident that certain felonies (*e.g.*, forcible rape and armed robbery) cannot be committed without some restraint of the victim. We are of the opinion, and so hold, that G.S. 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable

2. First-degree kidnapping is defined in N.C.G.S. § 14-39(b), which requires the State to prove, in addition to the elements set forth in subsection (a), at least one of the elements listed in subsection (b): "that the victim was not released in a safe place, was seriously injured, or was sexually assaulted." *State v. Bell*, 311 N.C. 131, 137, 316 S.E.2d 611, 614 (1984).

> feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy. . . . [W]e construe the word "restrain," as used in G.S. 14-39, to connote a restraint separate and apart from that which is inherent in the commission of the other felony.

Id. at 523, 243 S.E.2d at 351.[3] The Court recognized, however, that "two or more criminal offenses may grow out of the same course of action" and concluded that there is "no constitutional barrier . . . provided the restraint, which constitutes the kidnapping, is a separate, complete act, independent of and apart from the other felony." *Id.* at 523-24, 243 S.E.2d at 351-52. Furthermore, "[s]uch independent and separate restraint need not be, itself, substantial in time, under G.S. 14-39 as now written." *Id.* at 524, 243 S.E.2d at 352; *see also id.* at 522, 243 S.E.2d at 351 ("It is equally clear that the Legislature rejected our determinations . . . that, where the State relies upon . . . 'restraint,' such must continue 'for some appreciable period of time.' Thus, it was clearly the intent of the Legislature to make resort to a tape measure or a stop watch unnecessary in determining whether the crime of kidnapping has been committed.").

The Court has since elaborated on this issue, stressing in *State v. Pigott* that the "key question" is whether there is sufficient evidence of restraint, such that the victim is " 'exposed . . . to greater danger than that inherent in the [other felony] itself, . . . [or] is . . . subjected to the kind of danger and abuse the kidnapping statute was designed to prevent.' " 331 N.C. 199, 210, 415 S.E.2d 555, 561 (1992) (third, fourth, and fifth alterations in original) (quoting *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981)). In *Pigott* the defendant visited the victim (his employer) after midnight asking for a loan. *Id.* at 202, 415 S.E.2d at 557. After the victim refused, the defendant returned to the victim's apartment that same night with a gun. *Id.* at 202, 415 S.E.2d at 557. The

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3. Notably, the Court in *Fulcher* was specifically addressing the purposes enumerated in N.C.G.S. § 14-39(a)(2) ("Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony"), which contemplates another crime (the "other felony") that typically will be charged concurrently with the kidnapping. 294 N.C. at 523-24, 243 S.E.2d at 351-52. Nonetheless, this Court has applied the same principle to the enumerated purpose of "terrorizing" in N.C.G.S. § 14-39(a)(3). *See State v. Prevette*, 317 N.C. 148, 155-58, 345 S.E.2d 159, 164-66 (1986) (vacating the defendant's conviction for kidnapping for the purpose of terrorizing because the only evidence of restraint was an inherent and inevitable feature of the victim's murder, for which the defendant was separately convicted).

defendant threatened the victim with the gun and then "forced him to lie on his stomach and tied his hands behind his back." *Id.* at 210, 415 S.E.2d at 561. After searching the apartment for money, the defendant returned to the victim and asked him whether he had any more money. *Id.* at 210, 415 S.E.2d at 561. The victim responded that he did not, and the defendant then bound the victim's feet to his hands. *Id.* at 210, 415 S.E.2d at 561. The defendant then shot the victim in the head. *Id.* at 202, 210, 415 S.E.2d at 557, 561. At trial, the defendant was convicted of first-degree murder, armed robbery, first-degree arson, and first-degree kidnapping. *Id.* at 202, 415 S.E.2d at 556-57.

The defendant appealed directly to this Court, arguing that there was insufficient evidence of a restraint separate and apart from that inherent in the armed robbery. *Id.* at 208, 415 S.E.2d at 560. The Court disagreed, holding that

> all the restraint necessary and inherent to the armed robbery was exercised by threatening the victim with the gun. When defendant bound the victim's hands and feet, he "exposed [the victim to a] greater danger than that inherent in the armed robbery itself." This action, which had the effect of increasing the victim's helplessness and vulnerability beyond the threat that first enabled defendant to search the premises for money, constituted such additional restraint as to satisfy that element of the kidnapping crime.

Id. at 210, 415 S.E.2d at 561 (alteration in original) (quoting *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446). Accordingly, the Court affirmed the defendant's conviction for kidnapping. *Id.* at 210, 215, 415 S.E.2d at 561, 564.

Similarly, Mark's testimony here presented evidence which, taken in the light most favorable to the State, showed that "all the restraint necessary and inherent to the [sex offense] was exercised by" defendant's getting on the bed, positioning himself on top of Mark, and punching Mark in the face and head until Mark was stunned. *Id.* at 210, 415 S.E.2d at 561. In contrast, once Mark swung at defendant and defendant jumped off of Mark, defendant took additional action, "which had the effect of increasing [Mark's] helplessness and vulnerability beyond" the initial blows to Mark's head that enabled defendant to commit the sex offense. *Id.* at 210, 415 S.E.2d at 561. Specifically, while Mark was "kicking away" at defendant, defendant grabbed Mark by the ankles and yanked him off the bed, causing Mark's head to hit the floor. Then defendant did not attempt to further sexually assault Mark, who

was now on the floor pressed against a dresser, but instead defendant called to his companion, who came into the room, where the two of them proceeded to kick and stomp Mark over his entire body. Mark did not attempt to kick or swing at defendant again, but remained balled up on the floor until the kicking ceased. Defendant's actions after Mark swung at him constituted an additional restraint, *see Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351 (describing "restraint" as a "restriction upon freedom of movement"); *see also State v. Beatty*, 347 N.C. 555, 559, 495 S.E.2d 367, 370 (1998) (describing "binding *and kicking*" as "forms of restraint" (emphasis added)), which "exposed [Mark] to greater danger than that inherent in the [sex offense] itself," *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446. For example, Mark testified that, as a result of the kicking and stomping on his knees and legs, which had not been targeted or harmed during the commission of the sex offense, his knees were "really messed up," rendering him unable to walk and forcing him "to crawl to the bathroom at home" for two to three weeks afterwards. Accordingly, we conclude that this additional restraint by defendant constituted "a restraint separate and apart from that which [was] inherent in the commission of the" sex offense. *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351.

In his brief before this Court, defendant largely focuses his argument not on whether there was evidence of restraint separate and apart from that inherent in the sex offense, but whether there was evidence of restraint separate and apart from that inherent in the commission of misdemeanor assault.[4] Defendant argues that although the decision in *Fulcher* contemplated "certain *felonies* [that] cannot be committed without some restraint of the victim," *id.* at 523, 243 S.E.2d at 351 (emphasis added), *Fulcher* should be equally applicable to *misdemeanor* offenses because the rationale was that principles of double jeopardy prohibit a defendant from being punished twice for the same conduct. *Id.* at 523, 243 S.E.2d at 351 ("[N.C.G.S. §] 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the

4. It is unclear whether defendant is conceding that the restraint involved in his kicking and stomping the victim on the floor was separate and apart from that inherent in the commission of the sex offense. In his brief, defendant asserts that "[i]f the trial court had left out the stomping of the feet from the misdemeanor assault inflicting serious injury jury charge, the evidence would have supported a guilty verdict on the kidnapping charge. This is because the misdemeanor assault inflicting serious injury charge would be based totally on punches with fists, which all occurred before or during the sexual assault." On the other hand, defendant also alleges in his brief that "the force necessary to restrain [Mark] was an integral part of the sexual and physical assaults."

constitutional prohibition against double jeopardy."); *see also State v. Sparks*, 362 N.C. 181, 186, 657 S.E.2d 655, 659 (2008) ("The [Double Jeopardy] [C]lause protects against three distinct abuses: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, *and multiple punishments for the same offense.*" (alterations in original) (emphasis added) (quoting *State v. Thompson*, 349 N.C. 483, 495, 508 S.E.2d 277, 284 (1998))). Assuming *arguendo*, however, that *Fulcher* applies equally to misdemeanor offenses, here there was no double punishment, and no violation of the prohibition against double jeopardy, because judgment was arrested on the misdemeanor assault conviction.[5] *See*, *e.g.*, *State v. Freeland*, 316 N.C. 13, 23-24, 340 S.E.2d 35, 40-41 (1986) (stating that when the defendant's multiple convictions did unconstitutionally subject him to double punishment, the trial court on remand could remedy the violation by arresting judgment on either of the conflicting convictions).

We are careful to note that defendant's sole argument on appeal with regard to the conviction for kidnapping, both below and before this Court, is that the State presented insufficient evidence of the element of "restraint."[6] On this narrow issue, we conclude that the State presented sufficient evidence of the element of restraint that was separate and apart from that inherent in the commission of the sex offense.

For the reasons stated, we hold that the trial court did not err in denying defendant's motions to dismiss the charge of second-degree kidnapping. On this issue, we reverse the Court of Appeals and instruct that

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5. In spite of this, defendant argues that judgment was arrested on the misdemeanor assault conviction not because of any conflict with the kidnapping conviction, but because of a conflict with the "serious injury" element of the sex offense conviction. Yet, defendant cites to no case law, and we are not aware of any, regarding the relevance of this contention.

6. Defendant does not, for example, argue that the State presented insufficient evidence that any restraint by defendant, which was separate and apart from that inherent in the sex offense, was also for the purposes of terrorizing Mark. *See*, *e.g.*, *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986) ("Since kidnapping is a specific intent crime, the State must prove that the defendant unlawfully confined, restrained, or removed the person for one of the eight purposes set out in the statute."); *id.* at 745-46, 340 S.E.2d at 405-06 (concluding that when the defendant, in addition to making threats against the victim's life, "held the victim at gunpoint for almost three hours after inflicting a serious head injury upon her, during which time he threatened to shoot himself in her presence and in the presence of their three-year-old son, and he tried to get her to shoot him," the evidence was sufficient to support a finding that the defendant's purpose was to terrorize the victim).

court to reinstate the judgment of the trial court. The remaining issues addressed by the Court of Appeals are not before this Court and its decision as to these issues remains undisturbed.

REVERSED AND REMANDED.

Justice BEASLEY dissenting.

While I join in Justice Morgan's dissenting opinion, I write separately to discuss the majority's continued expansion of what constitutes sufficient evidence to support a conviction for kidnapping under N.C.G.S. § 14-39. The majority's reasoning permits the State, in future prosecutions, to sustain a conviction for second-degree kidnapping (a Class E felony)[1] with proof that the defendant engaged in an assault (ranging from a Class 2 to Class A1 misdemeanor)[2] which also had the effect of restraining the victim. Because I believe the majority's interpretation of N.C.G.S. § 14-39 transcends the bounds of the legislature's expressed intent, the statute's purpose, and notions of fundamental fairness, I respectfully dissent.

A person is guilty of kidnapping if he or she "unlawfully confine[s], restrain[s], or remove[s] from one place to another, any other person 16 years of age or over without the consent of such person," when "such confinement, restraint or removal is for the purpose of," *inter alia*, "[f]acilitating the commission of any felony or facilitating flight of any person following the commission of a felony," N.C.G.S. § 14-39(a)(2) (2017), or "terrorizing the person so confined, restrained or removed," *id.* § 14-39(a)(3) (2017).[3] However, recognizing that "certain felonies . . . cannot be committed without some restraint of the victim," this Court

1. N.C.G.S. § 14-39(b) (2017) (classifying second-degree kidnapping as a Class E felony).

2. *Compare* N.C.G.S. § 14-33(a) (2017) (classifying simple assault as a Class 2 misdemeanor) *with id.* § 14-33(c) (2017) (classifying various forms of aggravated assaults, including assault that inflicts serious injury, as Class A1 misdemeanors).

3. While N.C.G.S. § 14-39 provides other means of supporting a conviction for kidnapping, only subdivisions 14-39(a)(2) and (a)(3) are relevant to this discussion. While the jury was instructed under only subdivision 14-39(a)(3), restraint for the purpose of "terrorizing" the victim, our precedent analyzing situations in which the "restraint" used to establish kidnapping is inherent in the commission of other offenses committed by a defendant has developed under subdivision (a)(2), *see State v. Fulcher*, 294 N.C. 503, 523-24, 243 S.E.2d 338, 351-52 (1978), and has been applied to convictions under subdivision (a)(3), *see State v. Prevette*, 317 N.C. 148, 157-58, 345 S.E.2d 159, 165-66 (1986) (applying *Fulcher* to prohibit the State from using the same conduct to support a conviction for murder *and* the "restraint" element of kidnapping for the purpose of "terrorizing" the victim under subdivision (a)(3)).

has held that a restraint which is *inherent to* the commission of the felony which would otherwise supply the predicate felony under subdivision 14-39(a)(2) cannot also support a conviction for kidnapping. *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). Additionally, this Court has held that a restraint which *is inherent to another criminal offense committed by the defendant and for which the defendant is punished* cannot support a conviction for kidnapping even when the State proceeds under another provision of subsection 14-39(a) which does not require that the defendant restrain the victim for the purpose of committing a felony. *See State v. Prevette*, 317 N.C. 148, 157-58, 345 S.E.2d 159, 165-66 (1986).

In *Prevette* the defendant was convicted of first-degree murder and first-degree kidnapping. *Id.* at 149, 345 S.E.2d at 160. The State presented evidence that the victim died as a result of suffocation after she was bound and gagged and her hands and feet were also restrained. *Id.* at 150-52, 345 S.E.2d at 161-62. Although the State proceeded on a theory of kidnapping based on the argument that the defendant restrained the victim for the purpose of terrorizing her, *see* N.C.G.S. § 14-39(a)(3), *and not* for the purpose of committing the murder, *see id.* § 14-39(a)(2), this Court held that the binding of the victim's hands and feet, "which prevented the removal of the gag," was *inherent to* the murder and could not support a separate conviction for kidnapping because "the restraint of the victim which resulted in her murder [was] indistinguishable from the restraint used by the State to support the kidnapping charge." *Prevette*, 317 N.C. at 157-58, 345 S.E.2d at 165-66. The Court in *Prevette* "examin[ed] the subject, language, and history" of the kidnapping and murder statutes and concluded that the legislature did not "intend[ ] to authorize punishment for kidnapping when the restraint necessary to accomplish the kidnapping was an inherent part of the first degree murder." *Id.* at 158, 345 S.E.2d at 165-66.

While *Fulcher* and *Prevette* were premised *in part* on the constitutional prohibition against double jeopardy,[4] *see Fulcher*, 294 N.C. at 523, 525, 243 S.E.2d at 351, 352; *Prevette*, 317 N.C. at 158, 345 S.E.2d at 166, both cases were actually decided on grounds of statutory interpretation.

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4. Of course, there is no double jeopardy violation associated with using defendant's assaultive conduct to supply the "restraint" element for kidnapping because, as the majority points out, the trial court arrested judgment on defendant's conviction for misdemeanor assault inflicting serious injury. The error instead stems from the fact that this conduct is insufficient under the statute to support a conviction for kidnapping *regardless* of whether defendant was convicted or sentenced for the assault offense

The Court in *Fulcher* and *Prevette* applied the long-accepted canon of statutory interpretation that, "[w]here one of two reasonable constructions of a statute will raise a serious constitutional question, it is well settled that our courts should adopt the construction that avoids the constitutional question." *State v. T.D.R.*, 347 N.C. 489, 498, 495 S.E.2d 700, 705 (1998) (first citing *In re Arthur*, 291 N.C. 640, 642, 231 S.E.2d 614, 616 (1977); then citing *In re Arcadia Dairy Farms, Inc.*, 289 N.C. 456, 465-66, 223 S.E.2d 323, 328-29 (1976); and then citing *Kent v. United States*, 383 U.S. 541, 557, 86 S. Ct. 1045, 1055 (1966)); *see also*, *e.g.*, *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (per curiam) (explaining that North Carolina courts "will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds"). Thus, the requirement that the "restraint" under subsection 14-39(a) used to support a kidnapping conviction must not be the same as the restraint inherent to another charged offense for which a defendant receives a sentence is contained within the statute itself under *Fulcher* and *Prevette*.

A proper construction of section 14-39, in light of this Court's concerns regarding the expansion of the crime of kidnapping beyond the legislature's intent, would also require that the restraint necessary to support a conviction for kidnapping go beyond an assault that has the incidental effect of restraining the victim. The statute, in relevant part, requires that the defendant restrain the victim *for the purpose* of "facilitating" a felony or "terrorizing" the victim. *See* N.C.G.S. § 14-39(a)(2), (3). Here the majority's interpretation permits defendant's assaultive conduct (pulling the victim off the bed and kicking the victim while he was on the floor) to satisfy the "restraint" element but makes no argument that defendant used this "restraint" *for the purpose of terrorizing the victim* beyond its recitation that the assaultive conduct "exposed [the victim] to [a] greater danger than that inherent in the [sex offense]" or "increas[ed] the victim's helplessness and vulnerability" beyond the earlier restraint used to commit the sex offense. *See State v. Pigott*, 331 N.C. 199, 210, 415 S.E.2d 555, 561 (1992). The majority's reasoning is tautological; assaultive conduct that takes place after a completed felony and has the effect of restraining the victim will *always* "expose[ ] [the victim] to [a] greater danger" or "increas[e] the victim's helplessness and vulnerability" because such conduct *is the greater danger*.

Undoubtedly, the defendant's reprehensible criminal conduct (breaking and entering into the residence, restraining the victim in order to commit the sex offense, and then later kicking the victim) had the effect of terrorizing the victim; "[t]his Court should not, however, permit

these 'bad facts' to lure it into making 'bad law.' " *N.C. Baptist Hosps., Inc. v. Mitchell*, 323 N.C. 528, 539, 374 S.E.2d 844, 850 (1988) (Meyer, J., dissenting). Importantly, the majority is only relying on the assaultive conduct defendant committed against the victim *after* the sex offense to support the "restraint" element. Although most assaults have the effect of terrorizing the victim, not all assaults are specifically engaged in for the purpose of terrorizing the victim, and—more importantly—not all assaults constitute kidnapping. Yet the majority's opinion would permit any assault that has the effect of confining or restraining the victim to be charged as kidnapping. *See State v. Dix*, 282 N.C. 490, 501, 193 S.E.2d 897, 903-04 (1973) (warning that an expansive definition of kidnapping which "overruns other crimes for which the prescribed punishment is less severe" may "create[ ] the potential for abusive prosecutions" by giving a prosecutor " 'naked and arbitrary power' to choose the crime [to] prosecute" (quoting *People v. Adams*, 34 Mich. App. 546, 560, 192 N.W.2d 19, 26 (1971), *aff'd in part and rev'd in part*, 389 Mich. 222, 205 N.W.2d 415 (1973))), *superseded by statute*, Act of June 25, 1975, ch. 843, 1975 N.C. Sess. Laws 1198 (rewriting N.C.G.S. § 14-39), *as recognized in Fulcher*, 294 N.C. at 521-23, 243 S.E.2d at 350-51.[5]

I would hold that defendant's assaultive conduct (pulling the victim off the bed and kicking him while he was on the floor) is insufficient to support a conviction for kidnapping. This factual scenario is not "the kind of danger and abuse the kidnapping statute was designed to prevent." *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981) (citing *Dix*, 282 N.C. 490, 193 S.E.2d 897); *cf. State v. Moore*, 315 N.C. 738, 745-46, 340 S.E.2d 401, 405-06 (1986) (holding that the evidence was sufficient to show that the defendant's restraint of the victim supported a conviction under N.C.G.S. § 14-39(a)(3) for "terrorizing" the victim when the defendant (1) had previously beaten the victim, (2) moved the victim from his car to his trailer, (3) threatened to shoot the victim if she tried to run, (4) stated he would kill the victim "before letting her take his children away from him," and (5) intermittently pointed a gun at himself or the victim during her confinement in his trailer for almost three hours); *State v. Rodriguez*, 192 N.C. App. 178, 187-89, 664 S.E.2d 654, 660-61 (2008) (holding that evidence was sufficient to show that the defendant's restraint of the victims supported a conviction under N.C.G.S. § 14-39(a)(3) when the defendant (1) "physically abused some of the victims" in

5. While *Dix* interpreted an earlier enactment of the kidnapping statute, *see Dix*, 282 N.C. at 492, 193 S.E.2d at 898 (citing N.C.G.S. § 14-39 (1969)), the thrust of the quoted language recognizing the unjust consequences of expanding the definition of the offense applies with equal force under the current statute.

close proximity to and within the earshot of other victims, (2) dunked one of the victims under water, (3) burned that victim "so severely that his skin was peeling," and (4) threatened other victims that they would suffer a similar fate if they did not follow his commands or if they contacted law enforcement). Therefore, I respectfully dissent.

