371 N.C.—No. 5 Pages 579-937

JUDICIAL STANDARDS COMMISSION; RULES OF APPELLATE PROCEDURE

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

APRIL 10, 2019

MAILING ADDRESS: The Judicial Department
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Corporations—direct claim by shareholder—voter dilution—personal injury distinct from corporation—standing—Where the terms of an acquisition agreement between two tobacco companies diluted the voting power of a subset of the purchasing company's minority shareholders, plaintiff shareholder had standing to bring a direct claim against the 42% shareholder, British American Tobacco (BAT), for breach of fiduciary duty. The alleged dilution of plaintiff's voting power—based on BAT's 42% voting power being permitted to remain the same at the expense of other shareholders—harmed plaintiff and the non-BAT shareholders but not the corporation itself. Plaintiff's alleged personal injury in conjunction with his claim that BAT breached a fiduciary duty to himself and non-BAT shareholders was sufficient to confer subject matter jurisdiction on the Court. **Corwin v. British Am. Tobacco PLC, 605.**

CORPORATIONS—Continued

Corporations—minority shareholder—fiduciary duties—Where plaintiff shareholder filed a class action suit asserting a claim for breach of fiduciary duty against a 42% shareholder, British American Tobacco (BAT), because the terms of an acquisition agreement resulted in the dilution of plaintiff's voting power, the allegations of the complaint, if true, failed to satisfy the actual control test under Delaware law for a minority shareholder to owe fiduciary duties to other shareholders. Considering the restrictions in the Governance Agreement on BAT's power along with the absence of allegations of coercive or otherwise controlling actions on the part of BAT, plaintiff failed to allege that BAT exercised such domination and control over the purchasing company's board that BAT was indistinguishable from a majority shareholder. The Court did not need to decide whether to follow Delaware's rule that a minority shareholder can owe fiduciary duties to other shareholders because the complaint would still fail under that rule. **Corwin v. British Am. Tobacco PLC, 605.**

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Costs—medical malpractice—expert witnesses—The trial court did not abuse its discretion in an award of costs in a medical malpractice action against a doctor and hospitals where the doctor contended that it was improper to assess fees for the testimony of experts whose testimony concerned the only the hospitals. The experts did address issues relating to the doctor in addition to the hospitals. There was no issue concerning N.C.G.S. § 7A-305(d)(11), which authorizes certain costs. **Justus v. Rosner, 818.**

CRIMINAL LAW

Criminal Law—jury instructions—actual and constructive possession—one theory of possession not supported by evidence—Where defendant was on trial for possession of a firearm by a felon and the trial court instructed the jury, over defendant's objection, on both actual and constructive possession even though the evidence only supported the theory of *actual* possession, the Court of Appeals correctly determined that the trial court erred by allowing the jury to potentially convict defendant of possession of a firearm by a felon on the basis of a constructive possession theory. **State v. Malachi, 719.**

Criminal Law—jury instructions—unsupported instruction—no prejudice—Where defendant was on trial for possession of a firearm by a felon and the trial court instructed the jury, over defendant's objection, on both actual and constructive possession even though the evidence only supported the theory of *actual* possession, defendant failed to satisfy the Supreme Court that there was a reasonable possibility that, in the absence of the erroneous constructive possession instruction, the jury would have acquitted defendant. **State v. Malachi, 719.**

Criminal Law—jury instructions—unsupported instruction—subject to harmless error analysis—Where defendant was on trial for possession of a firearm by a felon and the trial court instructed the jury, over defendant's objection, on a theory of possession unsupported by the evidence, the Supreme Court held that defendant's challenge to the delivery of the trial court's unsupported instruction was subject to traditional harmless error analysis. The Court declined defendant's request to adopt a rule that such error is requires automatic reversal. **State v. Malachi, 719.**

Criminal Law—solicitation—distinguished from attempt—The trial court should have granted defendant's motion to dismiss charges of attempted murder where defendant arranged with a hired killer (actually an undercover officer) to kill his former wife, counseled the hired killer on how to complete that action, and paid the hired killer in full. North Carolina's definition of "attempt" has developed through the common law rather than through the model penal code, as it has some other states. Defendant's acts were all part of the solicitation, not the execution of the crime solicited. There was no evidence to establish that defendant committed an overt act that would have resulted in the killing in the ordinary and likely course or things. **State v. Melton, 750.**

FIDUCIARY RELATIONSHIP

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MOTOR VEHICLES

Motor Vehicles—underinsured motorist coverage—collateral for purposes of collateral source rule—In a case arising from an automobile accident, the trial court erred by crediting a $145,000 payment made to plaintiff under his own underinsured motorist (UIM) coverage against the $230,000 judgment that plaintiff obtained against defendant where plaintiff's UIM carrier elected to waive its statutory subrogation rights. Payments from UIM coverage are collateral for purposes of the collateral source rule. In this case, one party or the other would receive a "windfall" as a result of the Supreme Court's decision, and the better option, which was most consistent with the policy reasons for the collateral source rule, was to allow the plaintiff to retain the windfall that resulted from his foresight in voluntarily electing to purchase UIM coverage rather than allowing defendant, who failed to purchase enough liability coverage, to be the ultimate beneficiary of plaintiff's prudent decision. **Hairston v. Harward, 647.**

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PLEADINGS

Pleadings—removal of LLC manager—foreign organization—pre-suit demand requirement—futility exception—The trial court did not err by dismissing plaintiffs' claims for removal of Mr. Barton as manager or general partner of certain investment entities where the claims were derivative; the laws of California and Oregon, where the entities were organized, applied to the question of pre-suit demand; and the demand and the explanation needed in the pleadings for the futility exception to the demand requirement were not present. **Azure Dolphin, LLC v. Barton, 579.**

PLEADINGS—Continued

Pleadings—second amendment to complaint—undue delay—The trial court did not abuse its discretion by denying plaintiffs' second motion to amend the complaint. There was ample support for the trial court's conclusion that plaintiff's second amendment involved undue delay, suggested a dilatory motive, and was neither accompanied by a brief nor a statement of the position of opposing counsel, as required by the applicable Business Court Rules. **Azure Dolphin, LLC v. Barton, 579.**

SCHOOLS AND EDUCATION

Schools and Education—county's method of sales tax distribution—Leandro challenge—State responsibility—The trial court did not err by granting a N.C. Civil Procedure Rule 12(b)(6) dismissal of a claim brought under *Leandro v. State*, 346 N.C. 336 (1997), where an action challenged a county's choice of method of distribution for local sales tax revenue to a tripartite school system. The claim was untenable because it assumed that a county board of commissioners had a constitutional duty to provide a sound basic education; county boards of commissioners had no such duty. The remedy for these harms rested with the State. **Silver v. Halifax Cty. Bd. of Comm'rs, 855.**

SEARCH AND SEIZURE

Search and Seizure—SWAT perimeter—defendant walking through—heavy object in pocket—The search and seizure of defendant did not violate the Fourth Amendment where a SWAT team was conducting a sweep of a house in a dangerous area; defendant walked through the perimeter of SWAT officers stationed around the house, stating that he was going to get his moped; and defendant had a heavy object in his pocket that appeared to an officer to be a firearm. The rule in *Michigan v. Summers*, 452 U.S. 692 (1981), justified the seizure because defendant, who was within the immediate vicinity of the premises to be searched and present during the execution of a search warrant, qualified as an occupant under *Summers* because he posed a real threat to the safe and efficient completion of the search. Further, the search and seizure were supported by individualized suspicion under *Terry v. Ohio*, 392 U.S. 1 (1968). **State v. Wilson, 920.**