Justice MORGAN dissenting.

I respectfully dissent from my learned colleagues in the majority who have determined that there was sufficient evidence of restraint beyond that which was inherent in defendant's commission of the first-degree sex offense to support the second-degree kidnapping conviction. In my view, the Court of Appeals was correct in its determination that the trial court erred in denying defendant's motion to dismiss the charge of second-degree kidnapping because the victim was not subjected to any restriction upon his freedom of movement that was separate and apart from the restraint which was an element of the first-degree sex offense. Accordingly, I would affirm the opinion of the majority of the Court of Appeals in this matter.

I agree with the majority's starting premise that in order to obtain a conviction for second-degree kidnapping, the State must prove that a defendant (1) confined, restrained, or removed from one place to another any other person (2) unlawfully, (3) without consent and (4) for one of the statutory purposes enumerated elsewhere in N.C.G.S. § 14-39, including the provisions in N.C.G.S. § 14-39(a)(2) that the "confinement, restraint or removal is for the purpose of . . . [f]acilitating the commission of any felony or facilitating flight of any person following the commission of a felony," and in N.C.G.S. § 14-39(a)(3) that the "confinement, restraint or removal is for the purpose of . . . [d]oing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person." N.C.G.S. § 14-39(a) (2017).

The crime of first-degree sex offense, as it was codified in N.C.G.S. § 14-27.4 at the time that defendant committed the criminal act,[1] was described in the statute as follows:

> (a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:

1. N.C.G.S. § 14-27.4 was rewritten and recodified as N.C.G.S. § 14-27.26 by Act of July 29, 2015, ch. 181, sec. 8, 2015 NC. Sess. Laws 460, 462 (applying to all offenses committed on or after Dec. 1, 2015).

(1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim; or

(2) With another person by force and against the will of the other person, and:

a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or

b. Inflicts serious personal injury upon the victim or another person; or

c. The person commits the offense aided and abetted by one or more other persons.

(b) Any person who commits an offense defined in this section is guilty of a Class B1 felony.

N.C.G.S. § 14-27.4 (2013).

The majority expressly acknowledges that the Court of Appeals referenced this Court's guidance rendered in *State v. Ripley*, 360 N.C. 333, 626 S.E.2d 289 (2006), regarding the criminal offense of kidnapping and the proper recognition of its elements as relates to other criminal offenses that may be committed during the same transaction of events in which an act of kidnapping occurs. As quoted by the appellate court majority below, we said in *Ripley*:

> It is self-evident that certain felonies (*e.g.*, forcible rape and armed robbery) cannot be committed without some restraint of the victim. We are of the opinion, and so hold, that G.S. 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. . . . [W]e construe the word "restrain," as used in G.S. 14-39, to connote a restraint separate and apart from that which is inherent in the commission of the other felony.

Id. at 337, 626 S.E.2d at 292 (italics and alterations in original) (quoting *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978)).

Our analysis in *Ripley* of this area of substantive criminal law governing the commission of multiple criminal offenses continued as follows:

> Additionally, this Court noted that more than one criminal offense can grow out of the same criminal transaction, but specifically held "the restraint, which constitutes the kidnapping, [must be] a separate, complete act, independent of and apart from the other felony." [*Fulcher*, 294 N.C.] at 524, 243 S.E.2d at 352; *see also State v. Beatty*, 347 N.C. 555, 559, 495 S.E.2d 367, 369 (1998) (noting "a person cannot be convicted of kidnapping when the only evidence of restraint is that 'which is an inherent, inevitable feature' of another felony such as armed robbery"[ ] (quoting *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351)[)].

Id. at 337-338, 626 S.E.2d at 292 (first alteration in original).

In the present case, it is clear that there is sufficient evidence in the trial record to support the jury's verdict that defendant is guilty of first-degree sex offense. In perpetrating this offense, defendant satisfied its elements by engaging in a sexual act with the victim by force and against the victim's will. Lifting the salient facts from the majority opinion on this point, defendant punched the victim in the face, knocking him sideways onto the bed. Defendant then got on the bed and on top of the victim, with defendant again using his fist to strike the victim in the face. After a blow from defendant caused the victim to roll over onto his stomach, defendant then stunned the victim with a punch to the back of the head, followed by defendant pulling down the victim's pants and anally penetrating the victim with his penis three times.

Though not a statutory element of the criminal offense of first-degree sex offense, restraint is the means by which defendant effectuated the crime by implementing the force that subverted the will of the victim. The criminal offense of second-degree kidnapping expressly includes restraint as one of the crime's elements delineated in N.C.G.S. § 14-39. Unfortunately, the majority is so occupied with the need to emphasize that a second-degree kidnapping can occur in conjunction with a first-degree sex offense—because restraint is required in the kidnapping offense but not inherent in the first-degree sex offense—that the majority fails to realize, under the unique facts and circumstances of the case at bar, that the restraint utilized to constitute the force and subvert the will of the victim is the same restraint employed in the full transaction of events that also yielded the miscalculated finding of second-degree kidnapping.

In addition, the majority improperly relied on *State v. Pigott*, 331 N.C. 199, 415 S.E.2d 555 (1992). The majority evaluated the actions of the defendant in *Pigott* in visiting the home of his employer, unsuccessfully

asking the employer for a loan, leaving the employer's home but returning with a gun, forcing the employer to lie on the floor, binding the employer's hands, ransacking the premises for money, subsequently binding the employer's feet to the employer's hands, shooting the employer in the head, looking around for more money, and then subsequently setting the employer's premises on fire. *Id.* at 202, 415 S.E.2d at 557. On appeal of the defendant's first-degree murder conviction to this Court, he unsuccessfully argued that it was error for the trial court to fail to dismiss the charge of first-degree kidnapping. *Id.* at 210, 415 S.E.2d at 561.

We held in *Pigott*, in the context of the armed robbery charge which the defendant also faced, that

> all the restraint necessary and inherent to the armed robbery was exercised by threatening the victim with the gun. When defendant bound the victim's hands and feet, he "exposed [the victim to a] greater danger than that inherent in the armed robbery itself." This action, which had the effect of increasing the victim's helplessness and vulnerability beyond the threat that first enabled defendant to search the premises for money, constituted such additional restraint as to satisfy that element of the kidnapping crime.

Id. at 210, 415 S.E.2d at 561 (alteration in original) (quoting *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981)). Based upon this analysis, this Court affirmed the defendant Pigott's first-degree kidnapping conviction.

In the instant case the majority adapts the factual circumstances of *Pigott* to justify its determination that separate and distinct acts of defendant here constituted "additional restraint": defendant's act of grabbing the victim by the ankles and yanking the victim off of the bed, which in turn caused the victim's head to hit the floor after the sex offense, and defendant's act of summoning his companion to join in kicking and stomping the victim's body. In stating that these actions of defendant amounted to an "additional restraint" which "exposed [Mark][2] to greater danger than that inherent in the [sex offense] itself," the majority concludes that this activity constituted "a restraint separate and apart from that which was inherent to the commission of the sex offense."

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2. This pseudonym was utilized by the appellate courts for simplicity and to protect the victim's privacy.

In attempting to align the case *sub judice* with *Pigott*, the majority buttresses the point of my dissenting view. There was a separate restraint of the victim employer in *Pigott* that went beyond the restraint inherent in the armed robbery offense itself so as to constitute the defendant's commission of first-degree kidnapping, in that the defendant intermittently perpetrated increasingly heightened levels of restrictions on the victim's freedom of movement while committing the armed robbery offense, namely: forcing the victim to lie on the floor after returning to the premises with a gun, looking for money after binding the victim's hands, continuing to look around for more money after binding the victim's feet to his hands and shooting the victim in the head as the victim continued to apparently survive this ordeal until the defendant ignited the fire that burned portions of the premises and generated deadly carbon monoxide fumes. *Id.* at 202, 415 S.E.2d at 560. On the other hand, there was no additional restraint which was employed by defendant to commit the first-degree sex offense because the requisite restraint was inherent in the perpetration of the crime. To the extent that the majority considers defendant's violence against the victim after the completion of the sex offense to constitute an "additional restraint" to justify second-degree kidnapping as a separate offense, such a strained view has no validity for four reasons: (1) N.C.G.S. § 14-39(a)(2) is not applicable, because the felony of first-degree sex offense was already completed such that the commission of second-degree kidnapping after the perpetration of the sex offense could not have facilitated the sex offense; (2) N.C.G.S. § 14-39(a)(2) also does not apply because the additional "restraint" was not for the purpose of "facilitating [defendant's] flight . . . following [his] commission of" the first-degree sex offense; rather, the evidence in the trial record shows that the victim ran out of the residence shortly after the two men stopped kicking him; (3) N.C.G.S. § 14-39(a)(3) likewise is not applicable, because the trial record does not afford this Court an opportunity to determine, on appellate review, at what points in time the victim's successive injuries occurred and when the terror that resulted in his emotional injuries were inflicted; and (4) at trial, the jury found defendant guilty as charged of misdemeanor assault inflicting serious injury which, coupled with the first-degree sex offense indictment and conviction appropriately identified all offenses for which defendant could be charged and convicted as a result of any injuries suffered by the victim during the entire transaction of events, and the trial court arrested judgment on the misdemeanor assault conviction.

As we opined in *Ripley* and its predecessor cases, use of the word "restrain" in N.C.G.S. § 14-39 means that the criminal restriction of one's freedom of movement must be separate and apart from the restraint

that is inherent in the commission of another felony. Under the facts and circumstances of this case, the restraint that was inherent in defendant's commission of the first-degree sex offense did not extend beyond the crime's parameters so as to support the jury's guilty verdict of second-degree kidnapping. Therefore, I would affirm the decision of the Court of Appeals.

Justice BEASLEY joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
WILLIAM SHELDON HOWELL

No. 455PA16

Filed 6 April 2018

Sentencing—misdemeanor possession of marijuana—elevation to felony

Under the reasoning of *State v. Jones*, 358 N.C. 473 (2004), and in light of the plain language of N.C.G.S. § 90-95(e)(3), possession of more than one-half but less than one and one-half ounces of marijuana in violation of N.C.G.S. § 90-95(d)(4) by a defendant with a prior conviction for an offense punishable under the Act is classified as a Class I felony for all purposes. The General Assembly intended for subdivision (e)(3) to establish a separate felony offense rather than merely to serve as a sentence enhancement of the underlying misdemeanor.

Justice BEASLEY dissenting.

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 898 (2016), reversing a judgment entered on 9 December 2015 by Judge Mark E. Powell in Superior Court, Transylvania County, and remanding for resentencing. Heard in the Supreme Court on 11 December 2017.

Joshua H. Stein, Attorney General, by Tracy Nayer, Assistant Attorney General, for the State-appellant.

Edward Eldred for defendant-appellee.

MORGAN, Justice.

In this case we are called upon to determine whether language in N.C.G.S. § 90-95(e)(3) of the North Carolina Controlled Substances Act ("the Act"), which provides that a Class 1 misdemeanor "shall be punished as a Class I felon[y]" when the misdemeanant has committed a previous offense punishable under the Act, procedurally enhances punishment for the misdemeanor offense or instead creates a substantive felony offense. Relying on our reasoning in *State v. Jones*, 358 N.C. 473, 598 S.E.2d 125 (2004), we conclude that the General Assembly intended for subdivision (e)(3) to establish a separate felony offense rather than merely to serve as a sentence enhancement of the underlying misdemeanor.

On 27 October 2014, defendant William Sheldon Howell was indicted for several offenses alleged to have been committed on 10 October 2014, including possession with intent to sell or deliver approximately fifteen grams of marijuana, maintaining a dwelling used for keeping and selling marijuana, and knowingly possessing with the intent to use drug paraphernalia. Also on 27 October 2014, defendant was indicted for attaining the status of habitual felon. One of the three underlying felonies listed in the habitual felon indictment was a 27 August 2003 conviction in Buncombe County for felonious possession with intent to sell or deliver marijuana. As a result of the events of 10 October 2014, on 15 June 2015, defendant was further indicted for (1) possessing over one-half ounce but less than one and one-half ounces of marijuana, a Class 1 misdemeanor under N.C.G.S. § 90-95(d)(4) of the Act, and (2) having been previously convicted of an offense under the Act, namely, the above-referenced August 2003 conviction in Buncombe County.

On 9 December 2015, defendant entered into a plea agreement with the State, in which defendant would (1) plead guilty to the N.C.G.S. § 90-95(d)(4) marijuana possession charge, (2) acknowledge his prior convictions in violation of the Act, and (3) admit his habitual felon status in exchange for the State's dismissal of other pending charges. In the Superior Court, Transylvania County, Judge Mark E. Powell accepted defendant's plea and entered a consolidated judgment on the charges, noting that, although the marijuana possession charge was "a Class 1 misdemeanor, . . . I'm treating it as a Class I felony because of the prior conviction. And that Class I felony because of the habitual felon status is punished as a Class E felony."[1] The trial court sentenced defendant

1. The habitual felon statute provides that a person convicted of a felony who has attained habitual felon status "must . . . be sentenced and punished as an habitual felon."

to an active term of twenty-nine to forty-seven months, suspended the period of incarceration, and placed defendant on supervised probation for thirty-six months.

Defendant appealed to the North Carolina Court of Appeals, where he argued that the trial court erred by enhancing his sentence for misdemeanor possession of marijuana to a Class I felony due to his prior conviction under the Act and then from a Class I felony to a Class E felony based on his habitual felon status. In an opinion filed on 6 December 2016, the Court of Appeals agreed, reversing and remanding the case for resentencing. *State v. Howell*, ___ N.C. App. ___, 792 S.E.2d 898 (2016). The Court of Appeals reasoned that, "while defendant's Class 1 misdemeanor [was] punishable as a felony under the circumstances present here, the substantive offense remain[ed] a Class 1 misdemeanor" and defendant's "habitual felon [status could not] be used to further enhance a sentence that [wa]s not itself a substantive offense." *Id.* at ___, 792 S.E.2d at 901.

The State sought discretionary review of the Court of Appeals decision, and this Court allowed the State's petition by order entered on 16 March 2017. When this Court looks at a determination of the Court of Appeals by way of discretionary review, our task "is to determine whether there is any error of law in the decision of the Court of Appeals and only the decision of that court is before us for review." *State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994) (citations omitted).

The State contends that, in failing to discuss and apply this Court's opinion in *Jones*, the reasoning of which the State asserts is controlling here, the Court of Appeals erroneously determined that N.C.G.S. § 90-95(e)(3) does not create a substantive felony offense. We agree with the State's interpretation of the applicability of our decision in *Jones* to the case at bar.

An explanation of our resolution of the issue in this appeal is facilitated by a brief review of three subsections of section 90-95 of the Act: N.C.G.S. § 90-95(a), (d), and (e). The first subsection contains general provisions that criminalize making, selling, delivering, and possessing controlled substances and counterfeit controlled substances. N.C.G.S. § 90-95(a)(1), (2) (2017). Pertinent to this case, the third subdivision of

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N.C.G.S. § 14-7.2 (2017). In turn, a defendant punished as an habitual felon receives a sentence four classes higher than the principal felony for which the person was convicted. *Id.* § 14-7.6 (2017).

subsection (a) makes it unlawful "[t]o possess a controlled substance." *Id.* § 90-95(a)(3) (2017).

The second of the cited subsections sets forth how violations of N.C.G.S. § 90-95(a)(3) are punished based upon what type of controlled substance is possessed. Under N.C.G.S. § 90-95(d), "any person who violates G.S. 90-95(a)(3) with respect to:"

> (1) A controlled substance classified in Schedule I shall be punished as a Class I felon. However, if the controlled substance is MDPV and the quantity of the MDPV is 1 gram or less, the violation shall be punishable as a Class 1 misdemeanor.
>
> (2) A controlled substance classified in Schedule II, III, or IV shall be guilty of a Class 1 misdemeanor. If the controlled substance exceeds four tablets, capsules, or other dosage units or equivalent quantity of hydromorphone or if the quantity of the controlled substance, or combination of the controlled substances, exceeds one hundred tablets, capsules or other dosage units, or equivalent quantity, the violation shall be punishable as a Class I felony. If the controlled substance is methamphetamine, amphetamine, phencyclidine, or cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, or any salt, isomer, salts of isomers, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances (except decocanized coca leaves or any extraction of coca leaves which does not contain cocaine or ecgonine), the violation shall be punishable as a Class I felony.
>
> (3) A controlled substance classified in Schedule V shall be guilty of a Class 2 misdemeanor;
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> (4) A controlled substance classified in Schedule VI shall be guilty of a Class 3 misdemeanor, but any sentence of imprisonment imposed must be suspended and the judge may not require at the time of sentencing that the defendant serve a period of imprisonment as a special condition of probation. If the quantity of the controlled substance exceeds one-half of an

> ounce (avoirdupois) of marijuana or one-twentieth of an ounce (avoirdupois) of the extracted resin of marijuana, commonly known as hashish, the violation shall be punishable as a Class 1 misdemeanor. If the quantity of the controlled substance exceeds one and one-half ounces (avoirdupois) of marijuana, or three-twentieths of an ounce (avoirdupois) of the extracted resin of marijuana, commonly known as hashish, or if the controlled substance consists of any quantity of synthetic tetrahydrocannabinols or tetrahydrocannabinols isolated from the resin of marijuana, the violation shall be punishable as a Class I felony.

Id. § 90-95(d) (2017). Thus, possession of marijuana falls under subdivision (d)(4), which mandates that possession of more than one-half but less than one and one-half ounces of that controlled substance—the amount defendant here pleaded guilty to possessing—is "punishable as a Class 1 misdemeanor." *Id.* § 90-95(d)(4). But, the provisions of subdivision (d)(4) are subject to modification by subsection (e), which specifies different punishments for possession of controlled substances under certain conditions,[2] including when a defendant has been previously convicted for a violation of the Act:

> (e) *The prescribed punishment and degree of any offense under this Article shall be subject to the following conditions*, but the punishment for an offense may be increased only by the maximum authorized under any one of the applicable conditions:
>
> . . .
>
> (3) *If any person commits a Class 1 misdemeanor under this Article and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be punished as a Class I felon.* The prior conviction used to raise the

2. Other conditions listed in subsection (e) include, *inter alia*, that the sale or delivery of the controlled substance was by an adult to a person under age sixteen or to a pregnant woman (subdivision (e)(5)), by an adult near a school or child care center (subdivision (e)(8)), or on the grounds of "a penal institution or local confinement facility" (subdivision (e)(9)). N.C.G.S. § 90-95(e) (2017).

> current offense to a Class I felony shall not be used to calculate the prior record level.

Id. § 90-95(e)(3) (2017) (emphases added). There is no dispute between the parties that, under this subdivision and in light of his plea agreement, defendant was subject to *punishment* as a Class I felon for possession of marijuana. Instead, the contested issue is the effect of subdivision (e)(3) on the *offense* for which defendant was convicted—whether the offense was a Class I felony or only a Class 1 misdemeanor with the sentence enhanced to the level of a Class I felon.

In *Jones* this Court considered an analogous question with regard to possession of a different controlled substance: "whether the North Carolina General Assembly classifie[d] the offense of possession of cocaine as a misdemeanor or a felony under N.C.G.S. § 90-95(d)(2)." 358 N.C. at 474, 598 S.E.2d at 126. The defendant had been indicted for and acknowledged the status of, *inter alia*, being an habitual felon, with one of the three underlying felonies being a 12 November 1991[3] conviction for possession of cocaine. *Id.* at 474, 598 S.E.2d at 126. "Pursuant to his plea agreement, [the] defendant preserved a right to appeal the trial court's denial of his . . . motion to dismiss his habitual felon indictment." *Id.* at 475, 598 S.E.2d at 126. On appeal, the defendant

> contended that his habitual felon indictment was insufficient because . . . the 1991 conviction for possession of cocaine[ ] was classified as a misdemeanor under N.C.G.S. § 90-95(d)(2). A panel of the Court of Appeals unanimously agreed based upon its conclusion that in 1991 N.C.G.S. § 90-95(d)(2) "plainly" classified possession of cocaine as a misdemeanor.