SENTENCING

Sentencing—safekeeping order—not overruled—Defendant was not entitled to relief where she argued that the judge who sentenced her overruled the safekeeping order of the trial judge trial by sentencing her. A judge other than the trial judge may conduct a sentencing hearing, and there was no indication that the trial judge wished to retain jurisdiction over the matter or delay sentencing. **State v. Meadows, 742.**

Sentencing—within statutory limit—presumed regular and valid—Defendant was not entitled to relief where she argued that the judge who sentenced her abused his discretion. The sentence was within the statutory limit and thus presumed regular and valid where the record showed no indication that the judge considered irrelevant or improper matters in determining the severity of the sentence. **State v. Meadows, 742.**

TRIALS

Trials—medical malpractice—verdict set aside—The Court of Appeals correctly concluded that the trial court did not abuse its discretion by setting aside a verdict in

a medical malpractice action based on N.C. Civil Procedure Rule 59(a)(7). The trial judge is in the best position to determine whether a verdict is against the greater weight of the evidence, including whether the jurors were affected by misleading suggestions from expert witnesses. **Justus v. Rosner, 818.**

UNFAIR TRADE PRACTICES

Unfair Trade Practices—failure to state a claim—underlying constructive fraud claim dismissed—The trial did not err by dismissing plaintiffs' unfair and deceptive practices claim for failure to state a claim upon which relief could be granted where the claim was based on a claim for constructive fraud, the dismissal of which was upheld elsewhere in the opinion. **Azure Dolphin, LLC v. Barton, 579.**

VENUE

Venue—motion to change—as of right and discretionary—interlocutory—An answer is not required before the filing of a motion for a discretionary change of venue, and the trial court in this case had the authority to consider such a motion. However, the trial court's discretionary determination was interlocutory and affected no substantial right of either party and was properly dismissed by the Court of Appeals. **Stokes v. Stokes, 770.**

WILLS

Wills—handwritten codicil—reference to amended portion—present testamentary intent ambiguous—Where a properly attested self-proving will contained a handwritten codicil that referenced a provision of the will—"DO NOT HONOR ARTICLE IV VOID ARTICLE IV"—the will and the holographic codicil together clearly evinced testamentary intent by referencing the portion of the will to amend. But a genuine issue of material fact existed as to whether the phrase "begin[n]ing 7-3-03" showed the testator's then-present testamentary intent. **In re Will of Allen, 665.**

WORKERS' COMPENSATION

Workers' Compensation—findings—insufficient—reliance on Parsons presumption not clear—A workers' compensation case was remanded for further findings clarifying the basis of the award where it was not clear whether the Industrial Commission made a finding of causation independent of any presumption. **Pine v. Wal-Mart Assocs., 707.**

SCHEDULE FOR HEARING APPEALS DURING 2019

NORTH CAROLINA SUPREME COURT

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

January 8, 9
February 4, 5, 6
March 4, 5, 6
April 8, 9, 10, 11
May 13, 14, 15, 16
August 26, 27, 28, 29
September 30
October 1, 2, 3,
November 4, 5, 6, 7
December 9, 10, 11

AZURE DOLPHIN, LLC, a Nevada Limited Liability Company, and JEAN-PIERRE BOESPFLUG

v.

JUSTIN BARTON; BARTON BOESPFLUG II, a California Limited Liability Partnership; HESS CREEK, LLC, an Oregon Limited Liability Company; ROYAL ASCOT, LLC, an Oregon Limited Liability Company; and VINTAGE OAK II, a California Limited Partnership

No. 128A18

Filed 7 December 2018

1. Pleadings—removal of LLC manager—foreign organization—pre-suit demand requirement—futility exception

The trial court did not err by dismissing plaintiffs' claims for removal of Mr. Barton as manager or general partner of certain investment entities where the claims were derivative; the laws of California and Oregon, where the entities were organized, applied to the question of pre-suit demand; and the demand and the explanation needed in the pleadings for the futility exception to the demand requirement were not present.

2. Fiduciary Relationship—breach of fiduciary duty—constructive fraud—fiduciary relationship—insufficiently alleged

The trial court did not err in an action between real estate investors by dismissing plaintiffs' hybrid constructive fraud and breach of fiduciary duty claim for failure to state a claim upon which relief could be granted. Plaintiffs insufficiently alleged a fiduciary relationship between the investors as a matter of law or fact.

3. Unfair Trade Practices—failure to state a claim—underlying constructive fraud claim dismissed

The trial did not err by dismissing plaintiffs' unfair and deceptive practices claim for failure to state a claim upon which relief could be granted where the claim was based on a claim for constructive fraud, the dismissal of which was upheld elsewhere in the opinion.

4. Pleadings—second amendment to complaint—undue delay

The trial court did not abuse its discretion by denying plaintiffs' second motion to amend the complaint. There was ample support for the trial court's conclusion that plaintiff's second amendment involved undue delay, suggested a dilatory motive, and was neither accompanied by a brief nor a statement of the position of opposing counsel, as required by the applicable Business Court Rules.

Appeal pursuant to N.C.G.S. §§ 7A-27(a)(2) and 7A-27(a)(3) from a final opinion and order dated 2 October 2017 and an interlocutory order entered on 2 June 2017, both by Judge Adam M. Conrad, 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 1 October 2018.

Blanco, Tackabery & Matamoros, P.A., by Peter J. Juran, M. Rachael Dimont, and Chad A. Archer, for plaintiff-appellants.

Bell, Davis & Pitt, P.A., by Andrew A. Freeman and Alan M. Ruley, for defendant-appellees.

ERVIN, Justice.

The principal issues before the Court in this case are whether the trial court properly dismissed the claims that plaintiffs Azure Dolphin, LLC, and Jean-Pierre Boespflug asserted in their first amended complaint and whether the trial court properly denied plaintiffs' second motion to amend their complaint. After careful consideration of plaintiffs' challenges to the trial court's orders in light of the applicable law, we conclude that the challenged orders should be affirmed.

I. Factual Background

A. Substantive Facts

Mr. Boespflug and defendant Justin Barton[1] began working together in the real estate investment business approximately thirty years ago. As part of their business strategy, Mr. Boespflug and Mr. Barton created "various entities to acquire and hold investment properties throughout the United States," including "large apartment complexes and commercial buildings." Among the investment entities that resulted from this process were defendants Hess Creek, LLC, an Oregon limited liability company formed in 1996; Royal Ascot, LLC, an Oregon limited liability company formed in 2001; and Barton Boespflug II and Vintage Oak II,[2] both of which were California limited partnerships formed in 1986.

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1. Mr. Barton and his wife, Janet Barton, control and operate a property management business located in Winston-Salem known as Viking Properties.

2. While plaintiffs' amended complaint refers to this entity as both "Vintage Oak" and "Vintage Oaks," we note that plaintiffs' briefs refer to the entity as "Vintage Oak." We, therefore, will refer to this entity as "Vintage Oak" throughout the remainder of this opinion.

According to the allegations contained in the amended complaint, Mr. Barton served as manager or general partner for Hess Creek, Royal Ascot, Barton Boespflug, Vintage Oak, and the other investment entities, while Mr. Boespflug "contributed the majority of the capital" and served as either a member or limited partner of each of the investment entities. Mr. Boespflug gave Mr. Barton "some discretion to manage the Properties," with Mr. Barton having the responsibility for "reporting to [Mr.] Boespflug intermittently on the state of the portfolio." At some unspecified point in time, Mr. "Boespflug formed Azure Dolphin," a Nevada limited liability company, to which he transferred a portion of his economic interests in the investment entities that he and Mr. Barton had created and operated.

On 21 April 2011, Mr. Boespflug, a dual citizen of France and the United States, moved back to Paris. On 26 April 2011, Mr. Barton e-mailed Mr. Boespflug for the purpose of requesting his assistance in securing a new loan and refinancing two existing loans. In his reply, Mr. Boespflug "explained to [Mr.] Barton that his financial position was no longer conducive to personally guaranteeing loans" relating to the investment entities. After a lender "demanded that both Azure [Dolphin] and [Mr.] Boespflug guaranty the new loans," Mr. Boespflug reiterated "that this was not an option."

Subsequently, Mr. Barton converted Mr. Boespflug's membership interests in the investment entities to notes payable with a face value that "was a fraction of the true value of [Mr.] Boespflug's membership interests." More specifically, on 1 January 2012, Mr. Barton issued promissory notes to Mr. Boespflug in order to transfer "all of the Investment Entities['] interests [that Mr.] Boespflug [had] previously assigned to Azure Dolphin" to the following entities: Barton Boespflug; Viking Property Investors, LLC; Ash Creek, LLC; Vintage Oak; and Willamette River I, LLC. On 1 January 2013, Mr. Barton issued a second series of promissory notes to Mr. Boespflug by means of which he acquired "the remainder of [Mr.] Boespflug's interest in the Investment Entities." The promissory notes in question reflected the value of the interests that Mr. Boespflug and Azure Dolphin owned in the investment entities, which, according to appraisals that Mr. Barton had obtained, amounted to a total of $2,008,006. In plaintiffs' view, Mr. Barton "manipulated" the appraisals so as to undervalue Mr. Boespflug's interests in the investments entities.

After engaging in these transactions, Mr. Barton "unilaterally amended the operating agreements of the Investment Entities with terms considerably more favorable to him," "sold at least six of the [p]roperties" owned by the investment entities, and transferred properties

held by the investment entities "into his own name and to different entities controlled by [Mr.] Barton and/or his immediate family members."

On 15 January 2013, Mr. Barton sent an e-mail to Mr. Boespflug to which was attached a letter signed by Mr. Barton that had as its subject line "Buyout of Jean-Pierre Boespflug, effective 1/1/2013." The letter stated that:

> Effective January 1, 2013 (pursuant to amended restated operating agreements, dated November 1, 2011), your economic interest in partnerships, per MAI appraisals, will be replaced with promissory notes. These partnerships are as follows: Ash Creek, LLC, Hess Creek, LLC, Jay's Canby, LLC, Jay's Commonwealth Park I, LLC, Jay's Commonwealth Park II, LLC, Newby House LLC, Richmond Park, LLC, and River Valley Investors, LLC. The respective promissory notes and corresponding loan amortization schedules are enclosed.

According to the amended complaint, these promissory notes accompanied "an otherwise unrelated email with no indication of the importance of the communication and thus this email remained unread until 2016." Mr. Boespflug claimed that he did not actually learn of the actions reflected in this letter until the summer of 2016.

B. Procedural History

1. Trial Court Proceedings

a. Preliminary Proceedings

On 16 December 2016, Mr. Boespflug, Azure Dolphin, and JPB Holdings, Inc.,[3] commenced this action by filing a complaint asserting fifteen claims, including individual and derivative claims for constructive fraud, breach of the duty of loyalty, breach of the duty of care, breach of the duty of good faith and fair dealing, civil conspiracy, fraudulent conveyance, and unfair and deceptive practices, and seeking various remedies against twenty-one defendants,[4] including Mr. Barton, certain

3. Although JPB Holdings, Inc., participated in the proceedings before the trial court, it is not a party to the proceedings on appeal.

4. The defendants named in the original complaint were Mr. Barton; Janet Barton; Viking Properties; Sanur Brokerage; Viking Property Investors; Montpelier Investors, LLC; Jay's Canby Florence, LLC; Willamette River One, LLC; Victoria Place General Partnership; Jay's Commonwealth Phase 1, LLC; Jay's Commonwealth Phase 2, LLC; Ash Creek; Barton Boespflug; Hess Creek; Jay Canby, LLC; Newby House, LLC; Richmond Park, LLC; River Valley Investors, LLC; Royal Ascot; Vintage Oak; and Willamette River One.

of the investment entities, and other defendants. On 19 December 2016,[5] the Chief Justice designated this case as a mandatory complex business case. On 10 February 2017, defendants[6] filed a motion to compel arbitration or, alternatively, to dismiss plaintiffs' complaint for lack of personal jurisdiction, lack of subject matter jurisdiction, failure to join a necessary party, insufficiency of process, failure to state a claim upon which relief could be granted, and "the existence of arbitration agreements." On the same day, Sanur Brokerage filed an answer to plaintiffs' complaint.

On 14 March 2017, plaintiffs filed a motion seeking leave to file an amended complaint, a copy of which was attached to their amendment motion. The proposed amended complaint attempted to add eleven additional defendants and included a number of new factual and legal assertions, including allegations that the trial court had jurisdiction over all of the named defendants pursuant to N.C.G.S. § 1-75.4(1) and that, even though certain of the investment entities had been organized under the laws of other states, they were "instrumentalities of [Mr.] Barton as he engages in substantial activity within North Carolina" and had "received property and proceeds of property that belong to North Carolina domestic entities and benefit from bad acts committed by [Mr.] Barton inside of North Carolina or directed at North Carolina corporations." In seeking leave to amend their complaint, plaintiffs asserted that the amended complaint would "cure deficiencies alleged by the [d]efendants in their joint Motion to Dismiss filed on February 10, 2017[,] including naming necessary parties previously unknown to the [p]laintiffs."

On 6 April 2017, the trial court granted plaintiffs' amendment motion, ordered plaintiffs to file their amended complaint on or before 11 April 2017, and denied defendants' dismissal motion without prejudice to their right to move to dismiss the amended complaint. In the 6 April 2017 order, the trial court noted that plaintiffs had "failed to state the position of opposing counsel" as required by Business Court Rule 7.3 and indicated its expectation that plaintiffs would "comply with the General Rules of Practice and Procedure for the North Carolina Business Court in future filings."

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5. The e-filing date and file-stamp date associated with many of the documents referenced in this case differ slightly. In the event that there is such a discrepancy, we have utilized the e-filing date in this opinion in lieu of the date upon which the document was file-stamped.

6. All of the defendants named in the original complaint except for Viking Properties joined the motion to dismiss the original complaint.