Id. at 475, 598 S.E.2d at 126 (citation omitted). Cocaine is a Schedule II controlled substance. N.C.G.S. § 90-90(1)(d) (2017). As noted above,

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3. As the State notes, the 1991 conviction for possession of cocaine by the defendant in *Jones* "was governed by a prior version of section 90-95(d)(2)." *Jones*, 358 N.C. at 477 n.5, 598 S.E.2d at 127 n.5 (citing N.C.G.S. § 90-95(d)(2) (Supp. 1991) (amended 1993)). However, because "the text of the statute relevant to the issue presented by [the *Jones*] appeal remain[ed] the same . . . as it appeared in November 1991," the Court "refer[red] only to the [then] current version of section 90-95(d)(2) in [its] opinion." *Id.* at 477 n.5, 598 S.E.2d at 127 n.5. Despite additional amendments to section 90-95 in the years since *Jones* was decided, the critical language of subdivision (d)(2)—providing that, generally, a person who possesses a Schedule II controlled substance is "guilty of a Class 1 misdemeanor," but that a conviction for possession of the Schedule II controlled substance cocaine is "punishable as a Class I felony"—has remained unchanged. *See* N.C.G.S. § 90-95(d)(2) (2017).

subdivision 90-95(d)(2) states that, while generally a person in possession of a specified amount of "[a] controlled substance classified in Schedule II . . . shall be guilty of a Class 1 misdemeanor," if the controlled substance possessed is cocaine, "the violation shall be punishable as a Class I felony." *Id.* § 90-95(d)(2).

In *Jones* the defendant made a very similar argument to the one advanced by defendant in the present case:

> that under the plain language of section 90-95(d)(2), the offense of possession of cocaine is a misdemeanor. . . . [because] cocaine [is] a Schedule II controlled substance, and the first sentence of section 90-95(d)(2) . . . states that a person in possession of a "Schedule II, III, or IV" controlled substance is "guilty of a Class 1 misdemeanor." According to [the] defendant, the statute's third sentence, providing that a conviction for possession of cocaine is "punishable as a Class I felony," does not serve to classify possession of cocaine as a felony for determining habitual felon status. Rather, that phrase simply denotes the proper punishment or sentence for a conviction for possession of cocaine.

358 N.C. at 477, 598 S.E.2d at 127-28 (internal citations omitted). This Court firmly rejected that construction of the statute, holding that the more specific exceptions set forth in the third sentence of N.C.G.S. § 90-95(d)(4) controlled over the general rule set out in the first sentence, since "the phrase shall be 'punishable as a Class I felony' does not simply denote a sentencing classification, but rather, dictates that a conviction for possession of the substances listed therein, including cocaine, is elevated to a felony classification for all purposes." *Id.* at 478, 598 S.E.2d at 128. Further, the Court "acknowledge[d] that the General Assembly utilizes differing terminology to classify criminal offenses as felonies," while still rejecting the "defendant's argument that these differences indicate the General Assembly's intent to create a special felony sentencing classification for possession of cocaine." *Id.* at 484, 598 S.E.2d at 132. Pertinent to the instant appeal, the court in *Jones* also observed:

> The General Assembly routinely uses the phrases "punished as" or "punishable as" a "felony" or "felon" to classify certain crimes as felonies. *See*, *e.g.*, N.C.G.S. § 14-18 (2003) (providing that "[v]oluntary manslaughter shall be punishable as a Class D felony, and involuntary manslaughter shall be punishable as a Class F felony"); N.C.G.S.

> § 14-30 (2003) (stating that a person who commits the crime malicious maiming "shall be punished as a Class C felon"); N.C.G.S. § 14-39(b) (2003) (noting that first-degree kidnapping "is punishable as a Class C felony" and that second-degree kidnapping "is punishable as a Class E felony"); N.C.G.S. § 14-52 (2003) (stating that "burglary in the first degree shall be punishable as a Class D felony, and burglary in the second degree shall be punishable as a Class G felony"); N.C.G.S. § 14-58 (2003) (providing that first-degree arson "is punishable as a Class D felony" and that second-degree arson "is punishable as a Class G felony"); N.C.G.S. § 14-202.1(b) (2003) (stating that "[t]aking indecent liberties with children is punishable as a Class F felony"); N.C.G.S. § 20-106 (2003) (providing that a person guilty of receiving or transferring stolen vehicles "shall be punished as a Class H felon"); N.C.G.S. § 20-138.5(a), (b) (2003) (noting, pursuant to the habitual impaired driving statute, that if a person drives while impaired and has been convicted of three or more offenses involving impaired driving as defined by N.C.G.S. § 20-4.01(24a) within the previous seven years, that person "shall be punished as a Class F felon").

Id. at 484-85, 598 S.E.2d at 132 (brackets in original). This Court noted that these examples and "other statutes contain a structure similar to N.C.G.S. § 90-95(d)(2), in which a crime is *classified as a misdemeanor, but elevated to a felony by the language 'punishable' or 'punished' as a 'felony' or 'felon' where special circumstances exist.*" *Id.* at 485, 598 S.E.2d at 132 (emphasis added). This Court then concluded that, under subdivision (d)(2), "the offense of possession of cocaine is classified as a felony for all purposes." *Id.* at 486, 598 S.E.2d at 133.

Here the critical language in subdivision (e)(3) is "shall be punished as a Class I felon." N.C.G.S. § 90-95(e)(3). As we held in *Jones*, the effect of such phrases is to elevate an offense that would otherwise be a misdemeanor to a felony when the specified conditions are met. We further note that the General Assembly's intent is even clearer in this case in light of the explicit wording of the applicable subsection. Subsection (e), by its plain language, addresses how specific conditions, like a misdemeanant's prior convictions under the Act, affect two determinations: "[t]he prescribed punishment *and degree of any offense* under this Article . . . ." *Id.* § 90-95(e) (emphasis added). The emphasized phrase denotes that the subsequent provisions of the statute affect not only the

designated punishment but also the degree of the offenses discussed when the listed conditions are present. Likewise, the final sentence of subdivision (e)(3) states that "[t]he prior conviction used *to raise the current offense to a Class I felony* shall not be used to calculate the prior record level," indicating that the General Assembly intended the effect of the conditions listed in the subdivision to not simply enhance the punishment of a misdemeanor as defendant contends but rather "to raise the current offense to a Class I felony." *See id.* § 90-95(e)(3) (emphasis added).

In conclusion, we hold that, under the reasoning of *Jones* and in light of the plain language of N.C.G.S. § 90-95(e)(3), possession of more than one-half but less than one and one-half ounces of marijuana in violation of N.C.G.S. § 90-95(d)(4) by a defendant with a prior conviction for an offense punishable under the Act "is classified as a [Class I] felony for all purposes." *Jones*, 358 N.C. at 486, 598 S.E.2d at 133. Accordingly, the Court of Appeals erred in determining that "the substantive offense remain[ed] a Class 1 misdemeanor" and that, as a consequence, defendant's "habitual felon [status could not] be used to further enhance a sentence that [wa]s not itself a substantive offense." *Howell*, ___ N.C. App. at ___, 792 S.E.2d at 901. The trial court here properly elevated defendant's possession of marijuana offense to a Class I felony on the basis of his prior conviction under the Act, and then correctly punished that substantive Class I felony as a Class E felony on the basis of defendant's habitual felon status.

Accordingly, we reverse the decision of the Court of Appeals on this issue and instruct that court to reinstate the trial court's judgment.

REVERSED.

Justice BEASLEY dissenting.

In this case the conduct for which defendant was sentenced was his possession of between one-half ounce and one and one-half ounces of marijuana. The majority's statutory interpretation affirms a sentence that first elevates a Class 1 misdemeanor to a Class I felony due to defendant's past conduct and second, based on this "felony," further enhances defendant's sentence to a Class E felony *also* due to defendant's past conduct. I dissent from the majority opinion because I do not believe this Court's opinion in *State v. Jones* controls the interpretation of this statutory provision, and furthermore, under the majority's interpretation

of how these provisions work together, the sentence is not proportional to the crime and is excessive in light of defendant's charged conduct.

First, *Jones* is distinguishable from this case because in *Jones*, the Court interpreted an entirely different provision in N.C.G.S. § 90-95. *See generally State v. Jones*, 358 N.C. 473, 598 S.E.2d 125 (2004) (interpreting N.C.G.S. § 90-95(d)(2) to conclude that the possession of cocaine is classified as a Class I felony rather than enhanced from a Class 1 misdemeanor to a Class I felony). The Court's interpretation in *Jones* of N.C.G.S. § 90-95(d)(2) should not control how we interpret N.C.G.S. § 90-95(e)(3). In *Jones* the provision at issue stated, "*If the controlled substance is . . . cocaine . . . the violation shall be punishable as a Class I felony.*" 358 N.C. at 476-77, 598 S.E.2d at 127 (quoting N.C.G.S. § 90-95(d)(2) (2003) (emphasis added)). The language and structure of subdivision 90-95(d)(2) as analyzed in *Jones* are analogous to subdivision 90-95(d)(4)[1] and, in this case, support the majority's interpretation of subdivision 90-95(d)(4)to elevate defendant's Class 3 misdemeanor to a Class 1 misdemeanor just as *Jones* elevated the defendant's Class 1 misdemeanor to a Class I felony.

But the majority's next analytical step—the elevation of the substantive offense from a Class 1 misdemeanor to a Class I felony under subdivision 90-95(e)(3)[2]—is not controlled by *Jones*. Despite this Court's dicta that the General Assembly "routinely uses the phrases 'punished as' or 'punishable as' a 'felony' or 'felon' to classify certain crimes as felonies," *Jones*, 358 N.C. at 484-85, 598 S.E.2d at 132 (citations omitted),

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1. This provision states, in relevant part, that "[i]f the quantity of the controlled substance exceeds one-half of an ounce (avoirdupois) of marijuana . . . , the violation shall be punishable as a Class 1 misdemeanor." N.C.G.S. § 90-95(d)(4) (2017).

2. This section provides that "[t]he prescribed punishment and degree of any offense under this Article shall be subject to the following conditions, but the punishment for an offense may be increased only by the maximum authorized under any one of the applicable conditions:"

> . . .
>
> (3) If any person commits a Class 1 misdemeanor under this Article and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be punished as a Class I felon. The prior conviction used to raise the current offense to a Class I felony shall not be used to calculate the prior record level.

N.C.G.S. § 90-95(e)(3) (2017).

a statutory provision using the language "punished as" was not at issue in *Jones*. The General Assembly used different language in subdivision 90-95(e)(3) than it used in subdivisions 90-95(d)(2) and 90-95(d)(4). The language at issue in this case reads: "If any person commits a Class 1 misdemeanor under this Article and if he has previously been convicted for one or more offenses . . . punishable under . . . this Article, *he shall be punished* as a Class I felon," N.C.G.S. § 90-95(e)(3) (2017) (emphasis added), while the language at issue in *Jones* was "[i]f the controlled substance is . . . cocaine . . . *the violation shall be punishable as* a Class I felony," *Jones*, 358 N.C. at 476-77, 598 S.E.2d at 127 (emphasis modified from original) (quoting N.C.G.S § 90-95(d)(2) (2003)). The subject of the phrase at issue in Jones indicates the focus of the provision is on the violation itself, namely, possession of cocaine, thus supporting a conclusion that the provision constitutes an escalation of the classification of the offense, namely, "any person" previously convicted of a drug-related violation, *see* N.C.G.S. § 90-95(d)(2) (2017); however, the subject of the language at issue here indicates the focus is on *the defendant*, which supports an analysis that the provision constitutes a sentence enhancement, *see id.* § 90-95(e)(3). Thus, our determination of legislative intent in *Jones* relating to a different provision containing different language is not controlling in this case.[3]

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3. Additionally, in *Jones*, the Court was able to defer to the way in which the crime of cocaine possession has been treated historically; that is, the Court was persuaded that the legislature intended to treat cocaine possession as a felony because possession of cocaine had always been a felony rather than a misdemeanor under the North Carolina Controlled Substances Act, regardless of the quantity of cocaine. *See Jones*, 358 N.C. at 479-84, 598 S.E.2d at 129-32. Due to the fact that this Court in *Jones* spent multiple pages discussing the twenty-five years of legislative deference to our treatment of that crime, I believe this Court was heavily persuaded by the legislative history of the way *cocaine possession* has been treated by the General Assembly. *See id.* at 479-84, 598 S.E.2d at 129-32. The offense of marijuana possession carries a markedly different legislative history that supports a different interpretative result than the one reached in *Jones*. Since the General Assembly enacted the Controlled Substances Act in 1971, marijuana possession offenses have always been classified based on the *quantity* of marijuana possessed, *see, e.g.*, *State v. Mitchell*, 336 N.C. 22, 27, 442 S.E.2d 24, 26 (1994), rather than the defendant's past conduct. Here defendant's conviction was for possession of between one-half and one and one-half ounces of marijuana, a crime that has been considered a misdemeanor since 1985. *See* Act of July 19, 1971, ch. 919, 1971 N.C. Sess. Laws 1477 (enacting the North Carolina Controlled Substances Act, classifying marijuana as a Schedule VI substance, and classifying the first and second offense of possession of marijuana as a misdemeanor regardless of quantity); Act of May 22, 1973, ch. 654, sec. 1, 1973 N.C. Sess. Laws. 967, 968 (changing classification of the offense of marijuana possession to a felony when the defendant possesses more than an ounce); Act of July 10, 1985, ch. 675, sec. 1, 1985 N.C. Sess. Laws 873, 873-84 (classifying marijuana possession as "a general misdemeanor" unless the quantity *exceeds* one and one-half ounces); *see also* N.C.G.S. § 90-95(d)(4) (classifying the offense of marijuana possession as a Class 1 misdemeanor if the quantity does not exceed one and one-half ounces).

Because *Jones* does not control, I believe the interpretation of N.C.G.S. § 90-95(e)(3) is a matter of first impression. The plain language of subdivision 90-95(e)(3)—that "[defendant] shall be punished as a Class I felon"— is subject to two competing interpretations: (1) the provision serves as a sentencing enhancement, meaning defendant should receive the sentence associated with a Class I felony; or (2) the provision elevates the substantive conviction from a misdemeanor to a felony. *See* N.C.G.S. § 90-95(e)(3). Reasonable minds could differ regarding the meaning of this provision, based on its plain language. The ambiguity is not helped by the fact that the final sentence in subdivision (e)(3) states that "[t]he prior conviction [is] *used to raise the current offense to a Class I felony.*" *Id.* The former interpretation is the argument defendant makes in this case and the view taken by the Court of Appeals, *see State v. Howell*, ___ N.C. App. ___, ____, 792 S.E.2d 898, 901 (2016) (only analyzing the plain language to support the conclusion that the provision is a sentencing enhancement), while the latter is the interpretation of the State and the majority of this Court.

When the provision at issue is read along with other provisions within section 90-95, it is apparent that the General Assembly used three separate phrases to reflect how defendants should be punished—"the violation shall be punishable as"; "[defendant] shall be punished as"; and "[defendant] shall be guilty of." *See* N.C.G.S. § 90-95 (2017). The General Assembly used varying language within subdivision (e)(3) itself and across its eight provisions, indicating there should be some difference in how subdivisions (e)(3), (e)(5), (e)(8), and (e)(10) should operate versus subdivisions (e)(4), (e)(7) and (e)(9). *See id.* § 90-95(e). Because "different words used in the same statute should be assigned different meanings," *In re M.I.W.*, 365 N.C. 374, 379, 722 S.E.2d, 469, 473 (2012) (quoting *Ferrell v. Express Check Advance of SC LLC*, 591 F.3d 698, 704 (4th Cir. 2010)), I conclude that the General Assembly chose these specific phrases for different operational purposes, though it is unclear exactly what was intended. Because the interpretation of these phrases has implications affecting other statutes, such as the habitual felon statute in this case, we should not assume they can be used interchangeably. *See*, *e.g.*, N.C.G.S. §§ 14-7.1 to -7.76 (2017). Since it is not clear what the General Assembly meant by using these various phrases, and the dueling interpretations create widely differing results—specifically, this defendant's potential maximum punishment of twenty-four versus eighty-eight months of active jail time—the rule of lenity should apply.

"The rule of lenity requires interpreters to resolve ambiguity in criminal laws in favor of defendants. Deferring to the prosecuting branch's

expansive views of these statutes 'would turn [their] normal construction . . . upside-down, replacing the doctrine of lenity with a doctrine of severity." *Whitman v. United States*, 135 S. Ct. 352, 353, 190 L. Ed. 2d 381, 382 (2014) (mem.) (statement of Scalia, J.) (alterations in original) (quoting *Crandon v. United States*, 494 U.S. 152, 178, 108 L. Ed. 2d 132, 152 (1990) (Scalia, J., concurring in the judgment)) *denying cert. to United States v. Whitman*, 555 F. App'x 98 (2d Cir. 2004); *accord State v. Hinton*, 361 N.C. 207, 211, 639 S.E.2d 437, 440 (2007) ("In construing ambiguous criminal statutes, we apply the rule of lenity, which requires us to strictly construe the statute."). The General Assembly's choice to separate sub-section 90-95(e) from sub-section 90-95(d) in the statutory structure indicates the legislature intended these two provisions to operate differently. In contrast to the language in subdivision 90-95(d)(4), subdivision 90-95(e)(3) focuses on a defendant's past conduct—specifically, the defendant's previous convictions. Construing the statute according to the rule of lenity, I read subdivision 95-90(e)(3) to have no effect on the substantive classification of the violation (as subdivision 90-95(d)(4) does). Rather, its sole effect is to enhance a defendant's sentence.

Moreover, under the majority's interpretation of the provision, subdivision 90-95(e)(3) is duplicative of the habitual felon statute when applied to defendant's case. *Compare* N.C.G.S. § 14-7.6 (providing that habitual felons[4] are "sentenced at a felony class level that is four classes higher than the principal felony for which the person was convicted") *with id.* § 90-95(e)(3) ("If any person commits a Class 1 misdemeanor under this Article and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be punished as a Class I felon."). Both statutes target recidivists, raising the level at which a defendant is sentenced based on the defendant's past conduct, and reflect the intent of the legislature "to segregate that person from the rest of society for an extended period of time" when the individual displays a propensity for recidivism. *State v. Kirkpatrick*, 345 N.C. 451, 454, 480 S.E.2d 400, 402 (1997) (quoting *Rummel v. Estelle*, 445 U.S. 263, 284, 63 L.Ed.2d 382, 397 (1980)).

Here, however, because the majority's reasoning allows both the N.C.G.S. § 90-95(e)(3) and the habitual felon recidivist provisions to apply, defendant is punished doubly for his past conduct—specifically,

4. An "habitual felon," under the statute, is "[a]ny person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof." N.C.G.S. § 14-7.1(a).

his 27 August 2003 conviction for felonious possession with intent to sell or deliver marijuana—in the instant case. Also, though not at issue in this case, one could anticipate a situation in which the majority's reasoning is applied to a defendant not yet qualified as an habitual felon, to convert that defendant into an habitual felon by treating a misdemeanor drug offense as a third and qualifying felony under subdivision 90-95(e)(3). Therefore, in considering the statutory framework as a whole, subdivision 90-95(e)(3) may have been intended to increase the punishment for those recidivist defendants who have committed multiple drug offenses, with the effect of assigning a defendant the same punishment as that imposed on a felon but not elevating his substantive conviction to a felony.

Finally, what is troubling about the majority's interpretation of how these various sentencing provisions work together is that this interpretation creates a penalty that is disproportionate in light of defendant's actual conduct reflected in this offense. The "deeply rooted" proportionality principle of sentencing, *Solem v. Helm*, 463 U.S. 277, 284-86, 77 L. Ed. 2d 637, 645-57 (1983) (explaining the history behind the principle), dictates that "the punishment should fit the crime," *Ewing v. California*, 538 U.S. 11, 31, 155 L. Ed. 2d 108, 124 (2003) (Scalia, J. concurring in the judgment) (defining the principle before disagreeing with the majority that the Framers included a proportionality principle within the Eighth Amendment that applies to noncapital cases).[5] "[T]he punishment ought to reflect the degree of moral culpability associated with the offense for which it is imposed. Trivial offenses should attract only minor punishment and the most despicable offenses should be punished severely,

5. The U.S. Supreme Court has held that the principle of proportionality is contained within the Eighth Amendment's proscription of cruel and unusual punishments, and thus, the Federal Constitution prohibits sentences that are disproportionate to the crime committed. *Helm*, 463 U.S. at 284, 77 L. Ed. 2d at 645; *see generally Ewing*, 538 U.S. 11, 155 L. Ed. 2d 108 (despite the lack of a majority opinion, seven members of the Court agreed that a sentence is cruel and unusual within the meaning of the Eighth Amendment if the court finds it to be grossly disproportionate to the crime). Notably, in *Ewing*, *Helm*, and *Rummel* (cases all considering recidivists' sentences under the Eighth Amendment), the underlying crimes triggering the recidivist statute were substantively felonies. *Ewing*, 538 U.S. at 18-19, 155 L. Ed. 2d at 115-16; *Helm*, 463 U.S. at 279-81, 77 L. Ed. 2d at 642-44; *Rummel*, 445 U.S. at 265-66, 63 L. Ed. 2d at 385-86. There may be an even more persuasive Eighth Amendment argument when a crime typically classified and punished as a misdemeanor is escalated to a felony, triggering the recidivist statute and resulting in a disproportionate sentence. *See Helm*, 463 U.S. at 290-92, 77 L. Ed. 2d at 649-50 (applying a three-factor test to strike down a sentence as significantly disproportionate after considering (1) the gravity of the offense versus the harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for the commission of the same crime in other jurisdictions).

with punishment appropriately graduated for offenses that fall between these extremes." Ian P. Farrell, *Gilbert & Sullivan & Scalia: Philosophy, Proportionality, & The Eighth Amendment*, 55 Vill. L. Rev. 321, 337 (2010). Logically, because defendant's past conduct does not change the nature of the current crime for which he is being punished, his past criminal history should operate as a sentencing enhancement under subdivision 90-95(e)(3) rather than to reclassify a misdemeanor offense as a felony offense.