On 18 April 2017, plaintiffs filed an amended complaint. On 19 April 2017, defendants filed a clarification motion in which they asserted that plaintiffs had failed to file their amended complaint by 11 April 2017 and had, instead, sought an extension of time within which to file their amended complaint. In addition, defendants noted that, on 17 April 2017, the trial court had denied plaintiffs' extension motion and had, instead, ordered plaintiffs to "file the version of their Amended Complaint attached to their March 14, 2017 Motion to Amend no later than 5:00 [p.m.] on April 18, 2017." Finally, defendants asserted that plaintiffs' amended complaint had been filed without authorization and differed from the proposed amended complaint that had been attached to plaintiffs' amendment motion.

On 20 April 2017, plaintiffs filed an errata notice and the version of the amended complaint that had been attached to their amendment motion. On 21 April 2017, the Business Court entered an order striking the amended complaint that plaintiffs had filed on 18 April 2017 and declaring that the amended complaint that plaintiffs had filed on 20 April 2017 was the relevant pleading for purposes of future proceedings in this case.

On 12 May 2017, plaintiffs filed a motion for leave to file a second amended complaint, to which they attached a proposed amended complaint. On 19 May 2017, defendants filed a motion to dismiss plaintiffs' amended complaint. On 22 May 2017, plaintiffs filed an errata notice and a new version of the proposed second amended complaint.

On 30 May 2017, the trial court entered an order denying plaintiffs' second amendment motion. In its order, the trial court stated that, while "[p]laintiffs filed the correct version of the amended complaint on April 20, 2017," they did not do so until "31 days after [p]laintiffs first notified the Court that they intended to file a second motion for leave to amend." In addition, the trial court pointed out that the "proposed second amended complaint undoes many of the changes made in the first amended complaint," such as the elimination of "Sanur Brokerage LLC, Viking Properties, LLC, and all individuals except for Justin and Janet Barton as defendants." According to the trial court, plaintiffs' second amendment motion involved undue delay, suggested the existence of a "dilatory motive," and was accompanied by neither a brief nor a statement of the position of opposing counsel as required by the applicable Business Court Rules.

On 8 June 2017, plaintiffs voluntarily dismissed their claims against Sanur Brokerage, Viking Properties, and the "necessary defendants" that

plaintiffs had named in the amended complaint. In addition, plaintiffs voluntarily dismissed their unjust enrichment, conversion, and derivative claims for breach of fiduciary duty, imposition of a constructive trust, and punitive damages.

b. Trial Court's Order

On 2 October 2017, the trial court entered an order granting defendants' dismissal motion. *Azure Dolphin, LLC v. Barton*, No. 16 CVS 7622, 2017 WL 4400223, at *11 (N.C. Super. Ct. Forsyth County Bus. Ct. Oct. 2, 2017), *appeal dismissed in part*, 2018 WL 3241726, at *3 (N.C. Super. Ct. Mar. 28, 2018). After noting that "[e]ach of the ten [d]efendants [challenging the trial court's jurisdiction over their persons had] filed an affidavit stating it is not domiciled in and does not have its principal place of business in this State," the trial court concluded that "[p]laintiffs have not carried their burden to support the exercise of personal jurisdiction" given their failure to produce "evidence of any 'continuous and systematic' contacts between these ten [d]efendants and North Carolina giving rise to general jurisdiction," citing *Goodyear v. Brown*, 564 U.S. 915, 919, 131 S. Ct. 2846, 2851, 180 L. Ed. 2d 796, 803 (2011), or any "evidence that the ten [d]efendants 'purposely avail[ed]' themselves 'of the privilege of conducting activities within' North Carolina, such that the exercise of specific jurisdiction would be appropriate," citing *Cambridge Homes of N.C. L.P. v. Hyundai Constr., Inc.*, 194 N.C. App. 407, 413, 670 S.E.2d 290, 296 (2008) (quoting *Lulla v. Effective Minds, LLC*, 184 N.C. App. 274, 279, 646 S.E.2d 129, 133 (2007)). As a result, the trial court dismissed the claims that plaintiffs had asserted against these ten defendants for lack of personal jurisdiction.

After dismissing the claims that had been asserted on behalf of JPB Holdings on the grounds that it lacked a valid corporate existence, the trial court determined that it lacked the authority to dissolve Barton Boesplug and Vintage Oak, both of which were California limited partnerships, and Hess Creek and Royal Ascot, both of which were Oregon limited liability companies. In addition, although Jay's Commonwealth Park and Jay's Commonwealth Park Phase II were both North Carolina limited liability companies, the trial court found that, since neither Azure Dolphin nor Mr. Boespflug were members of the entities in question, both plaintiffs lacked standing to assert a dissolution claim involving those entities, citing N.C.G.S. § 57D-6-02(2) (providing that "only a member of [a limited liability company] has standing to assert a claim for judicial dissolution"). Lastly, the trial court dismissed plaintiffs' claim seeking the removal of Mr. Barton from his position as manager of the

investment entities[7] on the grounds that such relief must be sought in a derivative, rather than an individual action, and that plaintiffs had failed to make the demand upon the entities in question required by N.C.G.S. § 57D-8-01(a)(2) before filing their complaint in this case.

Thirdly, the trial court addressed plaintiffs' claim seeking to have Mr. Boespflug's removal as a member of the investment entities and Mr. Barton's efforts to "unilaterally amend[ ] the operating agreements of some or all of the Investment Entities" invalidated. In concluding that these claims should be dismissed, the trial court determined that plaintiffs had failed to join all of the parties necessary for a proper adjudication of the claims in question, citing N.C.G.S. § 1-260 (providing that "all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings"), on the grounds that, since "[a]ny declaration invalidating an operating agreement or altering the LLC's membership under the operating agreement would, 'as a practical matter,' adversely affect the rights of these members," it would be improper for the trial court to adjudicate the validity of the operating agreements without joining each member of the relevant investment entities, quoting *N.C. Monroe Constr. Co. v. Guilford County Bd. of Educ.*, 278 N.C. 633, 640, 180 S.E.2d 818, 822 (1971). In addition, the trial court determined that "any attempt to cure would be futile" given that "all of the additional parties reside outside North Carolina, and there are no allegations that would support the exercise of personal jurisdiction over them." As a result, the trial court dismissed plaintiffs' claims seeking the invalidation of Mr. Barton's amendments to the operating agreements of the investment entities and the restoration of Mr. Boespflug's interests in the investment entities for lack of subject matter jurisdiction.

The trial court next considered whether plaintiffs' amended complaint contained sufficient allegations to state a hybrid claim for breach of fiduciary duty and constructive fraud.[8] Although these two claims had been pleaded jointly in the amended complaint, the trial court noted

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7. Any reference to a "removal claim" throughout the remainder of this opinion should be understood as referring to plaintiffs' request for a judicial declaration that Mr. Barton be removed as manager or general partner of the investment entities.