In this case the Court of Appeals majority was correct to conclude defendant's Class 1 misdemeanor should have been punished as a Class I felony, but the substantive offense should remain a Class 1 misdemeanor, and therefore, defendant's habitual felon status has no effect on his sentence. *Howell*, ___ N.C. App. at ___, 792 S.E.2d at 901. Because the quantity of the marijuana, and not defendant's past conduct, is what controls the classification of the substantive offense under this statutory framework, and because this punishment does not "fit [defendant's] crime," I respectfully dissent.

STATE OF NORTH CAROLINA
v.
JOHN OWEN JACOBS

No. 126PA17

Filed 6 April 2018

Evidence—Rape Shield Law—STDs in complainant absent in defendant

In defendant's trial for sexual offenses committed against his daughter, the trial court erred by excluding evidence of the complainant's history of sexually transmitted diseases (STDs) pursuant to Rule of Evidence 412. The excluded evidence—which included expert testimony regarding the presence of STDs in the complainant and the absence of those STDs in defendant and the inference that defendant did not commit the charged crimes—fell within the exception to the Rape Shield Law set forth in Rule of Evidence 412(b)(2), as "evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant." There was a reasonable probability that, had

this error not been committed, a different result would have been reached at trial.

Justice MORGAN dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 798 S.E.2d 532 (2017), finding no error after appeal from a judgment entered on 28 July 2015 by Judge Reuben F. Young in Superior Court, Bladen County. Heard in the Supreme Court on 10 January 2018.

Joshua H. Stein, Attorney General, by Elizabeth J. Weese, Assistant Attorney General, for the State.

Paul F. Herzog for defendant-appellant.

Anne Bleyman and North Carolina Prisoner Legal Services, Inc., by Christopher J. Heaney, for North Carolina Advocates for Justice, amicus curiae.

JACKSON, Justice.

In this case we consider whether the exception outlined in North Carolina Rule of Evidence 412(b)(2) applies to evidence of the complainant's history of sexually transmitted diseases (STDs) such that the trial court erred in excluding that evidence pursuant to Rule 412 when other evidence showed that defendant was not infected with those STDs. Because we conclude that the relevant evidence in defendant's offer of proof fell within the Rule 412(b)(2) exception, we reverse the decision of the Court of Appeals holding that the trial court did not err in excluding the STD evidence and remand this case for a new trial.

On 6 May 2013, complainant "Betty"[1] was taken to the hospital after reporting that defendant, her father, had been having sexual relations with her. As part of her examination, she was tested for STDs. The test results revealed that Betty had contracted Trichomonas vaginalis and the Herpes simplex virus, Type II. On that same day, defendant was arrested for first-degree rape of a child and first-degree sex offense with a child. Three days after defendant's arrest, pursuant to a search

1. The pseudonym "Betty" is used throughout this opinion to protect the identity of the minor child.

warrant, defendant was tested for STDs and the test results showed no evidence of either Trichomonas or the Herpes simplex virus, Type II.

Prior to trial, the State filed multiple motions *in limine* asserting that no Rule 412 exceptions applied to evidence related to STDs in this case and that, as a result, the trial court should prohibit the defense from mentioning such evidence during the trial. Subsequently, defendant filed a notice of intent to call an expert witness, Keith Ramsey, M.D. of the East Carolina University School of Medicine, to testify that Betty had STDs that were not present in defendant and to testify as to the implications of this information. After hearing arguments on the State's Rule 412 motions at the beginning of the July 2015 trial, the trial court concluded that defendant could not introduce any STD evidence unless the State "open[ed] the door" to such evidence.[2]

At trial, Betty testified that defendant had been having sexual relations with her over a period of several years beginning with an incident in 2011, when Betty was eight or nine years old. Betty described the first incident with some particularity. During her testimony Betty also described three specific instances in which defendant engaged in sexual acts with her in 2013, when Betty was eleven years old. First, Betty testified that on 5 May 2013, after she had showered, eaten, and gone to bed, she woke up to defendant's pulling the bed covers off of her. She testified that defendant then pulled her shorts down and had sex with her. Betty also recounted that the week before the previous incident, defendant had sex with her in the kitchen of their home. This incident occurred while her mother was at work and her younger brother was outside the home. Finally, Betty testified that defendant had sex with her on 25 April 2013 in her bedroom. She noted that she remembered the date because defendant had picked her up early from school after she had been disciplined for kicking another student. On cross-examination, Betty indicated that defendant had sex with her approximately twice per week for about three years. Over the course of subsequent days, both the State and defense called several other witnesses, and defendant even testified on his own behalf. Of particular relevance to our decision here, during defendant's case-in-chief, defense counsel submitted to the trial court an offer of proof pursuant to Rule 412 that contained, *inter alia*, the "Medical Expert Report" prepared by Dr. Ramsey to preview

2. The trial judge stated that the parties might need to address the possibility of introducing the STD evidence prior to the first witness' taking the stand. The transcript reveals that there was a bench conference off the record before Betty took the stand, but there is no indication in the record as to what was discussed during this bench conference.

his potential testimony regarding the implications of the STD evidence. After considering the offer of proof, the trial court reaffirmed its earlier decision that evidence regarding Betty's STDs must be excluded from trial for violating the Rape Shield Law.

On 28 July 2015, a jury returned a verdict finding defendant guilty of first-degree sex offense with a child. The jury deadlocked on the remaining rape charges. For the conviction of first-degree sex offense with a child, the trial court imposed a sentence of 420 to 564 months of imprisonment. After sentencing, defendant gave oral notice of appeal.

Regarding the issue of the STD evidence, defendant argued before the Court of Appeals that the trial court erred by excluding the evidence because its inclusion would have made sexual contact between Betty and defendant less likely, thereby qualifying for the Rule 412(b)(2) exception. The Court of Appeals majority disagreed and instead concluded that the STD evidence was properly excluded from trial because that exception was not applicable here. *State v. Jacobs*, ___ N.C. App. ___, ___, 798 S.E.2d 532, 536 (2017). In reaching this conclusion, the Court of Appeals majority noted defendant's reliance on this Court's application of the Rule 412(b)(2) exception in *State v. Ollis* but distinguished *Ollis* from the present case on the basis that defendant here "offer[ed] no such alternative explanation or specific act to prove that any sexual act committed was by someone other than him." *Id.* at ___, 798 S.E.2d at 536 (citing *Ollis*, 318 N.C. 370, 376, 348 S.E.2d 777, 781 (1986)). Based upon this distinction, the Court of Appeals then reasoned that defendant offered the STD evidence "to raise speculation and insinuate that Betty must have been sexually active with someone else." *Id.* at ___, 798 S.E.2d at 536. On appeal, defendant also argued that the trial court's decision to exclude the STD evidence violated his constitutional right to present a defense. The Court of Appeals declined to reach the substance of this argument after determining that defendant had not raised this issue at trial and therefore had waived it. *Id.* at ___, 798 S.E.2d at 534.

Judge Robert N. Hunter, Jr. concurred in the result only. He wrote separately to emphasize that STD evidence should not "be included wholesale" within the coverage of Rule 412. *Id.* at ___, 798 S.E.2d at 536 (Hunter, Jr., J. concurring in result only). Nonetheless, he further explained that if a defendant can offer relevant and exculpatory medical evidence that "does not necessarily speak to the past sexual behavior of the victim, such evidence should be admissible regardless of whether it fits within" a Rule 412 exception. *Id.* at ___, 798 S.E.2d at 536.

On appeal to this Court, defendant reiterates his argument that the trial court misinterpreted Rule 412(b)(2) in excluding the proffered STD

evidence. Defendant specifically asserts that the medical evidence that was to be presented by Dr. Ramsey was within the exception set forth in Rule 412(b)(2). We agree. Because this disposes of the case in defendant's favor, we do not address whether he preserved the constitutional question below.

As stated by this Court, "[t]he Rape Shield Statute provides that 'the sexual behavior of the complainant is irrelevant to any issue in the prosecution' except in four very narrow situations." *State v. Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 370 (1988) (quoting N.C.G.S. § 8C-1, Rule 412 (1986)). "Sexual behavior" is statutorily defined as "sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial." N.C.G.S. § 8C-1, Rule 412(a) (2017). The narrow exception defendant relies upon in this case depends on whether the evidence at issue was "evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant." *Id.* § 8C-1, Rule 412(b)(2) (2017). Generally, Rule 412 "stands for the realization that prior sexual conduct by a witness, *absent some factor which ties it to the specific act which is the subject of the trial*, is irrelevant due to its low probative value and high prejudicial effect." *State v. Younger*, 306 N.C. 692, 698, 295 S.E.2d 453, 456 (1982) (emphasis added).[3]

"Before any questions pertaining to [evidence of sexual behavior] are asked of any witness, the proponent of such evidence shall first apply to the court for a determination of the relevance of the sexual behavior to which it relates." N.C.G.S. § 8C-1, Rule 412(d) (2017). Then the court must conduct a transcribed *in camera* hearing "to determine the extent to which such behavior is relevant." *Id.* If the court determines that the proffered evidence is relevant, "it shall enter an order stating that the evidence may be admitted and the nature of the questions which will be permitted." *Id.*

Here defendant both submitted the necessary offer of proof and argued that the evidence fell within the exception stated in Rule 412(b)(2) because the evidence was "evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant." N.C.G.S. § 8C-1, Rule 412(b)(2). Defendant's proffered evidence included the results of STD panels administered to both Betty and defendant, as well as a report from a

3. *Younger* was decided pursuant to N.C.G.S. § 8-58.6, which was the predecessor statute to Rule 412. Notwithstanding differences in wording, the exceptions set forth in section 8-58.6 are substantively the same as those contained in the current version of Rule 412.

proposed expert witness. Defendant's proposed expert, Dr. Ramsey, is a certified specialist in infectious diseases. The medical expert report Dr. Ramsey prepared for this case included the following observations regarding the implications of the STD test results with respect to the likelihood of defendant's guilt:

> Based upon my review of the medical records, [Betty] had a Trichomonas infection at the time of exam on 5/6/2013, and has been infected with *Herpes simplex*[.] If the latter is due to HSV-2, neither the Trichomonas nor the *Herpes simplex* would have been acquired as non-sexually transmitted diseases[.] [Defendant] had a negative KOH Wet Prep test for Trichomonas, and a negative culture for *Herpes simplex* on 5/9/2013, indicating that he had no evidence of either infection[.] Based upon the results of these tests, it is in my expert opinion that it is not likely that the plaintiff and defendant engaged in unprotected sexual activity over a long period of time without transmitting either the Trichomonas, the *Herpes simplex* infection, or both, to the defendant.

Based on the materials presented in defendant's offer of proof, the STD evidence was an essential part of the proposed expert testimony. The proposed expert's conclusions regarding the presence of STDs in the victim and the absence of those same STDs in defendant affirmatively permit an inference that defendant did not commit the charged crime. Furthermore, such evidence diminishes the likelihood of a three-year period of sexual relations between defendant and Betty. Therefore, the trial court erred in excluding this evidence pursuant to Rule 412 and there is "a reasonable possibility that, had the error not been committed, a different result would have been reached at trial." *State v. Webster*, 324 N.C. 385, 393, 378 S.E.2d 748, 753 (1989) (citing N.C.G.S. § 15A-1443 (1988)).

The State's primary argument on appeal is that defendant offered this evidence for inappropriate purposes because "[t]he speculative nature of defendant's evidence reduces it to nothing more than a naked inference of sexual activity," serving to unnecessarily humiliate and embarrass the victim. This characterization is based neither on defendant's stated reason for offering the evidence nor the evidence in defendant's offer of proof. The purpose of this evidence appears to be precisely what defendant stated it to be: to support his claim that he did not commit the criminal acts for which he was charged. That purpose aligns completely with the exception carved out in Rule 412(b)(2).

Next, given the references to our prior decision in *State v. Ollis* by the Court of Appeals and by both parties throughout the history of this case, we observe that our decision in that case does not determine the outcome here. In *Ollis* this Court reasoned that evidence of specific prior sexual acts should be admitted because the evidence offered an alternative explanation for medical evidence presented by the State that could otherwise be misleading to the jury and therefore fell within the exception to the general prohibition against the admission of evidence concerning other sexual activity involving the victim set out in Rule 412(b)(2). *See Ollis*, 318 N.C. at 377, 348 S.E.2d at 781-82 (noting that the witness "made reference in her testimony on at least two occasions to multiple rapes of the victim, which in the absence of evidence that they were committed by some other male, the jury clearly would infer were acts committed by the defendant"). Although *Ollis* does describe one set of circumstances in which the Rule 412(b)(2) exception applies, that decision does not describe the only set of circumstances in which this exception applies. In the instant case defendant offers medical evidence that directly supports an inference "that the act or acts charged were not committed by the defendant." N.C.G.S. § 8C-1, Rule 412(b)(2). Defendant's proffered evidence falls within the text of the Rule 412(b)(2) exception without directly implicating this Court's specific reasoning in *Ollis*.

The record shows that the trial court excluded defendant's evidence solely based on Rule 412. The exception set forth in Rule 412(b)(2) exists to limit the blanket exclusion of evidence related to sexual behavior pursuant to Rule 412. Because we hold that defendant's offer of proof indicated that the STD evidence in this case fell within the Rule 412(b)(2) exception, we conclude that the Court of Appeals erred by holding that there was no error in the trial court's exclusion of the evidence. For the foregoing reasons, we reverse the decision of the Court of Appeals and remand this case to that court with instructions to vacate defendant's conviction for first-degree sex offense with a child and to further remand this case to Superior Court, Bladen County for a new trial.

REVERSED AND REMANDED; NEW TRIAL.

Justice MORGAN dissenting.

Based upon application of the rudimentary principles of statutory construction, I respectfully disagree with the decision of my learned colleagues. In reaching the result in this case, the majority has devalued, and essentially ignored, the operation of the descriptive word "specific"

in its interpretation of North Carolina General Statutes Section 8C-1, Rule 412(b)(2) and this provision's usage in the present case.

"Statutory interpretation properly begins with an examination of the plain words of the statute." *Three Guys Real Estate v. Harnett County*, 345 N.C. 468, 472, 480 S.E.2d 681, 683 (1997) (quoting *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992)). "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it plain and definite meaning . . . ." *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980) (first citing *State ex rel. Utils. Comm'n v. Edmisten*, 291. N.C. 451, 232 S.E.2d 184 (1977), and then citing *Peele v. Finch*, 284 N.C. 375, 200 S.E.2d 635 (1973)); *see also In re Tr. of Charnock*, 358 N.C. 523, 528, 597 S.E.2d 706, 709-10 (2004) (stating that "the Court looks first to the language of the statute and gives the words their ordinary and plain meaning" (citing *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999))).

Rule 412(b)(2) contains the following language:

> (b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:
>
> . . . .
>
> (2) Is evidence of *specific* instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant . . . .

N.C.G.S. § 8C-1, Rule 412(b)(2) (2017) (emphasis added).

The majority here has determined that defendant's offer of proof at trial indicated that the Rule 412(b)(2) exception of the "Rape Shield Law" was properly invoked so as to justify the admission into evidence of the alleged victim's sexually transmitted diseases, or STDs. The majority expressly focused upon (1) the observations of defendant's proposed medical expert that the minor alleged victim had two different STDs at the time of her medical examination on 6 May 2013; neither of which "would have been acquired as non-sexually transmitted diseases," and that defendant "had no evidence of either infection" on 9 May 2013; and (2) the "expert opinion that it is not likely that the [complainant][1] and defendant engaged in unprotected sexual activity over a long period

1. This reference is to the alleged victim, "Betty."

of time without transmitting either the Trichomonas, the *Herpes simplex* infection, or both, to the defendant." Based upon the presence of STDs in the alleged victim and the absence of the same STDs in defendant, the majority reasons that such evidence would afford defendant a permissible inference that he was not guilty and "diminishes the likelihood of a three-year period of sexual relations" between defendant and the alleged victim, to which she testified at trial. Therefore, the majority concludes in the instant case that "the relevant evidence in defendant's offer of proof fell within the Rule 412(b)(2) exception" and that defendant had correctly argued this point "because the evidence was 'evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant,' " thus making the evidence admissible under that provision.

Nestled within the cited words of the opinion offered by defendant's proposed medical expert was his observation that the alleged victim would not have contracted the identified STDs in any non-sexual manner. This conclusion obviously conveyed that the alleged victim had engaged in "sexual behavior" as that term is used in Rule 412, which therefore activates this Rape Shield Law's dictate that "the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless" one of the exceptions under Rule 412(b) applies so as to permit such proscribed evidence to be admitted at trial. Although the majority views the observations of defendant's proposed medical expert as satisfying the exception embodied in Rule 412(b)(2), there is no "evidence of *specific* instances of sexual behavior offered" by defendant through this offer of proof to "show[ ] that the . . . acts charged were not committed by him. N.C.G.S. § 8C-1, Rule 412(b)(2) (emphasis added). While the disputed evidence at issue tends to show at least one instance of sexual behavior in which the alleged victim engaged, as demonstrated by her acquisition of STDs, nonetheless, the proposed medical expert's opinion in particular, and defendant's offer of proof in general, are bereft of any "instances of sexual behavior" by the alleged victim that contain any specific details as required by the clear and plain language of Rule 412(b)(2). Indeed, in my view, defendant's offer of proof references no instance of sexual behavior by the alleged victim for which he provided sufficient specificity, in light of the three-year time period placed in issue by the alleged victim's trial testimony, to qualify for the evidentiary exception under Rule 412 and hence to overcome the inherent protections afforded to a complainant by the Rape Shield Law.

Ironically, the majority demonstrates a recognition of exemplars of "specific instances" when it employs that statutory phrase to describe

the details conveyed by the alleged victim when relating the sexual acts in which she claimed defendant engaged her. The alleged victim's narration of the sexual encounters to which she testified depicts a truer representation of the term "specific instances" in Rule 412(b)(2) than the generalities present in defendant's proffered STD evidence. While I would not require a defendant seeking to employ the "specific instances" exception to present a level of particularity approaching the alleged victim's list of vivid descriptions, an accused should nonetheless have to identify a time, place or circumstance in which a complainant was involved in "specific instances of sexual behavior" rather than merely complying with the majority's permissive substitution of a medical opinion referencing a diagnosis suggesting some instance of sexual behavior by the complainant. The majority unfortunately conflates the presence of the alleged victim's STDs, which could be the *result* of specific instances of her sexual behavior if any specific instances had been shown by defendant, with specific instances themselves.

"Since a legislative body is presumed not to have used superfluous words, our courts must accord meaning, if possible, to every word in a statute." *N.C. Bd. of Exam'rs v. N.C. State Bd. of Educ.*, 122 N.C. App. 15, 21, 468 S.E.2d 826, 830 (1996) (citing 2A Norman Singer, *Sutherland Statutory Construction* § 47.37 (5th ed. 1992)), *aff'd per curiam in part and disc. rev. improvidently allowed*, 345 N.C. 493, 480 S.E.2d 50 (1997). In the case at bar, the majority has not applied this Court's well-established principles of statutory construction, especially with regard to the essential word "specific," that purposefully appears in N.C.G.S. § 8C-1, Rule 412(b)(2). For the reasons indicated, I would affirm the trial court's ruling that excluded the evidence of STDs pursuant to Rule 412 and affirm defendant's conviction, consistent with the outcome of this case in the Court of Appeals but based upon a different rationale.