8. As the court pointed out, plaintiffs had already voluntarily dismissed their claims against Viking Properties, so the only remaining hybrid constructive fraud and breach of fiduciary duty claim was the one that plaintiffs had asserted against Mr. Barton and Viking Property Investors.

that they required proof of different elements. However, the existence of a fiduciary relationship is necessary to the successful assertion of both claims, citing *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001), and *Crumley & Assocs., P.C. v. Charles Peed & Assocs., P.A.*, 219 N.C. App. 615, 620, 730 S.E.2d 763, 767 (2012)). In spite of the fact that plaintiffs alleged that Mr. "Barton [had] abused his position of trust and confidence by altering the records of the Investment Entities, diverting the income streams and opportunities to himself, other entities under his control and other insiders of Viking Properties . . . for the purpose of benefitting himself to the detriment of the Investment Entities and the members," the trial court determined that plaintiffs "ha[d] not adequately alleged the existence of a fiduciary relationship" as either a matter of law or fact. In view of the fact that, "as a matter of law, a manager of [a limited liability company] does not owe a fiduciary duty to its members," the trial court concluded that plaintiffs' allegation that Mr. Barton managed the investment entities and that Mr. Boespflug was a member did not establish the existence of a fiduciary relationship between the two men as a matter of law. In addition, the trial court determined that the amended complaint did not "meet the 'demanding' standard for alleging that a fiduciary relationship exists as a fact," citing *Lockerman v. S. River Elec. Membership Corp.*, ___ N.C. App. ___, ___ 794 S.E.2d 346, 352 (2016), because the amended complaint, which depicted a relationship in which "[Mr.] Boespflug contributed most of the capital while [Mr.] Barton contributed most of the real estate expertise," did not reflect a dynamic in which either party "held 'all the financial power or technical information' or exercised dominion and influence over the other," citing *Lockerman*, ___ N.C. App. at ___, 794 S.E.2d at 352 (quoting *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 613, 659 S.E.2d 442, 451 (2008)). As a result, the trial court dismissed plaintiffs' hybrid constructive fraud and breach of fiduciary duty claim.

In addressing plaintiffs' remaining claims, the trial court began by dismissing the fraudulent conveyance claim that plaintiffs had asserted against four defendants on the grounds that plaintiffs' "vague" assertions that they were entitled to recover "real property, proceeds from that property and/or revenue streams associated with the property" were insufficiently particular to satisfy the requirements of N.C.G.S. § 1A-1, Rule 9. In addition, given that plaintiffs had relied upon "instances of fraud, constructive fraud, and fraud by omission" to establish that defendants had committed an unfair or deceptive act, plaintiffs' failure to "adequately allege facts to support their claims for constructive fraud and fraudulent conveyance" necessarily demonstrated that plaintiffs had

failed to "allege[ ] facts to show that [d]efendants committed an unfair or deceptive act under [N.C.G.S. §] 75-1.1." The trial court dismissed plaintiffs' civil conspiracy claim on the grounds that civil conspiracy does not constitute an independent cause of action and that the trial court had already dismissed the fraud-based claims upon which plaintiffs' civil conspiracy claim rested. Finally, the trial court dismissed plaintiffs' "purported 'claims for relief' for injunction, appointment of a receiver, constructive trust, and punitive damages" on the grounds that these "claims" were actually "*remedies*, not *causes of action*." As a result, the trial court dismissed all of the claims that plaintiffs had asserted against each defendant. Plaintiffs noted an appeal to this Court from the trial court's orders.

2. Appellate Proceedings

In seeking to persuade us to overturn the challenged trial court orders, plaintiffs contend that the trial court erred by dismissing their claims for Mr. Barton's removal as manager or general partner of the investment entities based upon plaintiffs' purported failure to comply with what is "commonly known as the 'North Carolina Limited Liability Company Act,' " citing N.C.G.S. §§ 57D-1-01, 57D-1-02(a). More specifically, plaintiffs note that N.C.G.S. § 57D-8-06 provides, in pertinent part, that, "[i]n any derivative proceeding in the right of a foreign [limited liability company], the matters covered by this Article will be governed by the law of the jurisdiction of the foreign [limited liability company's] organization," so that the statutory pre-suit "demand requirement" set out in N.C.G.S. § 57D-8-01(a)(2) is inapplicable to Barton Boespflug, Hess Creek, Royal Ascot, and Vintage Oak, each of which was organized under either California or Oregon law. As a result, plaintiffs contend that Oregon law governs whether and to what extent plaintiffs must satisfy a statutory pre-suit demand requirement before commencing a derivative action on behalf of Hess Creek and Royal Ascot and note that Oregon law recognizes a futility exception to its statutory pre-suit demand requirement, citing Or. Rev. Stat. Ann. § 63.801(2) (West 2018) (providing that "a complaint in a proceeding brought in the right of a limited liability company must allege with particularity the demand made, if any, to obtain action by the managers or the members who would otherwise have the authority to cause the limited liability company to sue in its own right, and either that the demand was refused or ignored or the reason why a demand was not made"); *Bernards v. Summit Real Estate Mgmt., Inc.*, 229 Or. App. 357, 363, 213 P.3d 1, 4 (2009). According to plaintiffs, "it would be entirely illogical to treat a plaintiff's statutorily excused 'failure' to make a futile demand on an entity prior to pursuit of a derivative

claim on the entity's behalf as a jurisdictional bar to the adjudication of that claim."

Similarly, plaintiffs assert that their "claims to remove [Mr.] Barton as general partner of Barton Boespflug II and Vintage Oak II are governed by California law" rather than North Carolina law. As a result of the fact that the relevant North Carolina statutory provisions apply to "a partnership formed by two or more persons *under the laws of this State*," N.C.G.S. § 59-102(8) (emphasis in plaintiffs' brief), plaintiffs assert that North Carolina's statutory limited partnership pre-suit demand requirement, N.C.G.S. § 59-1001 (providing that "[a] limited partner may bring an action in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed"), does not extend to entities, such as Barton Boespflug and Vintage Oak, which were not organized under North Carolina law. On the contrary, plaintiffs contend that California law governs their claims to remove Mr. Barton as the general partner of Barton Boespflug and Vintage Oak, citing N.C.G.S. § 59-901 for the proposition that "the laws of the jurisdiction under which a foreign limited partnership is organized govern its organization and internal affairs," and argue that, "to the extent the claims [relating to the limited partnerships] are derivative in nature, failure to make a pre-suit demand would not be fatal" under either North Carolina law, N.C.G.S. § 59-1001, or California law, Cal. Corp. Code § 15910.02 (West 2018) (providing that "[a] partner may bring a derivative action to enforce a right of a limited partnership if" "the partner first makes a demand on the general partners, requesting that they cause the limited partnership to bring an action to enforce the right, and the general partners do not bring the action within a reasonable time" "or [making such] a demand would be futile"). As a result, plaintiffs argue that the trial court erred by dismissing their claims for Mr. Barton's removal as the general partner of Barton Boespflug and Vintage Oak based upon plaintiffs' failure to make a pre-suit demand.

In addition, plaintiffs claim that a "litigant's purported failure to satisfy a pleading requirement does not deprive a court of subject matter jurisdiction" and would, instead, "entitle the litigant's opponent to challenge the claim by way of a [ ] motion to dismiss for failure to state a claim," which "is an affirmative defense." Citing *Simon v. Manufacturers Hanover Tr. Co.*, 849 F. Supp. 880, 882 (S.D.N.Y. 1994). In view of the fact that a court may not "*sua sponte* raise an affirmative defense on a defendant's behalf," it "must refrain from [ ] independently examining whether dismissal could be appropriate based on an unraised affirmative defense

that a complaint fails to state a claim upon which relief can be granted," citing *Unifund CCR, LLC v. Francois*, ___ N.C. App. ___, ___, 817 S.E.2d 915, 916 (2018). As a result, plaintiffs argue that, since defendants' motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) did not rest upon an argument that "dismissal was appropriate because [plaintiffs] failed to satisfy the pleading requirements of either Or. Rev. Stat. Ann. § 63.801(2) or Cal. Corp. Code § 15910.04," any decision to affirm the trial court's dismissal order would amount to "sanctioning a sua sponte invocation of an unraised affirmative defense."

Furthermore, plaintiffs contend that the common law-based "internal affairs doctrine would nevertheless vitiate the Business Court's holding" that plaintiffs' claims for the removal of Mr. Barton as manager or general partner of the investment entities were subject to the pre-suit demand requirements enunciated in N.C.G.S. § 57D-8-01(a)(2). According to plaintiffs, the internal affairs doctrine is

> a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands.

Quoting *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 680, 657 S.E.2d 55, 63, *disc. review denied*, 362 N.C. 679, 669 S.E.2d 741 (2008). Although this doctrine arose in the corporate context, plaintiffs assert that the internal affairs doctrine "has also been applied with respect to the internal affairs of limited liability companies and limited partnerships," citing *TC Invs., Corp. v. Becker*, 733 F. Supp. 2d 266, 282 (D.P.R. 2010). As a result, plaintiffs argue that the internal affairs doctrine provides another basis for concluding that plaintiffs' removal claims are subject to Oregon and California, rather than North Carolina, law.

Lastly, plaintiffs contend that "it is not clear that the claims for removal of [Mr.] Barton as manager or general partner of the Entity Appellees are purely derivative." After recognizing that decisions from other jurisdictions have determined that similar removal claims in the limited liability company and limited partnership context are derivative in nature, plaintiffs argue that, "in accordance with the internal affairs doctrine, courts look to the state of an entity's organization to determine whether a particular claim is derivative or direct," citing *Becker*, 733 F. Supp. 2d at 282, and *Munson v. Valley Energy Inv. Fund, U.S., LP*, 264 Or. App. 679, 703, 333 P.3d 1102, 1119 (2014). According to plaintiffs,

the Oregon and California courts "have eschewed strict classification of particular types of claims as either direct or derivative and have opted instead to take an ad hoc approach, evaluating whether a particular claim, as asserted in a particular lawsuit, is being asserted in a direct capacity, a derivative capacity, or both," citing *Loewen v. Galligan*, 130 Or. App. 222, 228, 882 P.2d 104, 111, *review denied*, 320 Or. 493, 887 P.2d 793 (1994), as "looking to whether a shareholder has suffered a 'special injury' to determine whether [a] claim, as asserted, was direct or derivative," and pointing to *Sole Energy Co. v. Petrominerals Corp.*, 128 Cal. App. 4th 212, 228, 26 Cal. Rptr. 3d 798, 809, *review denied*, 2005 Cal. LEXIS 8003 (2005), as holding that "[w]hether a cause of action is derivative or can be asserted by an individual shareholder is determined by considering the wrong alleged."

Plaintiffs assert that their claims to remove Mr. Barton from the management of Hess Creek and Royal Ascot "likely are at least partially direct" because Mr. "Boespflug and Azure Dolphin have undoubtedly suffered 'special injury' as a result of Barton's abuse of his position as manager," citing *Loewen*, 130 Or. App. at 228, 882 P.2d at 111. Similarly, plaintiffs argue that, because their removal claims pertaining to Hess Creek and Royal Ascot "are 'based . . . on a fraud affecting [them] directly,' " they are, for that reason, at least partially direct, quoting *Sutter v. Gen. Petroleum Corp.*, 28 Cal. 2d 525, 530, 170 P.2d 898, 901 (1946). As a result, for all of these reasons, plaintiffs contend that the trial court erred by dismissing plaintiffs' removal claims on the basis of N.C.G.S. § 57D-8-01(a)(2).

Secondly, plaintiffs assert that the trial court erred by dismissing plaintiffs' hybrid constructive fraud and breach of fiduciary duty claim by ignoring the "allegations that a fiduciary relationship existed as a matter of law" and by improperly subjecting plaintiffs to a heightened pleading standard. According to plaintiffs, Mr. "Boespflug specifically pleaded allegations which, if taken as true, are sufficient to establish a broker-principal fiduciary relationship between [Mr.] Barton and [Mr.] Boespflug." In support of their "broker-principal" argument, plaintiffs point to the allegations contained in the amended complaint that Mr. Barton acted as Mr. Boespflug's "deal broker" and that Mr. Barton held himself out as an expert in real estate investments. In addition, plaintiffs contend that the allegations contained in the amended complaint show that a fiduciary relationship in fact existed between Mr. Boespflug and Mr. Barton. After acknowledging that the trial court, acting in reliance upon "the 'demanding' standard articulated in *Lockerman*," found that plaintiffs had failed to adequately plead the existence of a de facto

fiduciary relationship, plaintiffs contend that *Lockerman*, which was decided in a summary judgment rather than a pleading context, is irrelevant to the proper resolution of this case and has been utilized by the trial court to require plaintiffs to satisfy an impermissibly high pleading standard. As a result, since the amended complaint "adequately pleaded . . . the existence of both a de jure and a de facto fiduciary relationship," plaintiffs contend that the trial court erred by reaching a contrary conclusion.

Thirdly, plaintiffs claim that the trial court's erroneous decision to dismiss their hybrid constructive fraud and breach of fiduciary duty claim resulted in the erroneous decision to dismiss plaintiffs' unfair and deceptive practices claim. According to plaintiffs, the fact that they adequately pleaded a claim for constructive fraud sufficed to establish that they adequately pleaded an unfair and deceptive practices claim as well.

Finally, plaintiffs contend that trial court erred by denying their motion for leave to file a second amended complaint. After acknowledging that the trial court had considered "various factors sanctioned by the appellate courts of this State in its order denying [p]laintiffs' motion," plaintiffs assert that the trial court "improperly [drew] every inference and view[ed] all the circumstances in a light most favorable to the [d]efendants, who actually bore the burden of demonstrating why the (presumptively permissible) motion should not have been granted."

In urging us to uphold the challenged orders, defendants begin by noting that, "[i]n discussing the 2 October 2017 Order granting the motion to dismiss, [plaintiffs] only address five of the defendants listed in the Amended Complaint"—Mr. Barton, Barton Boespflug, Hess Creek, Royal Ascot, and Vintage Oak—and "only three of the fifteen claims for relief alleged in the Amended Complaint." In addressing plaintiffs' challenge to the dismissal of their removal claims, defendants contend that plaintiffs had "requested application of North Carolina law" and had refrained from questioning the manner in which the trial court had applied North Carolina law in dismissing their removal claims. According to defendants, "[u]nder both Oregon and California law, the necessary prerequisites to pursuing a derivative claim to remove a manager (to the extent such a claim exists) were not alleged" in plaintiffs' amended complaint, necessitating the dismissal of plaintiffs' claims under Oregon or California law. More specifically, defendants note that the Oregon statute upon which plaintiffs rely provides that the complaint in a derivative action "must allege with particularity the demand made . . . or the reason why a demand was not made," citing Or. Rev. Stat. § 63.801(2), and that the relevant California statute contains a "pleading requirement, which

[ ] requires a party to plead with particularity why a demand would be futile," citing Cal. Corp. Code § 15910.02 (West 2018). Defendants argue that plaintiffs have "fail[ed] to point to any paragraph in the forty-three page Amended Complaint that purports to satisfy the particularized demand futility pleading requirements of Oregon and California" and assert that "no such allegations were made."