STATE v. LEE

[370 N.C. 671 (2018)]

STATE OF NORTH CAROLINA
v.
GYRELL SHAVONTA LEE

No. 335PA16

Filed 6 April 2018

Criminal Law—jury instruction—self-defense—omission of stand-your-ground provision

The trial court erred in a first-degree murder case by giving its self-defense jury instruction that omitted the relevant stand-your-ground provision. Defendant showed a reasonable possibility that, had the trial court given the required stand-your-ground instruction, a different result would have been reached at trial. Defendant was entitled to a new trial with proper self-defense and stand-your-ground instructions.

Chief Justice MARTIN concurring.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 789 S.E.2d 679 (2016), finding no error after appeal from a judgment entered on 12 July 2015 by Judge J. Carlton Cole in Superior Court, Pasquotank County. Heard in the Supreme Court on 6 November 2017.

Joshua H. Stein, Attorney General, by Amy Kunstling Irene, Special Deputy Attorney General, for the State.

Glenn Gerding, Appellate Defender, by Paul M. Green, Assistant Appellate Defender, for defendant-appellant.

Williams Mullen, by Camden R. Webb; and Ilya Shapiro, pro hac vice, for Cato Institute, amicus curiae.

NEWBY, Justice.

This case is about whether the trial court erroneously instructed the jury when it omitted the relevant stand-your-ground provision from its instructions on self-defense, and, if so, whether such error was preserved. By omitting the relevant stand-your-ground provision, the trial court's jury instructions were an inaccurate and misleading statement of the law. Such error is preserved when the trial court deviates from an agreed-upon

pattern instruction. Defendant has shown a reasonable possibility that, had the trial court given the required stand-your-ground instruction, a different result would have been reached at trial. Accordingly, we reverse the decision of the Court of Appeals. Defendant is entitled to a new trial with proper self-defense and stand-your-ground instructions.

On 31 December 2012, defendant celebrated New Year's Eve at a neighbor's home in Elizabeth City. Shortly after midnight, defendant left his neighbor's home on foot and encountered several people convened around a car, including Quinton Epps (Epps) and defendant's cousin, Jamieal Walker (Walker). Epps and Walker were engaged in a heated argument. Epps ultimately left in the car, and defendant went inside his home. About twenty minutes later, another car approached defendant's home. Defendant and Walker were standing "beside the house and in the front yard." Defendant saw Epps exit the car's back passenger side. Walker and Epps began arguing, and Epps became verbally abusive and aggressive. Epps got back into the car and left the scene. Soon thereafter, another car drove alongside defendant's backyard, stopping briefly. Defendant retrieved his pistol and concealed it on his person, "[out of] instinct," though defendant believed "[Epps] wasn't a threat at th[at] time." The car ultimately parked three houses down from defendant's residence. Epps and several others exited the car.

Defendant and Walker walked down the street to talk to Epps. Epps and Walker again argued in the street and sidewalk area as defendant watched from a short distance. Defendant saw that Epps had a gun behind his back. The argument escalated, and Walker punched Epps in the face. Epps grabbed Walker's hoodie, shot him twice in the stomach, and continued shooting as Walker turned to flee. Walker was later found dead nearby.

After Epps fired his last shot at Walker, Epps turned and pointed his gun at defendant. Before Epps could fire, defendant fatally shot Epps. Defendant stated that it happened quickly, lasting approximately four seconds, and added that he would have shot Epps to protect Walker but could not get a clear shot because Epps and Walker were too close together during the struggle. Defendant was ultimately indicted for first-degree murder.

At trial defendant asserted that he fired the fatal shot in self-defense, maintaining that he shot Epps only after Epps turned the gun on him and denying that he continued to shoot after Epps fell to the ground. Defendant introduced evidence supporting his version of events, including, *inter alia*, an eyewitness, his police interview, and taped telephone calls from the jail. The State argued defendant did not shoot in

self-defense and introduced, *inter alia*, a witness who testified that while Epps was "on the ground," defendant "came out of nowhere" and "[ran] up and [kept] shooting [Epps]." During closing arguments, the State contended that defendant should have retreated because a reasonable person in defendant's shoes would have "removed himself from the situation" and "run[ ] away."

At the trial court's request, the parties agreed to the delivery of N.C.P.I.–Crim. 206.10, the pattern jury instruction on first-degree murder and self-defense. This instruction provides, in relevant part: "Furthermore, the defendant has no duty to retreat in a place where the defendant has a lawful right to be." N.C.P.I.–Crim. 206.10 (June 2014). In addition, N.C.P.I.–Crim. 308.10, which is incorporated by reference in footnote 7 of N.C.P.I.–Crim. 206.10 and is entitled "Self-Defense, Retreat," states that "[i]f the defendant was not the aggressor and the defendant was . . . [at a place the defendant had a lawful right to be], the defendant could stand the defendant's ground and repel force with force." *Id.* 308.10 (June 2012) (brackets in original).

Though the trial court agreed to instruct the jury on self-defense according to N.C.P.I.–Crim. 206.10, it ultimately omitted the "no duty to retreat" language of N.C.P.I.–Crim. 206.10 from its actual instructions without prior notice to the parties and did not give any part of the "stand-your-ground" instruction. Defense counsel did not object to the instruction as given. Though the jury reported that it was deadlocked, it ultimately convicted defendant of second-degree murder, following approximately nine hours of deliberation. Defendant appealed.

At the Court of Appeals, defendant argued that the trial court's "omission of a jury instruction that a person confronted with deadly force has no duty to retreat but can stand his ground" was error, preserved by the trial court's deviation from the agreed-upon pattern instruction, *see State v. Withers*, 179 N.C. App. 249, 255, 633 S.E.2d 863, 867 (2006), or plain error, regardless, *see State v. Wilson*, 197 N.C. App. 154, 164-65, 676 S.E.2d 512, 518-19, *disc. rev. denied*, 363 N.C. 589, 684 S.E.2d 158 (2009). The Court of Appeals affirmed defendant's conviction, reasoning that the law limits a defendant's right to stand his ground to "any place he or she has the lawful right to be," *State v. Lee*, ___ N.C. App. ___, ___, 789 S.E.2d 679, 685 (2016) (emphasis omitted) (quoting N.C.G.S. § 14-51.3(a) (2015)), which did not include the public street where the incident occurred. We allowed defendant's petition for discretionary review.

Defendant contends the trial court erroneously omitted the relevant stand-your-ground provision and that such error is preserved by the

trial court's deviation from the pattern instruction. We conclude that, by omitting the relevant stand-your-ground provision from the agreed-upon instructions on self-defense, the trial court's jury instructions constituted preserved error.

"The jury charge is one of the most critical parts of a criminal trial." *State v. Walston*, 367 N.C. 721, 730, 766 S.E.2d 312, 318 (2014). "[W]here competent evidence of self-defense is presented at trial, the defendant is entitled to an instruction on this defense, as it is a substantial and essential feature of the case . . . ." *State v. Morgan*, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986) (citations and emphasis omitted); *see State v. Guss*, 254 N.C. 349, 351, 118 S.E.2d 906, 907 (1961) (per curiam) ("The jury must not only consider the case in accordance with the State's theory but also in accordance with defendant's explanation.").

Our statutes provide two circumstances in which individuals are justified in using deadly force, thus excusing them from criminal culpability. Section 14-51.3 of North Carolina's General Statutes, entitled "Use of force in defense of person; relief from criminal or civil liability," provides:

> (a) A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, *a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if* either of the following applies:
>
> > (1) *He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.*
>
> . . . .
>
> (b) A person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force . . . .

N.C.G.S. § 14-51.3 (2017) (emphases added).

Section 14-51.2, entitled "Home, workplace, and motor vehicle protection; presumption of fear of death or serious bodily harm," provides that "[a] lawful occupant within his . . . home, motor vehicle, or workplace does not have a duty to retreat from an intruder,"

id. § 14-51.2(f) (2017), and "is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself . . . or another when using defensive force" in the case of "an unlawful and forcible entry," *id.* § 14-51.2(b) (2017). The relevant distinction between the two statutes is that a rebuttable presumption arises that the lawful occupant of a home, motor vehicle, or workplace reasonably fears imminent death or serious bodily harm when using deadly force at those locations under the circumstances in N.C.G.S. § 14-51.2(b). This presumption does not arise in N.C.G.S. § 14-51.3(a)(1).[1]

Under either statutory provision, a person does not have a duty to retreat, but may stand his ground.[2] Accordingly, when, as here, the defendant presents competent evidence of self-defense at trial, the trial court must instruct the jury on a defendant's right to stand his ground, as that instruction informs the determination of whether the defendant's actions were reasonable under the circumstances, a critical component of self-defense. *See State v. Blevins*, 138 N.C. 668, 670-71, 50 S.E. 763, 764 (1905) ("[The] necessity, real or apparent, [is] to be determined by the jury" and the defendant "can have that necessity determined in view of the fact that he has a right to stand his ground . . . ."); N.C.P.I.–Crim. 206.10 (A successful self-defense claim requires, *inter alia*, a showing that "the defendant believed it was necessary to kill the victim . . . to save [himself] from death or great bodily harm.").

Though the trial court here agreed to instruct the jury on self-defense under N.C.P.I.–Crim. 206.10, it omitted the "no duty to retreat" language of N.C.P.I.–Crim. 206.10 without notice to the parties and did not give any part of N.C.P.I.–Crim. 308.10, the "stand-your-ground" instruction. While defendant offered ample evidence at trial that he acted in self-defense

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1. Contrary to the opinion below, the phrase "any place he or she has the lawful right to be" is not limited to one's home, motor vehicle, or workplace, but includes any place the citizenry has a general right to be under the circumstances. *See, e.g.*, *Guss*, 254 N.C. at 351, 118 S.E.2d at 907; *see also* Research Div., N.C. Gen. Assembly, *Summaries of Substantive Ratified Legislation* 2011, at 48 (Dec. 2011) ("A person, *wherever located*, has no duty to retreat, and may use what force is necessary . . . ." (emphasis added)).

2. In 2011 the General Assembly amended the law of self-defense in North Carolina, Act of June 17, 2011, ch. 268, sec. 1, 2011 N.C. Sess. Laws 1002, 1002-04, to clarify that one who is not the initial aggressor may stand his ground, regardless of whether he is in or outside the home. *Compare State v. Godwin*, 211 N.C. 419, 422, 190 S.E. 761, 763 (1937) ("When an attack is made with a murderous intent, the person attacked . . . may stand his ground and kill his adversary, if need be."), *with State v. Pennell*, 231 N.C. 651, 654, 58 S.E.2d 341, 342 (1950) ("[W]hen a person . . . is attacked in his own dwelling, or home, or place of business . . . the law imposes upon him no duty to retreat before he can justify his fighting in self-defense . . . .").

while standing in a public street where he had a right to be when he shot Epps, the trial court did not instruct the jury that defendant could stand his ground. The State nonetheless contends that defendant did not object to the instruction as given, thereby failing to preserve the error below and rendering his appeal subject to plain error review only.

When a trial court agrees to give a requested pattern instruction, an erroneous deviation from that instruction is preserved for appellate review without further request or objection.

> [A] request for an instruction at the charge conference is sufficient compliance with the rule to warrant our full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions.

State v. Ross, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988). Because the trial court here agreed to instruct the jury in accordance with N.C.P.I.–Crim. 206.10, its omission of the required stand-your-ground provision substantively deviated from the agreed-upon pattern jury instruction, thus preserving this issue for appellate review under N.C.G.S. § 15A-1443(a).

Moreover, the record reflects a reasonable possibility that, had the trial court given the required stand-your-ground instruction, a different result would have been reached at trial. *See State v. Ramos*, 363 N.C. 352, 355-56, 678 S.E.2d 224, 227 (2009) (applying "reasonable possibility" of "different result" standard to determine whether erroneous instruction was prejudicial). During closing argument the State contended that defendant's failure to retreat was culpable. As such, the omission of the stand-your-ground instruction permitted the jury to consider defendant's failure to retreat as evidence that his use of force was unnecessary, excessive, or unreasonable. *See State v. Smith*, 360 N.C. 341, 346, 626 S.E.2d 258, 261 (2006) (The purpose of a jury instruction "is to give a clear instruction which applies the law to the evidence" and thus "assist the jury in understanding the case and in reaching a correct verdict." (quoting *State v. Williams*, 280 N.C. 132, 136, 184 S.E.2d 875, 877 (1971))). Accordingly, defendant is entitled to a new trial with proper instructions on self-defense.[3]

In sum, we conclude that by omitting the stand-your-ground provision from the agreed-upon instructions on self-defense, the trial court's jury

3. Because we resolve defendant's appeal on this issue, we do not address his remaining arguments.

instructions constituted preserved error. Defendant has shown a reasonable possibility that, had the trial court included the stand-your-ground provision in its instructions, a different result would have been reached at trial. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court with instructions to vacate defendant's conviction and further remand this case to the trial court for a new trial with proper instructions on self-defense and stand-your-ground.

REVERSED AND REMANDED; NEW TRIAL.

Chief Justice MARTIN concurring.

This case is about what a man did in the few seconds after he saw his cousin get shot. We now have to consider that man's response to this violent event in light of the doctrines of self-defense and defense of another under our stand-your-ground statutes.

I agree with the majority's ruling that the trial court erred by not instructing the jury on defendant's ability to lawfully stand his ground in self-defense. I therefore fully join in the majority opinion. I write separately to note that defendant has also argued that the trial court should have instructed the jury on defense of another, and to observe that the trial court's omission of an instruction on that defense also constituted error.

"[A] judge has an obligation to fully instruct the jury on all substantial and essential features of the case . . . arising on the evidence." *State v. Harris*, 306 N.C. 724, 727, 295 S.E.2d 391, 393 (1982). This obligation arises "[r]egardless of requests by the parties," *id.*, and a trial court commits error if it fails to meet this obligation, *see State v. Todd*, 264 N.C. 524, 531, 142 S.E.2d 154, 159 (1965). Our Court has applied this standard specifically to jury instructions on both self-defense and defense of another. *See id.*; *State v. Montague*, 298 N.C. 752, 755, 259 S.E.2d 899, 902 (1979). Articulating a principle that should apply equally to defense of another, this Court has stated that, "[w]here there is evidence that [a] defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in [the] defendant's evidence." *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974); *see also State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988) (citing *State v. McCray*, 312 N.C. 519, 529, 324 S.E.2d 606, 614 (1985)) ("When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense . . . , courts must consider the evidence in the light most favorable to [the] defendant.").

Under our State's common law, one could "kill in defense of another if one believe[d] it to be necessary to prevent death or great bodily harm to the other 'and ha[d] a reasonable ground for such belief.' " *State v. Perry*, 338 N.C. 457, 466, 450 S.E.2d 471, 476 (1994) (quoting *State v. Terry*, 337 N.C. 615, 623, 447 S.E.2d 720, 724 (1994)). The reasonableness of the defender's belief was "to be judged by the jury in light of the facts and circumstances as they appeared to the defender at the time of the killing." *Id.* (quoting *Terry*, 337 N.C. at 623, 447 S.E.2d at 724).

Two additional common law rules limited the scope of this doctrine. This Court stated the first rule in *State v. Gaddy*: "[T]he right to defend another [could] be no greater than the latter's right to defend himself." *See State v. Gaddy*, 166 N.C. 341, 346-47, 81 S.E. 608, 610 (1914). Under the second rule, which appeared in *State v. McAvoy* and other cases, the initial aggressor in a conflict could not claim perfect self-defense. *See, e.g.*, *State v. McAvoy*, 331 N.C. 583, 595-96, 417 S.E.2d 489, 497 (1992) (citing *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981)). An aggressor who started a fight without murderous intent, however, would still have been entitled to claim *imperfect* self-defense. *Id.* at 596, 417 S.E.2d at 497 (citing *Norris*, 303 N.C. at 530, 279 S.E.2d at 573). As a result, under the common law rules in *Gaddy* and *McAvoy*, a defendant who intervened to defend someone who had started a fight without murderous intent would have been entitled to a jury instruction only on imperfect defense of another. If a defendant established imperfect defense of another, a jury could not have acquitted him but could have convicted him of voluntary manslaughter instead of murder. *See id.* (citing *Norris*, 303 N.C. at 530, 279 S.E.2d at 573).

In 2011, however, the General Assembly enacted N.C.G.S. §§ 14-51.3 and 14 51.4, which at least partially abrogated—and may have completely replaced—our State's common law concerning self-defense and defense of another.

Subsection 14-51.3(a) states that a person's use of non-deadly force is justified "when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against [someone else's] imminent use of unlawful force." N.C.G.S. § 14-51.3(a) (2017). That subsection then establishes that a person is justified in using *deadly* force when that person is in a place that "he or she has the lawful right to be," *id.*, and "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another," *id.* § 14-51.3(a)(1).

N.C.G.S. § 14-51.4 provides exceptions to the justifications for defensive force set forth in subsection 14-51.3(a), stating that "[t]he

justification[s] described in . . . [section] 14-51.3 [are] not available to a person who used defensive force" in certain enumerated circumstances. *Id.* § 14-51.4 (2017). Subsection 14-51.4(2) then gives one of these circumstances; it states that a person's use of defensive force is not justified when that person "[i]nitially provoke[d] the use of force against himself or herself." *Id.* § 14-51.4(2). This subsection does *not* create an exception to section 14-51.3, however, when a defendee—the person that a defendant acts to protect—provokes a fight with non-deadly force and a defendant then intervenes to protect that defendee *from* deadly force. In other words, when a defendant uses deadly force to protect an initial aggressor who used non-deadly force against an attacker who responds with deadly force, that defendant's actions are still fully justified under subsections 14-51.3(a)(1) and 14-51.4(2).

This statutory framework thus appears to contradict the common law rules in *Gaddy* and *McAvoy* when those rules are applied together, because it does not reduce a defendant's justification to imperfect defense of another in this context. That defendant can rightly claim *perfect* defense of another. Nor does the only other exception in section 14-51.4 reduce a defendant's justification for the use of deadly force stated in subsection 14-51.3(a)(1) from perfect to imperfect defense of another; that exception states only that a person is not justified in using defensive force under section 14-51.3 if the person "[w]as attempting to commit, committing, or escaping after the commission of a felony." *Id.* § 14-51.4(1). So, under this statutory framework, a defendant who uses deadly force to protect an initial aggressor who used non-deadly force against an attacker who responds with deadly force should be entitled to perfect self-defense, as long as that defendant was not attempting to commit or committing a felony, or escaping after committing a felony, in the process.

It is important to note the statutory limits of the justification defense in subsection 14-51.3(a). At first glance, one might think that a defendant could defend another against deadly force even when that other had initially provoked a fight *with* deadly force. But that is not so. Because the second sentence of subsection 14-51.3(a), in context, describes a heightened variant of the justification discussed by the first sentence—a justification sufficient to cover deadly as well as non-deadly force—the requirement from the first sentence that the hostile force being opposed be "unlawful" should be imputed to the second sentence. Thus, no justification is available for using deadly force to defend another against *lawful* force. If a defendee provokes a fight with deadly force, then the use of deadly force by the opposing combatant would be lawful.

It follows that a defendant would not be justified under subsection 14-51.3(a)(1) in using deadly force himself against that opposing combatant to protect the defendee, as the defendant in that scenario would not be defending another against *unlawful* force. The justification for deadly force set forth in subsection 14-51.3(a)(1) is inherently limited in this way. *Cf. State v. Holloman*, 369 N.C. 615, 628-29, 799 S.E.2d 824, 833 (2017) (concluding that, when an initial aggressor provokes a fight using deadly force and the opposing combatant responds with deadly force, that aggressor is not justified in using deadly force in response under N.C.G.S. § 14-51.4(2)(a)).

Turning to the case at hand, defendant was entitled to a jury instruction on perfect defense of another. Based on the evidence at trial, a jury could reasonably conclude the following: Defendant saw his cousin, Jamieal Walker, being repeatedly shot by Quinton Epps, after Walker had punched Epps in the face. Walker began to run away, with Epps still shooting at him, and then Epps immediately turned his gun toward defendant. At that point, defendant shot Epps "to get him to drop his weapon." The fact that Epps momentarily turned his gun away from Walker did not mean that Walker was instantly removed from mortal danger. Both Charles Bowser, an eyewitness, and defendant himself testified that the entire sequence of Epps' turning his gun away from Walker and toward defendant and defendant's shooting of Epps took, at most, "four seconds." While the Court of Appeals leaned heavily on the fact that Walker was already fatally wounded before defendant shot Epps, *State v. Lee*, ___ N.C. App. ___, ___, 789 S.E.2d 679, 689 (2016), defendant could not have known at that moment whether Walker's injuries were fatal or what chance Walker had of survival. Also, as the majority notes, defendant stated that he would have shot Epps sooner if Epps and Walker had not been so close together during their fight. I accept all of these facts as true for the purpose of deciding this issue.