In addition, defendants argue that plaintiffs' contention that their request for Mr. Barton's removal as manager or limited partner of the investment entities was "partially" derivative lacks merit. According to defendants, the relevant operating agreements provide that the "removal of a manager for gross negligence requires either the 'majority vote' or a 'unanimous vote' of all members." As a result, "even if [plaintiffs] had properly pled a claim to remove [Mr.] Barton as the manager of the [investment entities]," the Court lacks the authority to act in accordance with plaintiffs' request.

In addition, defendants claim that plaintiffs' removal claims are time barred, given that the "allegedly negligent conduct that forms the basis for requested removal occurred prior to January 1, 2013, at the latest," which means that "[t]he statute of limitations for the [ ] removal claim expired three years later, on January 1, 2016." In view of the fact that this action was not filed until 16 December 2016, defendants contend that plaintiffs' "removal claim is barred by the statute of limitations."

Secondly, defendants assert that the trial court properly dismissed plaintiffs' constructive fraud and breach of fiduciary duty claim. According to defendants, plaintiffs had attempted to establish the existence of a de facto, but not a de jure, fiduciary relationship before the trial court. Under that set of circumstances, defendants contend that plaintiffs should not be permitted to argue before this Court that a de jure fiduciary relationship existed between Mr. Boespflug and Mr. Barton. In addition, defendants argue that plaintiffs failed to allege that Mr. Barton took any action in his capacity as Mr. Boespflug's real estate broker that would amount to a breach of that fiduciary duty.

Similarly, defendants argue that plaintiffs failed to allege sufficient facts to establish the existence of a de facto fiduciary relationship between Mr. Barton and Mr. Boespflug. More specifically, defendants contend that plaintiffs failed to allege sufficient facts to show that Mr. Barton completely dominated Mr. Boespflug. In addition, defendants assert that any conduct that might otherwise amount to the breach of a fiduciary duty, such as the issuance of the promissory notes about which plaintiffs complain, "is not a substitute for [plaintiffs'] failure to allege

sufficient facts to show that a de facto fiduciary relationship arose prior [to] the time this conduct occurred."

In the same vein, defendants argue that the trial court properly dismissed plaintiffs' unfair and deceptive practices claim in light of plaintiffs' failure to allege "instances of fraud, constructive fraud, and fraud by omission." Moreover, defendants assert that plaintiffs failed to allege the occurrence of an in-state injury, which they believe to be a prerequisite to the assertion of a valid unfair and deceptive practices claim. Lastly, defendants argue that the dismissal of plaintiffs' unfair and deceptive practices claim was appropriate because "intra-corporate conduct" is not cognizable under N.C.G.S. § 75-1.1.

Finally, defendants assert that the trial court properly denied plaintiffs' second amendment motion. Although plaintiffs did include "a section in their brief requesting that the denial of their second motion to amend be reversed," defendants contend that plaintiffs' failure to provide any "substantive analysis or argument" relating to the amendment issue constituted an abandonment of plaintiffs' challenge to the denial of their amendment motion. In addition, defendants note that the various justifications that the trial court provided "in the Order denying the second motion to amend" "make[ ] it undeniable that the trial court's decision was the product of a reasoned decision." As a result, defendants contend that the trial court did not err by denying plaintiffs' second amendment motion.

II. Substantive Legal Analysis

A. Claims for Mr. Barton's Removal

[1] In their initial challenge to the trial court's dismissal order, plaintiffs argue that the trial court erred by dismissing their claims for Mr. Barton's removal as the manager or general partner of certain of the investment entities for lack of standing because the claims in question were derivative, rather than personal, in nature and because plaintiffs failed to make a demand upon the entities to take action against Mr. Barton before filing suit. "We review the decision of a trial court to dismiss an action for lack of subject matter jurisdiction de novo." *Catawba County ex rel. Rackley v. Loggins*, 370 N.C. 83, 87, 804 S.E.2d 474, 477-78 (2017) (citing *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007)). Likewise, "[q]uestions of statutory interpretation are ultimately questions of law for the courts and are reviewed de novo." *In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (citing *Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998)).

A limited liability company is defined as "[a]n entity formed under [Chapter 57D] (or former Chapter 57C of the General Statutes) that has not become another entity or form of entity by merger, conversion, or other means." N.C.G.S. § 57D-1-03(19) (2017). A "derivative action" is defined as "a proceeding brought in the superior court of this State in the right of [a limited liability company] or, to the extent provided in G.S. 57D-8-06, in the right of a foreign [limited liability company], to recover a judgment in favor of the [limited liability company] or, if applicable, the foreign [limited liability company]." *Id.* § 57D-8-01(b) (2017). A member of a limited liability company[9] may initiate a derivative action when the member "ma[kes] written demand on the [limited liability company] to take suitable action," and either the demand is rejected or "90 days [ ] expire[ ] from the date the demand was made," or, alternatively, when "irreparable injury to the [limited liability company] would result by waiting for the expiration of the 90-day period." *Id.* § 57D-8-01(a)(2) (2017).

Similarly, a limited partnership is defined as "a partnership formed by two or more persons under the laws of this State and having one or more general partners and one or more limited partners, [including], for all purposes of the laws of the State of North Carolina, a limited liability limited partnership." *Id.* § 59-102(8) (2017). "A limited partner may bring an action in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed." *Id.* § 59-1001 (2017). As a result, North Carolina law contains pre-suit demand requirements applicable to derivative claims asserted against both limited liability companies and limited partnerships.

In dismissing plaintiffs' claims for the removal of Mr. Barton, the trial court determined that plaintiffs' failure to allege that they had made demand upon the investment entities in accordance with N.C.G.S. § 57D-8-01(a)(2) deprived plaintiffs of standing to maintain their removal claims and necessitated dismissal of those claims for lack of subject

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9. A member of a limited liability company is "[a] person who has been admitted as a member of the [limited liability company] as provided in the operating agreement or G.S. 57D-3-01, who was a member of the [limited liability company] immediately before the repeal of Chapter 57C of the General Statutes until the person ceases to be a member as provided in the operating agreement or G.S. 57D-3-02, or, with respect to a foreign [limited liability company], a person who has been admitted as a member of the foreign [limited liability company] under the law of the jurisdiction in which the foreign [limited liability company] is organized until the person ceases to be a member under that law." N.C.G.S. § 57D-1-03(21) (2017).

matter jurisdiction. Plaintiffs, however, argue that the trial court's decision to this effect was erroneous for a number of reasons, including, but not limited to, the fact that the demand rule contained in N.C.G.S. § 7D-8-01(a)(2) does not apply to limited partnerships,[10] that plaintiffs' removal claims are governed by the laws of jurisdictions other than North Carolina, and that the laws of the relevant foreign jurisdictions do not contain mandatory pre-suit demand requirements of the type embodied in N.C.G.S. § 57D-8-01(a)(2). As a result, plaintiffs urge us to overturn that portion of the trial court's dismissal order relating to plaintiffs' removal claims.