Given these facts, Epps used deadly force against Walker after Walker had merely thrown a punch. That punch did not justify a reasonable belief on Epps' part that shooting Walker was necessary to prevent Epps from suffering death or great bodily harm, so Epps himself did not act in lawful self-defense under subsection 14-51.3(a)(1) when he shot Walker. This means that Epps' use of deadly force was unlawful, and defendant therefore could have defended Walker from it with deadly force. Defendant was in a public street, where he had a lawful right to be, and, because Epps had already shot Walker multiple times, defendant could have reasonably believed that his own use of deadly force was necessary to save Walker from death or further serious bodily

injury. This satisfies the standard for the use of deadly force in defense of another under subsection 14-51.3(a)(1). Thus, the trial court erred by omitting a jury instruction on defense of another.

In sum, the trial court did not instruct the jury on perfect defense of another, even though defense of another under N.C.G.S § 14-51.3(a)(1) was a "substantial and essential feature[ ] . . . arising on the evidence" in this case. *See Harris*, 306 N.C. at 727, 295 S.E.2d at 393. The trial court erred by not instructing the jury on this defense. Defendant concedes that this issue was not properly preserved below, so this Court should review the issue only for plain error. I do not need to address whether the omission of this instruction rose to the level of plain error, however, as defendant will receive a new trial under the majority's ruling regardless. If the same or substantially similar evidence is presented at a future trial of defendant, the trial court should instruct the jury on the law concerning perfect defense of another. The jury should not be precluded from considering any reasonable explanation of defendant's actions right after he saw his cousin get shot.

STATE OF NORTH CAROLINA
v.
SEID MICHAEL MOSTAFAVI

No. 199A17

Filed 6 April 2018

False Pretense—motion to dismiss—sufficiency of indictment—amount of money obtained not required

The trial court properly denied defendant's motion to dismiss the charges of obtaining property by false pretenses. The indictment was facially valid and fulfilled the purpose of the Criminal Procedure Act of 1975. The indictment did not need to include the amount of money obtained because it adequately advised defendant of the conduct that was the subject of the accusation. Further, the State presented sufficient evidence at trial regarding defendant's false representation of ownership.

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 508 (2017), affirming in part and vacating in part judgments entered on 9 June 2016

by Judge Anderson D. Cromer in Superior Court, Forsyth County. Heard in the Supreme Court on 9 January 2018.

Joshua H. Stein, Attorney General, by Brent D. Kiziah, Assistant Attorney General, for the State-appellant.

Joseph P. Lattimore for defendant-appellee.

NEWBY, Justice.

In this case we decide whether an indictment charging defendant with obtaining property by false pretenses is fatally flawed because it described the property obtained as "United States Currency" and whether the State presented sufficient evidence of defendant's false representation of ownership to support his conviction for those charges. An indictment for obtaining property by false pretenses must describe the property obtained in sufficient detail to identify the transaction by which defendant obtained money. The indictment here sufficiently identifies the crime charged because it describes the property obtained as "United States Currency" and names the items conveyed to obtain the money. As such, the indictment is facially valid; it gives defendant reasonable notice of the charges against him and enables him to prepare his defense. Furthermore, we conclude that the State presented sufficient evidence of defendant's false representation that he owned the stolen property he conveyed. Therefore, we reverse the decision of the Court of Appeals.

The State presented evidence at trial showing that in July 2015, a homeowner hired a family friend to housesit for her while she was on vacation. On 10 July 2015, the house sitter contacted police to report that during the time she was housesitting someone had broken into the home. That same day, the house sitter and police contacted the homeowner to tell her about the alleged break-in. The next day, however, the house sitter confessed that she and defendant had stolen the items from the home.

Earlier in the week, the house sitter stole certain items from the home and conveyed them to a local pawnshop in exchange for cash to pay for drugs. She confided in defendant, and defendant requested to go to the victim's home. Defendant visited the home, then later returned with the house sitter, pulled his car into the garage, closed the door, and loaded various items into his vehicle before leaving the premises. Defendant obtained, *inter alia*, an Acer laptop, a Vizio television, a

computer monitor, and jewelry, all belonging to the homeowner. Later, defendant conveyed the stolen items to several local stores, including a pawnshop.

Defendant was charged by indictment with, *inter alia*, two counts of obtaining property by false pretenses. The indictment at issue stated in relevant part:

> I. The jurors for the State upon their oath present that . . . the defendant . . . knowingly and designedly with the intent to cheat and defraud obtain[ed] UNITED STATES CURRENCY from CASH NOW PAWN by means of a false pretense which was calculated to deceive and did deceive. The false pretense consisted of the following: BY PAWNING AN ACER LAPTOP, A VIZIO TELEVISION AND A COMPUTER MONITOR AS HIS OWN PROPERTY TO SELL, when in fact the property had been stolen from [the homeowner] and the defendant was not authorized to sell the property.
>
> II. [T]he jurors for the State upon their oath present that . . . the defendant . . . knowingly and designedly with the intent to cheat and defraud obtain[ed] UNITED STATES CURRENCY from CASH NOW PAWN by means of a false pretense which was calculated to deceive and did deceive. The false pretense consisted of the following: BY PAWNING JEWELRY AS HIS OWN PROPERTY TO SELL when in fact the property had been stolen from [the homeowner] and the defendant was not authorized to sell the property.

At trial the house sitter testified that at no point had she told defendant that she owned the house or the items, or that she purported to sell them to defendant. Defendant testified, however, that the house sitter claimed she owned the stolen items and that he had purchased the items from the house sitter at an agreed upon price.

The pawnshop employee who completed defendant's transaction testified that, consistent with every loan or sale transaction, he requested defendant's identification. The State introduced two pawn tickets, initialed by the employee but unsigned by defendant, that described the specific items defendant conveyed and included defendant's name, address, driver's license number, and date of birth. Both tickets contained language indicating that, by conveying the items, "[y]ou are giving a security interest in the below described goods."

Defendant unsuccessfully moved to dismiss all charges but did not challenge the indictment at issue as fatally defective. Ultimately, the trial court found defendant guilty of, *inter alia*, two counts of obtaining property by false pretenses, and defendant appealed.

A divided panel of the Court of Appeals vacated defendant's convictions for two counts of obtaining property by false pretenses. *State v. Mostafavi*, ___ N.C. App. ___, ___, 802 S.E.2d 508, 514 (2017). The Court of Appeals opined that, when an indictment charges a defendant with obtaining money by false pretenses, the indictment is fatally defective unless it also includes, at a minimum, the amount of money obtained. *Id.* at ___, 802 S.E.2d at 511-12. The Court of Appeals further reasoned that even "where the amount of money is *not* known to the pleader, our Supreme Court instructs that describing the money by the name of the victim from whom it was obtained, the date it was obtained, and the false pretense used to obtain the money is still not sufficiently specific." *Id.* at ___, 802 S.E.2d at 512. Thus, though the indictment here included "United States Currency" and the specific property defendant conveyed to the pawnshop, the Court of Appeals concluded that the description still "f[ell] short of the specificity" required. *Id.* at ___, 802 S.E.2d at 511.

The dissent argued that the indictment was facially valid because it included all essential elements of the crime, gave defendant sufficient notice of the charged crimes, and protected defendant against double jeopardy. *Id.* at ___, 802 S.E.2d at 515-17 (Tyson, J., concurring in part and dissenting in part) (citing *State v. Ricks*, 244 N.C. App. 742, 754, 781 S.E.2d 637, 645 (2016) (upholding as valid a false pretenses indictment charging defendant with obtaining a quantity of United States Currency)). After concluding the indictment was facially valid, the dissent further determined the evidence was sufficient to support the charges for obtaining property by false pretenses. *Id.* at ___, 802 S.E.2d at 517-18. The State filed notice of appeal based on the dissenting opinion.

Here defendant contends, as held by the Court of Appeals, that the indictment is fatally defective because it fails to allege the amount of money obtained by conveying the items, as required by existing precedent. We disagree.

As this Court has consistently recognized, "a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981) (citations omitted). In seeking "to simplify criminal proceedings," *State v. Freeman*, 314 N.C. 432, 436, 333 S.E.2d 743, 746 (1985), the Criminal Procedure Act of 1975 requires that an indictment contain "[a] plain and

concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation," N.C.G.S. § 15A-924(a)(5) (2017). In moving away from the "technical rules of pleading," this statutory framework recognizes the purpose of indictments as "identify[ing] clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime." *Sturdivant*, 304 N.C. at 311, 283 S.E.2d at 731 (citation omitted). Thus, an indictment must allege "all the essential elements of the offense endeavored to be charged," *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (quoting *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953)), *cert. denied*, 539 U.S. 985, 124 S. Ct. 44, 156 L. Ed. 2d 702 (2003), but "an indictment couched in the language of the statute is generally sufficient to charge the statutory offense," *State v. Palmer*, 293 N.C. 633, 638, 239 S.E.2d 406, 410 (1977).

A person commits the crime of obtaining property by false pretenses if he or she (1) "knowingly and designedly by means of any kind of false pretense"; (2) "obtain[s] or attempt[s] to obtain from any person . . . any money, goods, property, services, chose in action, or other thing of value"; (3) "with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value." N.C.G.S. § 14-100(a) (2017). In an indictment for the larceny of money, including indictments alleging obtaining property by false pretenses, "it is sufficient to describe such money, or treasury note, or bank note, simply as money, without specifying any particular coin, or treasury note, or bank note." *Id.* § 15-149 (2017).

Here the indictment charged defendant with two counts of obtaining property by false pretenses and mirrors the language of the controlling statute, N.C.G.S. § 14-100(a), by stating that defendant, through false pretenses, knowingly and designedly obtained "United States Currency from Cash Now Pawn" by conveying specifically referenced personal property, which he represented as his own. The indictment describes the personal property used to obtain money, referencing an Acer laptop, a Vizio television, a computer monitor, and jewelry, the inclusion of which is sufficient to identify the specific transactions at issue. Moreover, it is clear from the transcript that defendant was not confused at trial regarding the property conveyed. Had defendant "need[ed] more information to mount his preferred defense," he could have requested

a bill of particulars under N.C.G.S. § 15A-925. *State v. Spivey*, 368 N.C. 739, 743, 782 S.E.2d 872, 874-75 (2016) (alteration in original) (quoting *State v. Jones*, 367 N.C. 299, 310, 758 S.E.2d 345, 353 (2014) (Martin, J., concurring in part and dissenting in part)). The legislature enacted the aforementioned Criminal Procedure Act of 1975, which, *inter alia*, sought to eliminate the technical pleading requirements previously recognized for criminal pleadings. *Freeman*, 314 N.C. at 436, 333 S.E.2d at 746. Thus, in light of the current pleading requirements set forth in the Criminal Procedure Act of 1975, the indictment did not need to include the amount of money obtained because it adequately advised defendant of the conduct that is the subject of the accusation.[1]

Nonetheless, defendant argues, and the Court of Appeals agreed, that this Court's precedent in *State v. Jones*, 367 N.C. 299, 758 S.E.2d 345 (2014), requires that any indictment charging defendant with obtaining money by false pretenses include the amount of money obtained. In *Jones* this Court held that a false pretenses indictment merely stating that defendant obtained "services" at certain automobile service centers was fatally defective in that the term "services," without more, failed to "describe with reasonable certainty the property obtained by false pretenses." *Id.* at 307-08, 758 S.E.2d at 351 (stating the distinct but analogous proposition "that simply describing . . . property obtained as 'money' or 'goods and things of value' is insufficient to allege the crime of obtaining property by false pretenses" (first quoting *State v. Reese*, 83 N.C. 637, 640 (1880); and then quoting *State v. Smith*, 219 N.C. 400, 401, 14 S.E.2d 36, 36 (1941))); *see also Smith*, 219 N.C. at 401-02, 14 S.E.2d at 36-37 (concluding that the indictment was fatally defective because it failed to reference any "money" obtained and because the State presented evidence at trial that differed from that alleged in the indictment). *Jones*, therefore, is not only factually distinguishable because it did not involve obtaining "money" through false pretenses, but the cited language in *Jones* is dicta and not binding on our decision here.

Moreover, the State presented substantial evidence at trial that defendant falsely represented he owned the stolen property sufficient to withstand defendant's motion to dismiss the two counts of obtaining property by false pretenses. To survive a motion to dismiss for insufficient evidence, the State must present "substantial evidence [ ] of each essential element of the offense charged, or of a lesser offense included

1. Our view is consistent with N.C.G.S. § 14-100(a), which contemplates an attempt crime. A person may be indicted for obtaining property by false pretenses under an attempt theory even though no money or property is exchanged.

therein, and [ ] of defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted). The trial court must consider the evidence "in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *Id.* at 99, 261 S.E.2d at 117 (citations omitted). When an indictment alleges a defendant has obtained property by false pretenses, "[t]he [S]tate must prove, as an essential element of the crime, that [the] defendant made [a] misrepresentation as alleged [in the indictment]." *State v. Linker*, 309 N.C. 612, 615, 308 S.E.2d 309, 311 (1983) (citations omitted). "If the [S]tate's evidence fails to establish that defendant made this misrepresentation but tends to show some other misrepresentation was made, then the [S]tate's proof varies fatally from the indictment[ ]." *Id.* at 615, 308 S.E.2d at 311 (footnote and citations omitted). "[T]he false pretense need not come through spoken words, but instead may be by act or conduct." *State v. Parker*, 354 N.C. 268, 284, 553 S.E.2d 885, 897 (2001) (citations omitted), *cert. denied*, 535 U.S. 1114, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002).

Here the State's evidence at trial tended to prove all the elements alleged in the indictment. The pawnshop employee who completed the transaction verified the pawn tickets, which described the conveyed items and contained defendant's name, address, driver's license number, and date of birth. The tickets included language explicitly stating that defendant was "giving a security interest in the . . . described goods." Considered in the light most favorable to the State, here the State presented sufficient evidence of defendant's false representation that he owned the stolen property he conveyed.[2]

We therefore conclude that, by tracking the language of N.C.G.S. § 14-100(a) and clearly identifying "the conduct which is the subject of the accusation," N.C.G.S. § 15A-924(a)(5), the indictment is facially valid and fulfills the purpose of the Criminal Procedure Act of 1975. The indictment gives defendant reasonable notice of the charges against him, including the specific property he allegedly conveyed to obtain the money referenced in the indictment, so that he may prepare his defense

2. Because we conclude that the State presented sufficient evidence of defendant's false representation of ownership, we find it unnecessary to address whether defense counsel provided ineffective assistance of counsel by failing to make such an argument before the trial court. Therefore, remanding this case to the Court of Appeals to address defendant's ineffective assistance of counsel claim is unnecessary.

and protect himself against double jeopardy. Moreover, the State presented sufficient evidence at trial regarding defendant's false representation of ownership to survive defendant's motion to dismiss the two counts of obtaining property by false pretenses. Accordingly, the indictment charging defendant with obtaining property by false pretenses is facially valid, and the trial court properly denied defendant's motion to dismiss. The decision of the Court of Appeals vacating defendant's two convictions for obtaining property by false pretenses is reversed.

REVERSED.

VOGLER REYNOLDA ROAD, LLC
v.
SCI NORTH CAROLINA FUNERAL SERVICES, INC.

No. 312A17

Filed 6 April 2018

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an opinion and final judgment entered on 3 April 2017 by Judge James L. Gale, Chief Special Superior Court Judge for Complex Business Cases, in Superior Court, Forsyth County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 14 March 2018.

Ward and Smith, P.A., by John M. Martin, for plaintiff-appellee.

Moore & Van Allen PLLC, by Anthony T. Lathrop and Glenn E. Ketner, III, for defendant-appellant.

PER CURIAM.

AFFIRMED.

SANDHILL AMUSEMENTS, INC. AND GIFT SURPLUS, LLC	)	
	)	
v.	)	From Onslow County
	)	
STATE OF NORTH CAROLINA, EX REL. ROY COOPER, GOVERNOR, IN HIS OFFICIAL CAPACITY; BRANCH HEAD OF THE ALCOHOL LAW ENFORCEMENT BRANCH OF THE STATE BUREAU OF INVESTIGATION, MARK J. SENTER, IN HIS OFFICIAL CAPACITY; SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, ERIK A. HOOKS, IN HIS OFFICIAL CAPACITY; AND DIRECTOR OF THE NORTH CAROLINA STATE BUREAU OF INVESTIGATION, BOB SCHURMEIER, IN HIS OFFICIAL CAPACITY	)	

No. 363A14-3

ORDER

The following order was entered:

Plaintiffs' Motion to Withdraw Pending Petitions, filed on 9 March 2018, is allowed as to plaintiffs' Petition for Writ of Certiorari, filed on 30 October 2017, and as to plaintiffs' Petition for Writ of Supersedeas, filed on 30 October 2017.

Plaintiffs' Motion to Vacate as Moot the 13 October 2017 order of the Court of Appeals allowing petitioners' 21 September 2017 Petition for Writ of Prohibition is remanded to the Court of Appeals of North Carolina for its consideration.

By special order of the Court in Conference, this the 5th day of April 2018. Ervin, J. recused.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of April 2018.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

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

5 APRIL 2018

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** Dissolved **04/05/2018** 2. Denied 3. Denied
005P18	State v. Ricardo Melgar-Argueta	Def's PDR Under N.C.G.S. § 7A-31 (COA17-434)	Denied
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. Denied 2. Allowed **02/27/2018** Dissolved **04/05/2018** 3. Denied
014P18	Pender County and the Town of Atkinson v. Donald Sullivan and Marion P. Sullivan	1. Defs' *Pro Se* Motion for Notice of Appeal (COA17-1160) 2. Defs' *Pro Se* Motion to Withdraw Appeal	1. Dismissed *ex mero motu* **03/01/2018** 2. Dismissed as moot
016P18	Barrett C. Baxley v. Jasmine Baxley	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-463)	Denied
017P18	State v. Joseph Burton Mial	1. Def's *Pro Se* Motion for Appropriate Relief 2. Def's *Pro Se* Motion for Copies of Documents Out of Court Record 3. Def's *Pro Se* Motion for Preparation of Stenographic Transcript 4. Def's Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed 3. Dismissed 4. Allowed
018A18	Thomas E. Freeman, Jr. v. NC Department of Health and Human Services, Central Regional Hospital and Whitaker PRTF	Petitioner's *Pro Se* Notice of Appeal Based Upon a Constitutional Question	Dismissed *ex mero motu*

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

5 APRIL 2018

019A18	State v. Charles Thomas Stacks	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-770) 2. State's Motion to Dismiss Appeal	1. --- 2. Allowed
020P18	Vincent J. Mastanduno, Employee v. National Freight Industries, Employer, American Zurich Insurance Company, Carrier	1. Plt's Petition for *Writ of Certiorari* to Review Order of COA 2. Plt's Motion for Expedited Consideration of Plt's Petition for *Writ of Certiorari*	1. Denied 2. Denied
026PA17	David Wichnoski, O.D., P.A., et al. v. Piedmont Fire Protection Systems, LLC, et al.	Plts' Motion to Withdraw Appeal	Allowed **03/08/2018**
037P18	Sony Pictures Entertainment Inc., Kim Russo, Schmid & Voiles, Kathleen McColgan, Esq., Rosen & Saba LLP, James Rosen, Esq., and Adela Carrasco, Esq. v. Glenn Henderson	Def's *Pro Se* Motion for Suspension of the Rules Under Rule 2 (COA15-1217)	Denied
040P18	Amy S. Grissom v. David I. Cohen	Plt's PDR Prior to a Decision of the COA (COA18-66)	Denied
046P18	State v. Richard Thomas Mays	1. Def's *Pro Se* Petition for *Writ of Certiorar*i to Review Order of Superior Court, Mecklenburg County (COAP18-45) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
052PA17-3	Cooper v. Berger, et al.	1. Plt's Motion to Enforce Mandate 2. Plt's Motion for Expedited Response	1. Denied **03/13/2018** 2. Allowed, and Defendants' Response is Due on or Before Monday, March 12, 2018 at 12:00 Noon **03/07/2018**

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

5 APRIL 2018

054P18	State v. Carnell L. Calhoun	Def's *Pro Se* Motion for Writ to Compel Production of Court File Records	Dismissed **Jackson, J., recused** **Ervin, J., recused**
059P18	Nathaniel R. Webb v. Wake County Detention Center	Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Wake County	Dismissed
064P18	State v. Kelvin W. Sellars	Def's *Pro Se* Motion for Discretionary Review (COAP18-100)	Denied **03/08/2018**
067P18	State v. Jonathan Eugene Dixon	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **03/07/2018** 2. **Ervin, J., recused**
068A18	State v. Jermel Toron Krider	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **03/08/2018** 2.
069P18	State v. Nell Monette Baldwin	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **03/13/2018** **Beasley, J., recused** **Morgan, J., recused**
071P18	Ron Metcalf, Head of Household v. Graham County Department of Social Services	1. Plt's *Pro Se* Petition for Writ of Certiorari to Review Order of Superior Court, Graham County 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Plt's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
080P18	Darron J. Jones v. Mr. Cranford	1. Plt's *Pro Se* Petition for *Writ of Certiorari* 2. Plt's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
081P18	State v. Pete Muhammad	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP18-129) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed

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

5 APRIL 2018

083P18	Marshall Lee Brown, Jr. v. Eric Hooks, Secretary of the Department of Public Safety and Ken Beaver, Superintendent of Alexander Correctional Institution, et al.	Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of North Carolina Court of Appeals (COAP18-44)	Denied **03/19/2018**
084P18	State v. Tyrone Barnes	Def's *Pro Se* Motion to Compel	Dismissed **03/16/2018**
085P18	State v. Gary Michael Prince, Jr.	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	Dismissed
086P18	State v. Frederick John Schumann	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-707)	Denied
087P11-2	Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC; Glenn B. Adams; Harold L. Boughman, Jr., and Vickie L. Burge v. Coy E. Brewer, Jr., Ronnie A. Mitchell, William O. Richardson, and Charles Brittain	Defs' (Coy E. Brewer, Jr. and Ronnie A. Mitchell) *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-1122)	Denied
131P16-7	State v. Somchoi Noonsob	Def's *Pro Se* Motion for Immediate Release	Denied **03/26/2018**
149P17-2	State v. Mohammed N. Jilani	Def's *Pro Se* Motion for Writ of Prohibition	Dismissed
155P17-2	State v. Joe Robert Reynolds	Def's *Pro Se* Motion for PDR	Denied
219P17-2	Courtney NC LLC v. Baldwin	Def's *Pro Se* Petition for *Writ of Certiorari*	Dismissed **03/13/2018** **Beasley, J., recused** **Morgan, J., recused**
227P17	In the Matter of the Will of James Paul Allen, Deceased	Propounder's PDR Under N.C.G.S. § 7A-31 (COA16-1209)	Allowed

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

5 APRIL 2018

284P17	State v. Jonathan Wayne Broyhill	Def's PDR Under N.C.G.S. § 7A-31 (COA16-841)	Denied
300A93-3	State v. Norfolk Junior Best (DEATH)	1. Def's Motion to Hold in Abeyance the Time in Which to File a Petition for *Writ of Certiorari* from Denial of MAR 2. Def's Motion for Extension of Time to File Petition for *Writ of Certiorari*	1. --- **3/08/2018** 2. Allowed **03/08/2018** **Ervin, J., recused**
320P17-3	State v. Ryan Lamar Parsons	1. Def's *Pro Se* Motion for Notice of Appeal (COA17-1192) 2. Def's *Pro Se* Motion for PDR	1. Dismissed *ex mero motu* 2. Denied
328P17	State v. Juan Manuel Villa	1. Def's Motion for Temporary Stay (COA16-1104) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/05/2017** Dissolved **04/05/2018** 2. Denied 3. Denied
334PA16	ACTS Retirement Communities, Inc. v. Town of Columbus	Joint Motion to Dismiss Appeal	Allowed **03/28/2018**
362P17	State v. James C. Howard	Def's PDR Under N.C.G.S. § 7A-31 (COA17-77)	Denied
363A14-3	Sandhill Amusements, Inc., et al. v. Sheriff of Onslow County, et al.	1. Plts' Motion for Temporary Stay (COAP17-693) 2. Plts' Petition for *Writ of Supersedeas* 3. Plts' Petition for *Writ of Certiorari* to Review Order of COA 4. Plts' Motion to Withdraw Pending Petitions 5. Plts' Motion to Vacate Writ of Prohibition as Moot	1. Denied **11/13/2017** 2. --- 3. --- 4. Special Order 5. Special Order **Ervin, J., recused**

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

5 APRIL 2018

366P17	Conleys Creek Limited Partnership, LLP, et al. v. Smoky Mountain Country Club Property Owners Association, et al.	1. Plt's (Conleys Creek Limited Partnership) Notice of Appeal Based Upon a Constitutional Question (COA16-647) 2. Plt's (Conleys Creek Limited Partnership) PDR Under N.C.G.S. § 7A-31 3. Def's (Smoky Mountain Country Club Property Owners Association) Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
369P17	State v. Robert Lewis Bishop	Def's PDR Under N.C.G.S. § 7A-31 (COA17-55)	Denied
371P17	State v. Kenneth James Rouse	Def's PDR Under N.C.G.S. § 7A-31 (COA17-176)	Denied **Jackson, J., recused**
372P17-2	State v. Kenneth Kelly Duvall	1. Def's *Pro Se* Motion for PDR (COAP17-711) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot **Ervin, J., recused**
374P17	Curtis R. Holmes v. David G. Sheppard and Farm Bureau Insurance of North Carolina, Inc.	Def's PDR Under N.C.G.S. § 7A-31 (COA17-125)	Denied
377P17	State v. David Lynn Paige	1. Def's Notice of Appeal Based Upon A Constitutional Question (COA17-102) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
385P17	State v. Bradford Lee Bradshaw	Def's PDR Under N.C.G.S. § 7A-31 (COA17-196)	Denied
388P17	State v. Andwele Willie Eaves	1. Def's Motion for Temporary Stay (COA17-159) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/16/2017** Dissolved **04/05/2018** 2. Denied 3. Denied

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

5 APRIL 2018

398P17	State v. Joanna Roberta Madonna	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1300)	Denied
402P17	Thelma Bonner Booth, Widow and Administratrix of the Estate of Henry Hunter Booth, Jr., Deceased-Employee v. Hackney Acquisition Company, f/k/a Hackney & Sons, Inc., f/k/a Hackney & Sons (East), f/k/a J.A. Hackney & Sons, Employer, North Carolina Insurance Guaranty Association, on behalf of American Mutual Liability Insurance, Carrier, and on behalf of The Home Insurance Company, Carrier	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA17-274) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Def's (NCIGA) Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
411P17	State v. C'Quwan Johnson	Def's Petition for *Writ of Certiorari* to Review Order of COA (COA17-423)	Denied
413P17	State v. Bertylar Peace, Jr.	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	Denied
419P12-2	Michael Dennis Long v. State of North Carolina, Department of Public Safety, et al.	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **04/02/2018**
422P17	State v. James Gregory Armistead	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-323) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
423PA16-2	Cecelia W. Peoples and Ernest A. Robinson, Jr. v. Thomas H. Tuck	Def's PDR Under N.C.G.S. § 7A-31 (COA16-293-2)	Denied
432P17	State v. Daris Lamont Spinks	Def's PDR Under N.C.G.S. § 7A-31 (COA17-413)	Denied

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

5 APRIL 2018

435P17	Surgical Care Affiliates, LLC v. North Carolina Industrial Commission	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA17-78)	Denied
437P17	Lenton C. Brown v. North Carolina Department of Public Safety, an agency of the State of North Carolina, and Division of Adult Correction and Juvenile Justice, a subunit contained within the North Carolina Department of Public Safety	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA16-1298)	Denied
438P17	Anthony M. Kyles v. The Goodyear Tire & Rubber Co., Employer, Liberty Mutual Ins. Co., Carrier	1. Plt's Motion for Temporary Stay (COA17-594) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/29/2017** Dissolved **04/05/2018** 2. Denied 3. Denied
439P17	State v. Kenneth Gore, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA17-267)	Denied
449P11-18	In re Charles Everette Hinton	Petitioner's *Pro Se* Motion for Request and Demand for Final Civil Judgment by Default	Denied **03/09/2018** **Ervin, J., recused**
532P08-2	State v. Frank Durand Tomlin	Def's *Pro Se* Petition for *Writ of Mandamus* (COA17-351, COAP16-846)	Dismissed
629P01-6	State v. John Edward Butler	1. Def's *Pro Se* Motion to Appeal 2. Def's *Pro Se* Motion to Locate and Preserve Evidence 3. Def's *Pro Se* Motion for Preservation of Evidence and Post-Conviction DNA Testing	1. Dismissed 2. Dismissed 3. Dismissed

AMENDMENTS TO THE RULES CONCERNING THE ORGANIZATION OF THE STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 27, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning its organization, as particularly set forth in 27 N.C.A.C. 1A, Section .0700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0700, Standing Committees of the Council

Rule .0701, Standing Committees and Boards
(a) Standing Committees. Promptly after his or her election, the president shall appoint members to the standing committees identified below to serve for one year beginning January 1 of the year succeeding his or her election…..

(1) Executive Committee...

(8) ~~Technology and Social Media~~ Communications Committee. It shall be the duty of the Communications Committee to develop and coordinate official North Carolina State Bar communications to its membership and to third parties, including the use of printed publications, emerging technology, and social media. ~~It shall be the duty of this committee to stay abreast of technological developments that might enable the North Carolina State Bar to better serve and communicate with its members and the public, and to develop processes, procedures and policies for the deployment and use of social media and other means of disseminating official information.~~

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 27, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of February, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 5th day of April, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of April, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CERTIFICATION OF PARALEGALS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 27, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the certification of paralegals, as particularly set forth in 27 N.C.A.C. 1G, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals

Rule .0119 Standards for Certification of Paralegals
(a) To qualify for certification as a paralegal, an applicant must pay any required fee, and comply with the following standards:

(1) Education...

(2) National Certification. If an applicant has obtained and thereafter maintains in active status at all times prior to application (i) the designation Certified Legal Assistant (CLA)/Certified Paralegal (CP) from the National Association of Legal Assistants; (ii) the designation PACE-Registered Paralegal (RP)/Certified Registered Paralegal (CRP) from the National Federation of Paralegal Associations; or (iii) another national paralegal credential approved by the board, the applicant is not required to satisfy the educational standard in paragraph (a)(1).

(3) Examination...

~~(b) Alternative Qualification Period. For a period not to exceed two years after the date that applications for certification are first accepted by the board, an applicant may qualify by satisfying one of the following:~~

~~(1) earned a high school diploma, or its equivalent, worked as a paralegal and/or a paralegal educator in North Carolina for not less than 5000 hours during the five years prior to application, and, during the 12 months prior to application, completed three hours of continuing legal education in professional responsibility, as approved by the board;~~

~~(2) obtained and maintained at all times prior to application the designation Certified Legal Assistant (CLA)/Certified Paralegal (CP), PACE-Registered Paralegal (RP), or other national paralegal credential approved by the board and worked as a paralegal and /or a paralegal educator in North Carolina for not less than 2000 hours during the two years prior to application; or~~

~~(3) worked as a paralegal and/or a paralegal educator in North Carolina for not less than 2000 hours during the two years prior to application and fulfilled one of the following educational requirements:~~

~~(A) as set forth in Rule .0119(a)(1), or~~

~~(B) earned an associate's or bachelor's degree in any discipline from any institution of post-secondary education that is accredited by an accrediting body recognized by the United States Department of Education and successfully completed at least the equivalent of 18 semester credits at a qualified paralegal studies program, any portion of which credits may also satisfy the requirements for the associate's or bachelor's degree.~~

~~(c)~~(b) Notwithstanding an applicant's satisfaction of the standards set forth in Rule .0119(a) ~~or (b)~~, no individual may be certified as a paralegal if: ...

~~(d)~~(c) ...

~~(e)~~(d) Qualified Paralegal Studies Program. A qualified paralegal studies program is a program of paralegal or legal assistant studies that is an institutional member of the Southern Association of Colleges and Schools or other regional or national accrediting agency recognized by the United States Department of Education, and is either

(1) approved by the American Bar Association;

(2) an institutional member of the American Association for Paralegal Education; or

(3) offers at least the equivalent of 18 semester credits of coursework in paralegal studies as prescribed by the American Bar Association Guidelines for the Approval of Paralegal Education including the equivalent of one semester credit in legal ethics.

~~(f)~~(e) ...

CERTIFICATION OF PARALEGALS

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 27, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 22nd day of February, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 5th day of April, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of April, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 27, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct of the North Carolina State Bar, as particularly set forth in 27 N.C.A.C. 2, Rule 1.15, Safekeeping Property, be amended as follows (additions are underlined, deletions are interlined except where noted):

27 N.C.A.C. 2, North Carolina Rules of Professional Conduct

Rule 1.15 Safekeeping Property

Rule 1.15-1 Definitions
(a)…

(e) "Electronic transfer" denotes a paperless transfer of funds.

[Re-lettering remaining paragraphs.]

Rule 1.15-2 General Rules
(a) …

(s) ~~Signature on Trust Checks~~ Check Signing and Electronic Transfer Authority.

(1) Every trust account check ~~Checks drawn on a trust~~ ~~account~~ must be signed by a lawyer, or by an employee who is not responsible for performing monthly or quarterly reconciliations and who is supervised by a lawyer. ~~Prior to exercising signature authority, a lawyer or supervised employee shall take a one-hour trust account management continuing legal education (CLE) course approved by the State Bar for this purpose. The CLE course must be taken at least once for every law firm at which the lawyer or the supervised employee is given signature authority.~~

(2) Every electronic transfer from a trust account must be initiated by a lawyer, or by an employee who is not responsible for performing monthly or quarterly reconciliations and who is supervised by a lawyer.

(3) Prior to exercising signature or electronic transfer authority, a lawyer or supervised employee shall take a one-hour trust account management continuing legal education (CLE) course approved by the State Bar for this purpose. The CLE course must be taken at least once for every law firm at which the lawyer or the supervised employee is given signature or transfer authority.

(4) Trust account checks may not be signed using signature stamps, preprinted signature lines on checks, or electronic signatures other than "digital signatures" as defined in 21 CFR 11.3(b)(5).

(t) ...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 27, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of February, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 5th day of April, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of April, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 27, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct of the North Carolina State Bar, as particularly set forth in 27 N.C.A.C. 2, Rule 1.15, Safekeeping Property, be amended as follows (additions are underlined, deletions are interlined except where noted):

27 N.C.A.C. 2, North Carolina Rules of Professional Conduct

Rule 1.15-3 Records and Accountings
(a) Check Format.

...

(i) Reviews.

(1) ...

(2) Each quarter, for each general trust account~~, and~~ dedicated trust account, ~~and fiduciary account,~~ the lawyer shall review the statement of costs and receipts, client ledger, and cancelled checks of a random sample of representative transactions completed during the quarter to verify that the disbursements were properly made. The transactions reviewed must involve multiple disbursements unless no such transactions are processed through the account, in which case a single disbursement is considered a transaction for the purpose of this paragraph. A sample of three representative transactions shall satisfy this requirement, but a larger sample may be advisable.

(3) Each quarter, for each fiduciary account, the lawyer shall engage in a review as described in Rule 1.15-3(i)(2); however, if the lawyer manages more than ten fiduciary accounts, the lawyer may perform reviews on a random sample of at least ten fiduciary accounts in lieu of performing reviews on all such accounts.

~~(3)~~(4) ...

[Re-numbering remaining paragraphs.]

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 27, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 22nd day of February, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 5th day of April, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of April, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules of Professional Conduct of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 27, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct, as particularly set forth in 27 N.C.A.C. 2, Rule 3.5, Impartiality and Decorum of the Tribunal, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Rules of Professional Conduct

Rule 3.5, Impartiality and Decorum of the Tribunal

(a) A lawyer representing a party in a matter pending before a tribunal shall not:

(1) seek to influence a judge, juror, member of the jury venire ~~prospective juror~~, or other official by means prohibited by law;

(2) communicate *ex parte* with a juror or member of the jury venire ~~prospective juror~~ except as permitted by law;

(3) unless authorized to do so by law or court order, communicate *ex parte* with the judge or other official regarding a matter pending before the judge or official~~; communicate *ex parte* with a judge or other official except:~~

~~(A) in the course of official proceedings;~~

~~(B) in writing, if a copy of the writing is furnished simultaneously to the opposing party;~~

~~(C) orally, upon adequate notice to opposing party; or~~

~~(D) as otherwise permitted by law;~~

(4) ...

(b) All restrictions imposed by this rule also apply to communications with, or investigations of, family members ~~of the family~~ of a juror or of a member of the jury venire ~~prospective juror~~.

(c) A lawyer shall reveal promptly to the court improper conduct by a juror or a member of the jury venire, ~~prospective juror~~, and improper conduct ~~or~~ by another person toward a juror, a member of the jury venire, ~~prospective juror or a member~~ the family members of a juror or a member of the jury venire's ~~prospective juror's~~ family.

(d) For purposes of this rule:

(1) *Ex parte* communication means a communication on behalf of a party to a matter pending before a tribunal that occurs in the absence of an opposing party, without notice to that party, and outside the record.

(2) A matter is "pending" before a particular tribunal when that tribunal has been selected to determine the matter or when it is reasonably foreseeable that the tribunal will be so selected.

Comment

[1] ...

[2] To safeguard the impartiality that is essential to the judicial process, jurors and members of the jury venire ~~prospective jurors~~ should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with members of the jury venire ~~prospective jurors~~ prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with a juror or a member of the jury venire ~~prospective juror~~ about the case.

[3] ...

[4] Vexatious or harassing investigations of jurors or members of the jury venire ~~prospective jurors~~ seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on the lawyer's behalf who conducts an investigation of jurors or members of the jury venire ~~prospective jurors~~ should act with circumspection and restraint.

[5] Communications with, or investigations of, members of the families of jurors or the families of members of the jury venire ~~prospective jurors~~ by a lawyer or by anyone on the lawyer's behalf are subject to the restrictions imposed upon the lawyer with respect to the lawyer's communications with, or investigations of, jurors or members of the jury venire ~~prospective jurors~~.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by

the Council of the North Carolina State Bar at a regularly called meeting on October 27, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 22nd day of February, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 5th day of April, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of April, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ADMINISTRATION OF THE STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 26, 2018.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning its organization, as particularly set forth in 27 N.C.A.C. 1A, Section .0500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0500, Meetings of the North Carolina State Bar

.0501 Annual Meetings

The annual meeting of the North Carolina State Bar shall be held at such time and place within the state of North Carolina, after such notice (but not less than 30 days) as the council may determine.

.0502 Special Meetings

(a) A special ~~Special~~ meetings of the North Carolina State Bar may be called to address specific subjects ~~may be called upon 30 days notice,~~ as follows:

(1) ~~by the secretary,~~ upon direction of the council; or~~.~~

(2) ~~by the secretary,~~ upon delivery to the secretary of a written request by no fewer than ~~upon the call addressed to the council, of not less than~~ 25% of the active members of the North Carolina State Bar setting forth the subject(s) to be addressed.

(b) At a special meetings, only ~~no~~ subjects specified in the notice shall be ~~dealt with other than those specified in the notice~~ addressed.

(c) Any special meeting of the North Carolina State Bar will be held at such time and place within the state of North Carolina as the council or president may determine.

.0503 Notice of Meetings

~~Notice of all meetings shall be given by publication in such newspapers of general circulation as the council may select, or, in the discretion of the council, by mailing notice to the secretary of the several district bars or to the individual active members of the North Carolina State Bar.~~

(a) Notice of any meeting of the North Carolina State Bar shall be given by the secretary by posting a notice at the State Bar headquarters and on the State Bar website or as otherwise directed by the council. Notice shall also be provided as required by N.C. Gen. Stat. § 143-318.12 and by any other statutory provision regulating notice of public meetings of agencies of the state.

(b) Notice of the annual meeting will be given at least 30 days before the meeting. Notice of any special meeting will be given at least 48 hours before the meeting or as otherwise required by law.

.0504 Quorum
At ~~all~~ any annual ~~and~~ or special meetings of the North Carolina State Bar those active members of the North Carolina State Bar present shall constitute a quorum. There ~~, and there~~ shall be no voting by proxy or by absentee ballot.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 26, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of February, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 5th day of April, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of April, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ADMINISTRATION OF THE STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 26, 2018.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning its organization, as particularly set forth in 27 N.C.A.C. 1A, Section .0600, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0600, Meetings of the Council

.0601 Regular Meetings
Regular meetings of the council shall be held each year in ~~each of the months of~~ January, April, and July, at such times and places ~~after such notice (but not less than 30 days)~~ as the council may determine. A regular meeting of the council shall also be held each year~~; and on the day before~~ in conjunction with the annual meeting of the North Carolina State Bar~~,~~ at the location of ~~said~~ the annual meeting. Any regular meeting may be adjourned from time to time as a majority of members of the council present may determine.

.0602 Special and Emergency Meetings
(a) A special meeting of the council may be called to address specified subjects as follows:

(1) by the president in his or her discretion; or

(2) by a written request, delivered to the secretary, by eight councilors setting forth the subject(s) to be addressed at the meeting. The secretary will schedule a special meeting to be held no more than 30 days after receipt of the request.

(b) An emergency meeting of the council may be called by the president to address circumstances that require immediate consideration by the council.

(c) In the event of incapacity or recusal of the president, the president elect or the vice president may call a special or emergency meeting. In the event of incapacity or recusal of the president elect or the vice president, the immediate past president or secretary may call a special or emergency meeting. In the event of incapacity or recusal of all officers, any member of the council who has served at least two terms may call a special or emergency meeting.

~~The president in his or her discretion may call special meetings of the council. Upon written request of eight councilors, filed with the secretary requesting the president to call a special meeting of the council, the secretary shall, within five days thereafter, call such special meeting. The date fixed for such meeting shall not be less than five days nor more than ten days from the date of such call.~~

.0603 Notice of ~~Called Special~~ Meetings

(a) Notice of any regular meeting of the council will be given by the secretary by posting a notice at the State Bar headquarters and on the State Bar website or as otherwise directed by the council. Notice of any regular meeting will also be provided as required by N.C. Gen. Stat. § 143-318.12 and any other statutory provision regulating notice of public meetings of agencies of the state. Unless otherwise required by law, the secretary will issue notice of any regular meeting of the council at least 30 days before the meeting. ~~Notice of called special meetings shall be signed by the secretary. The notice shall set forth the day and hour of the meeting and the place for holding the same. Any business may be presented for consideration at such special meeting~~.

(b) The secretary will issue notice of any special meeting of the council at least 48 hours before the meeting, or as otherwise required by law. Notices of any special meeting will be sent to each councilor by email, or other electronic means intended to be individually received by each councilor, to the most recent address of record provided to the State Bar by each councilor for such communications. Notice will be given to any councilor who has not provided an email address, or other electronic means to receive notices, by regular mail. Notice may be sent, but is

not required to be sent, by any means authorized for service under the Rules of Civil Procedure. ~~Such notice must be given to each councilor unless waived by him or her. A written waiver signed by any councilor shall be equivalent to notice as herein provided. Notice to councilors not waiving as aforesaid shall be in writing and may be communicated by telegraph, or by letter through the United States Mail in the usual course, addressed to each of said councilors at his or her law office address. Notice by telegraph shall be filed with the telegraph carrier for transmission at least three days, and notice by mail shall be deposited in the United States Post Office at least five days, before the day fixed for the special meeting.~~

(c) The secretary will issue reasonable notice of any emergency meeting in a manner consistent with the purpose of the meeting. Such notice may be given through any appropriate means by which each councilor may receive notice on an expedited basis, including telephone, email, or other electronic means.

(d) The notice for any council meeting shall set forth the day, hour, and location of the meeting.

.0604 Quorum ~~at Meeting of Council~~
At a meeting~~s~~ of the council the presence of ten councilors shall constitute a quorum. There shall be no voting by proxy or by absentee ballot.

.0605 Manner of Meeting of Council
The council will assemble at the time and place provided in the meeting notice. Attendance at a special or emergency council meeting may be by electronic means such as audio or video conferencing. Attendance at a regular council meeting by electronic means may be authorized for an individual councilor in the discretion of the president.

.0606 Parliamentary Rules
Proceedings at any meeting of the council shall be governed by Roberts' Rules of Order.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 26, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 22nd day of February, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 5th day of April, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of April, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ADMINISTRATION OF THE STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 26, 2018.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning its organization, as particularly set forth in 27 N.C.A.C. 1A, Section .0700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0700, Standing Committees of the Council

Rule .0701, Standing Committees and Boards

.0701 Standing Committees and Boards

(a) Standing Committees. Promptly after his or her election, the president shall appoint members to the standing committees identified below...

(1) Executive Committee...

(5) Administrative Committee. It shall be the duty of the Administrative Committee to study and make recommendations on policies concerning the administration of the State Bar, including the administration of the State Bar's facilities, automation, personnel, retirement plan, ~~publications,~~ and district bars; to oversee the membership functions of the State Bar, including the collection of dues, the suspension of members for failure to pay dues and other fees, and the transfer of members to active or inactive status in accordance with the provisions of Sections .0900 and .1000 of Subchapter 1D of these rules; and to perform such other duties and consider such other matters as the council or the president may designate. ~~The committee may establish a Publications Board to oversee the regular publications of the State Bar.~~

(6)...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 26, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of February, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 5th day of April, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of April, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 26, 2018.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing legal education, as particularly set forth in 27 N.C.A.C. 1D, Section .1500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1500 Rules Governing the Administration of the Continuing Legal Education Program

.1501 Scope, Purpose and Definitions

(a) Scope...

(c) Definitions

(1) ~~"Accredited sponsor" shall mean an organization whose entire continuing legal education program has been accredited by the Board of Continuing Legal Education.~~

~~(2)~~ "Active member" shall include any person who is licensed to practice law in the state of North Carolina and who is an active member of the North Carolina State Bar.

~~(3)~~(2)...

~~(4)~~(3) "Approved ~~activity~~ program" shall mean a specific, individual ~~legal~~ educational ~~activity~~ program ~~presented by an accredited sponsor or presented by other than an accredited sponsor if such activity is~~ approved as a continuing legal education ~~activity~~ program under these rules by the Board of Continuing Legal Education.

~~(5)~~(4)... [re-numbering subsequent paragraphs through paragraph (13)]

(14) "Registered sponsor" shall mean an organization that is registered by the board after demonstrating compliance with the accreditation standards for continuing legal education programs as well as the requirements for reporting attendance and remitting sponsor fees for continuing legal education programs.

(15)"Rules" shall mean...

.1512 Source of Funds

(a) Funding for the program carried out by the board shall come from sponsor's fees and attendee's fees as provided below, as well as from duly assessed penalties for noncompliance and from reinstatement fees.

(1) ~~Accredited~~ Registered sponsors located in North Carolina (for ~~course programs~~ offered ~~within~~ in or outside North Carolina), ~~or accredited~~ registered sponsors not located in North Carolina (for ~~course~~ programs ~~given~~ offered in North Carolina), ~~or~~ and ~~unaccredited~~ all other sponsors located ~~within~~ in or outside of North Carolina (for ~~accredited courses~~ programs ~~within~~ offered in North Carolina) shall, as a condition of conducting an approved ~~activity~~ program, agree to remit a list of North Carolina attendees and to pay a fee for each active member of the North Carolina State Bar who attends the program for CLE credit. The sponsor's fee shall be based on each credit hour of attendance, with a proportional fee for portions of a program lasting less than an hour. The fee shall be set by the board upon approval of the council. Any sponsor, including ~~an accredited~~ a registered sponsor, ~~which~~ that conducts an approved ~~activity~~ program which is offered without charge to attendees shall not be required to remit the fee under this section. Attendees who wish to receive credit for attending such an approved ~~activity~~ program shall comply with ~~Rule .1512~~ paragraph (a)(2) below of this rule.

(2)...

.1518 Continuing Legal Education Program

(a) Annual Requirement...

(c) Professionalism Requirement for New Members...

(1) Content and Accreditation. The State Bar PNA Program shall consist of 12 hours of training in subjects designated by the State Bar including, but not limited to, professional responsibility, professionalism, and law office management. The chairs of the Ethics and Grievance Committees, in consultation with the chief counsel to those committees, shall annually establish the content of the program and shall publish the required content on or before January 1 of each year. To be approved as a PNA Program, the program must be provided by ~~an accredited~~ a sponsor registered under Rule .1603 of this subchapter and the sponsor must satisfy the annual content requirements, and submit a detailed description of the program to the board for approval at least 45 days prior to the presentation. A registered sponsor may not advertise a PNA Program until approved by the board. PNA Programs shall be specially designated by the board and no ~~course~~ program that

is not so designated shall satisfy the PNA Program requirement for new members.

(2)...

.1519 Accreditation Standards
The board shall approve continuing legal education activities programs which that meet the following standards and provisions.

(a)...

(g) ~~Any accredited~~ A sponsor of an approved program must remit fees as required and keep and maintain attendance records of each continuing legal education program sponsored by it, which shall be furnished to the board in accordance with regulations.

(h)...

.1520 ~~Accreditation~~ Registration of Sponsors and Program Approval
(a) ~~Accreditation~~ Registration of Sponsors. An organization desiring ~~accreditation~~ to be designated as ~~an accredited~~ a registered sponsor of ~~courses,~~ programs, or other continuing legal education activities may apply ~~for accredited sponsor status~~ to the board for registered sponsor status. The board shall ~~approve a sponsor as an accredited~~ register a sponsor if it is satisfied that the sponsor's programs have met the accreditation standards set forth in Rule .1519 of this subchapter and the application requirements set forth in Rule .1603 of this subchapter ~~regulations established by the board~~.

(1) Duration of Status. Registered sponsor status shall be granted for a period of five years. At the end of the five-year period, the sponsor must apply to renew its registration pursuant to Rule .1603(b) of this subchapter.

(2) Accredited Sponsors. A sponsor that was previously designated by the board as an "accredited sponsor" shall, on the effective date of paragraph (a)(1) of this rule, be re-designated as a "registered sponsor." Each such registered sponsor shall subsequently be required to apply for renewal of registration according to a schedule to be adopted by the board. The schedule shall stagger the submission date for such applications over a three-year period after the effective date of this paragraph (a)(2).

(b) Program Approval for ~~Accredited~~ Registered Sponsors.

(1) Once an organization is approved as ~~an accredited~~ a registered sponsor, the continuing legal education programs sponsored by that organization are presumptively approved for credit; however,

application must still be made to the board for approval of each program. At least 50 days prior to the presentation of a program, ~~an accredited~~ a registered sponsor shall file an application, on a form prescribed by the board, notifying the board of the dates and locations of presentations of the program and the sponsor's calculation of the CLE credit hours for the program.

~~(2) The board may at any time revoke the accreditation of an accredited sponsor for failure to satisfy the requirements of Rule .1512 and Rule .1519 of this subchapter, and for failure to satisfy the Regulations Governing the Administration of the Continuing Legal Education Program set forth in Section .1600 of this subchapter.~~

~~(3)~~(2) The board shall evaluate a program presented by ~~an accredited~~ a registered sponsor and, upon a determination that the program does not satisfy the requirements of Rule .1519, notify the ~~accredited~~ registered sponsor that the program is not approved for credit. Such notice shall be sent by the board to the ~~accredited~~ registered sponsor within 45 days after the receipt of the application. If notice is not sent to the ~~accredited~~ registered sponsor within the 45-day period, the program shall be presumed to be approved. The ~~accredited~~ registered sponsor may request reconsideration of an unfavorable accreditation decision by submitting a letter of appeal to the board within 15 days of receipt of the notice of disapproval. The decision by the board on an appeal is final.

(c) ~~Unaccredited~~ Sponsor Request for Program Approval.

(1) Any organization not ~~accredited~~ designated as ~~an accredited~~ a registered sponsor that desires approval of a course or program shall apply to the board. ~~The board shall adopt regulations to administer the accreditation of such programs consistent with the provisions of Rule .1519 of this subchapter.~~ Applicants denied approval of a program for failure to satisfy the accreditation standards in Rule .1519 of this subchapter may request reconsideration of such a decision by submitting a letter of appeal to the board within 15 days of receipt of the notice of disapproval. The decision by the board on an appeal is final.

(2) The board may at any time decline to accredit CLE programs offered by ~~a non-accredited~~ a sponsor that is not registered for a specified period of time, as determined by the board, for failure to comply with the requirements of Rule .1512, Rule .1519 and Section .1600 of this subchapter.

(d) Member Request for Program Approval. An active member desiring approval of a ~~course or~~ program that has not otherwise been approved shall apply to the board. ~~The board that shall adopt regulations to administer approval requests consistent with the requirements Rule .1519 of this subchapter.~~ Applicants denied approval of a program for failure to satisfy the accreditation standards in Rule .1519 of this subchapter may request reconsideration of such a decision by submitting a letter of appeal to the board within 15 days of the receipt of the notice of disapproval. The decision by the board on an appeal is final.

~~(e) Records. The board may provide by regulation for the accredited sponsor, unaccredited sponsor, or active member for whom a continuing legal education program has been approved to maintain and provide such records as required by the board.~~

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 26, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 22nd day of February, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 5th day of April, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided

by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of April, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 26, 2018.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing legal education, as particularly set forth in 27 N.C.A.C. 1D, Section .1600, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1600 Regulations Governing the Administration of the Continuing Legal Education Program

.1601 General Requirements for ~~Course~~ Program Approval

(a) Approval. CLE ~~activities~~ programs may be approved upon the written application of a sponsor~~, other than an accredited~~ including a registered sponsor, or of an active member on an individual program basis. An application for such CLE ~~course~~ program approval shall meet the following requirements:

(1) …

(b) ~~Course~~ Program Quality and Materials. The application and materials provided shall reflect that the program to be offered meets the requirements of Rule .1519 of this subchapter. Sponsors, including ~~accredited~~ registered sponsors, and active members seeking credit for an approved ~~activity~~ program shall furnish, upon request of the board, a copy of all materials presented and distributed at a CLE ~~course or~~ program. Written materials consisting merely of an outline without citation or explanatory notations generally will not be sufficient for approval. Any sponsor,

including ~~an accredited~~ a registered sponsor, ~~who~~ that expects to conduct a CLE ~~activity~~ program for which suitable written materials will not be made available to all attendees may obtain approval for that ~~activity~~ program only by application to the board at least 50 days in advance of the presentation showing why written materials are not suitable or readily available for such a program.

(c) Facilities ...

(e) Records. Sponsors, including ~~accredited~~ registered sponsors, shall within 30 days after the ~~course~~ program is concluded

(1) furnish to the board a list ~~in alphabetical order, in an electronic format if available,~~ of the names of all North Carolina attendees together with and their North Carolina State Bar membership numbers; the list shall be in alphabetical order and in a format prescribed by the board;

(2) …

(f) Announcement. ~~Accredited sponsors and sponsors who~~ Sponsors that have advanced approval for ~~course~~ programs may include in their brochures or other ~~course~~ program descriptions the information contained in the following illustration:

This [course, ~~for~~ seminar, or program] has been approved by the Board of Continuing Legal Education of the North Carolina State Bar for continuing legal education credit in the amount of ____ hours, of which ____ hours will also apply in the area of professional responsibility. ~~This course is not sponsored by the board.~~

(g) Notice …

.1603 ~~Accredited~~ Registered Sponsors

(a) Application for Registered Sponsor Status. ~~In order to~~ To be designated ~~receive designation~~ as ~~an accredited~~ a registered sponsor of ~~courses,~~ programs or other continuing legal education activities under Rule .1520(a) of this subchapter, ~~the application of the~~ a sponsor must ~~meet~~ satisfy the following requirements:

(1) ~~The~~ File a completed application for ~~accredited~~ registered sponsor status ~~shall be submitted~~ on a form furnished by the board.

(2) During the three years prior to application, present at least five original programs that were approved for CLE credit by the board.

(3) During the three years prior to application, substantially comply with the requirements in Rule .1601(a) and (e) of this subchapter on application for program approval, remitting sponsor fees, and reporting attendance for every program approved for credit.

~~(2) The application shall contain all information requested on the form.~~

~~(3) The application shall be accompanied by course outlines or brochures that describe the content, identify the instructors, list the time devoted to each topic, show each date and location at which three programs have been sponsored in each of the last three consecutive years, and enclose the actual course materials.~~

~~(4) The application shall include a detailed calculation of the total CLE hours specified in each of the programs sponsored by the organization.~~

~~(5) The application shall reflect that the previous programs offered by the organization in continuing legal education have been of consistently high quality and would otherwise meet the standards set forth in Rule .1519 of this subchapter.~~

~~(6) Notwithstanding the provisions of Rule .1603 (3),(4) and(5) above, any law school which has been approved by the North Carolina State Bar for purposes of qualifying its graduates for the North Carolina bar examination, may become an accredited sponsor upon application to the board.~~

(b) Renewal of Registration.

To retain registered sponsor status, a sponsor must apply for renewal every five years, as required by Rule .1520(a)(1), and must satisfy the requirements of paragraphs (a) of this rule. To facilitate staggered renewal applications, at the time that this rule becomes effective, any sponsor previously designated as an "accredited sponsor" shall be designated a registered sponsor and shall be assigned an initial renewal year which shall be not more than three years later.

(c) Revocation of Registered Sponsor Status. The board may at any time revoke the registration of a registered sponsor for failure to satisfy the requirements of Section .1500 and Section .1600 of this subchapter.

.1606 Fees

(a) Sponsor Fee. The sponsor fee, a charge paid directly by the sponsor, shall be paid by all sponsors of approved ~~activities~~ programs presented in North Carolina and by ~~accredited~~ registered sponsors located in North Carolina for approved ~~activities~~ programs wherever presented,

except that no sponsor fee is required where approved ~~activities~~ programs are offered without charge to attendees. In any other instance, payment of the fee by the sponsor is optional. The amount of the fee, per approved CLE hour per active member of the North Carolina State Bar in attendance, is $3.50….

(b) …

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 26, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of February, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 5th day of April, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of April, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 26, 2018.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D Section .1700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1700, The Plan of Legal Specialization

.1723 Revocation or Suspension of Certification as a Specialist

(a) Automatic Revocation or Suspension of Specialty Certification Following Professional Discipline. The board shall revoke its certification of a lawyer as a specialist if the lawyer is disbarred or receives a disciplinary suspension, any part of which is or subsequently becomes active, from the ~~North Carolina State Bar~~ Disciplinary Hearing Commission of the North Carolina State Bar, a North Carolina court of law, or, if the lawyer is licensed in another jurisdiction in the United States, from a court of law or the regulatory authority of that jurisdiction. The board shall suspend its certification of a lawyer as a specialist if the lawyer receives a disciplinary suspension, all of which is stayed. If a stayed disciplinary suspension ends without becoming active, the lawyer may be reinstated as a specialist if the lawyer applies for recertification and satisfies all of the requirements for recertification as set forth in the recertification standards for the relevant specialty. During a suspension from specialty certification, application for recertification shall be deferred until the end of the suspension. ~~Revocation shall be automatic without regard for any stay of the suspension period granted by the disciplinary authority.~~ This provision, and any amendment thereto, shall apply to discipline received on or after the effective date of ~~this~~ the provision or the amendment as appropriate.

(b) Discretionary Revocation or Suspension...

.1725, Areas of Practice

There are hereby recognized the following specialties:

(1) bankruptcy law
- (a) consumer bankruptcy law
- (b) business bankruptcy law

(2) estate planning and probate law

(3) real property law
(a) real property - residential
(b) real property - business, commercial, and industrial

(4) family law

(5) criminal law
(a) federal and state criminal law
(b) state criminal law
~~(b)~~(c) juvenile delinquency law

(6) immigration law

(7) workers' compensation

(8) Social Security disability law

(9) elder law

(10) appellate practice

(11) trademark law

(12) utilities law

(13) privacy and information security law

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 26, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 22nd day of February, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council

of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 5th day of April, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of April, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 26, 2018.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .2300 be amended as follows (additions are underlined , deletions are interlined):

27 N.C.A.C. 1D, Section .2300 Certification Standards for Estate Planning and Probate Law Specialty

.2306 Standards for Continued Certification as a Specialist
The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2306(d) below. No examination will be required for

continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2305(b) of this subchapter; however, for the purpose of continued certification as a specialist, service outside private practice, during which the specialist had duties primarily in the areas of estate planning, estate administration, and/or trust administration, may be substituted for the equivalent years of experience toward the five-year requirement, as determined by the board in its discretion.

(b) Continuing Legal Education ...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 26, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of February, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 5th day of April, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State

Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of April, 2018.

s/Morgan, J.
For the Court

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