As an initial matter, we are inclined to believe that plaintiffs' removal claims are, in fact, governed by foreign, rather than North Carolina, law.[11] As far as limited liability companies are concerned, N.C.G.S. § 57D-8-06 provides that, "[i]n any derivative proceeding in the right of a foreign [limited liability company], the matters covered by this Article will be governed by the law of the jurisdiction of the foreign [limited liability company's] organization." *Id.* § 57D-8-06 (2017). Similarly, with respect to limited partnerships, "the laws of the jurisdiction under which a foreign limited partnership is organized govern its organization and internal affairs . . . ." *Id.* § 59-901 (2017). As a result, the relevant North Carolina statutes indicate that plaintiffs' claims for Mr. Barton's removal as the manager of Hess Creek and Royal Ascot are governed by Oregon law and that plaintiffs' claims for Mr. Barton's removal as the general partner of Barton Boespflug and Vintage Oak are governed by California law.[12] However, the fact that the trial court's decision rested upon North Carolina, rather than Oregon and California, law does not require reversal of the trial court's decision to dismiss plaintiffs' removal claims in this case.

According to the statutory provisions governing derivative actions brought against Oregon limited liability companies:

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10. Although we tend to agree with plaintiffs that the demand rules for derivative claims relating to North Carolina limited liability companies and North Carolina limited partnerships are different, we need not address the nature or extent of those differences given our determination that the demand rules applicable to plaintiffs' claims are governed by foreign, rather than North Carolina, law.

11. We note, in passing, that the trial court appears to have introduced the pre-suit demand requirement issue into this case rather than the parties.

12. In light of our understanding of the relevant statutory provisions, we need not determine whether a similar result is required under the internal affairs doctrine.

> Except as otherwise provided in writing in the articles of organization or any operating agreement, a complaint in a proceeding brought in the right of a limited liability company must allege with particularity the demand made, if any, to obtain action by the managers or the members who would otherwise have the authority to cause the limited liability company to sue in its own right, and either that the demand was refused or ignored or the reason why a demand was not made.

Or. Rev. Stat. Ann. § 63.801(2) (West 2018). Similarly, the California statute governing the assertion of derivative claims in the limited partnership context provides that

> [a] partner may bring a derivative action to enforce a right of a limited partnership if:
>
> (1) the partner first makes a demand on the general partners, requesting that they cause the limited partnership to bring an action to enforce the right, and the general partners do not bring the action within a reasonable time; or
>
> (2) a demand would be futile.

Cal. Corp. Code § 15910.02 (West 2018). According to section 15910.04 of the California Corporations Code, the complaint filed in a derivative action involving a limited partnership must state "the date and content of plaintiff's demand and the general partners' response to the demand" or "why demand is excused as futile." *Id.* § 15910.04 (West 2018). As a result, while plaintiffs are correct in noting that both Oregon Revised Statutes section 63.801(2) and California Corporations Code section 15910.02 contain what amounts to a "futility" exception to the otherwise-applicable pre-suit demand requirement, they overlook the fact that both Oregon and California law require that the plaintiff allege the basis for any claim of futility in any derivative complaint that he or she elects to file on behalf of a limited liability company or a limited partnership.

A careful reading of plaintiffs' amended complaint provides no indication that plaintiffs have attempted to satisfy the statutory requirement that the complaint in any derivative action that they might seek to file under either Oregon limited liability company law or California limited partnership law contain an affirmative allegation explaining why it would have been futile for them to have made a demand upon the relevant investment entities. In fact, plaintiffs do not appear to contend in their brief that they made any effort to satisfy the requirement

that they affirmatively allege the basis for a contention that the making of a demand upon Hess Creek, Royal Ascot, Barton Boespflug, or Vintage Oak would have been futile. Instead, plaintiffs appear to argue that it would have been inappropriate for the trial court to raise what they describe as the "affirmative defense" of their failure to allege why it would have been futile for them to make demand upon the relevant investment entities and suggest that their removal claims were only "partially" derivative. Rather than being an affirmative defense, however, the pleading requirements set out in Oregon Revised Statutes section 63.801(2) and California Corporations Code section 15910.02 constitute affirmative obligations that plaintiffs clearly are required to satisfy in order to assert a valid derivative claim on behalf of either an Oregon limited liability company or a California limited partnership.[13] In addition, as defendants note, plaintiffs sought Mr. Barton's removal as the manager or general partner of the relevant investment entities rather than the recovery of damages or some relief that does not affect all other interested parties associated with the relevant investment entities for some specific injury that plaintiffs claim to have sustained. For that reason, plaintiffs' removal claims strike us as quintessentially derivative, rather than personal, in nature. *Loewen*, 130 Or. App. at 229-30, 882 P.2d at 112 (stating that a claim that does not seek recovery for a "special injury" is derivative). As a result, for all of these reasons, we conclude that the trial court did not err by dismissing plaintiffs' removal claims.[14]

B. Fiduciary Relationship

[2] Secondly, plaintiffs challenge the trial court's decision to dismiss their hybrid constructive fraud and breach of fiduciary duty claim for failure to state a claim upon which relief can be granted.

> Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (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.

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13. As a result of the fact that the pleading requirements set out in Or. Rev. Stat. Ann. § 63.801(2) (West 2018) and Cal. Corp. Code § 15910.02 (West 2018) are clearly mandatory in nature, plaintiffs' removal claims are clearly subject to dismissal pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) even if the pleading requirement in question is not jurisdictional in nature.

14. In light of our determination that plaintiffs failed to satisfy the applicable Oregon and California pleading requirements, we need not consider the validity of defendants' other arguments in support of the trial court's decision to dismiss plaintiffs' removal claims.

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)). In ruling upon a dismissal motion filed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), "the well-pleaded material allegations of the complaint are taken as true; but conclusions of law or unwarranted deductions of fact are not admitted." *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 781 S.E.2d 1, 7-8, 368 N.C. 440, 448 (2015) (quoting *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970)). "Our review of the grant of a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is de novo." *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013).

A claim for constructive fraud only "arises where a confidential or fiduciary relationship exists." *Watts v. Cumberland Cty. Hosp. Sys., Inc.*, 317 N.C. 110, 115-16, 343 S.E.2d 879, 884 (1986) (first citing *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981); and then citing *Patuxent Dev. Co. v. Bearden*, 227 N.C. 124, 128, 41 S.E.2d 85, 88 (1947)). Similarly, "[f]or a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Dalton*, 353 N.C. at 651, 548 S.E.2d at 707 (first citing *Curl v. Key*, 311 N.C. 259, 264, 316 S.E.2d 272, 275 (1984); and then citing *Link v. Link*, 278 N.C. 181, 192, 179 S.E.2d 697, 704 (1971)). In the event that a party "fail[s] to allege any special circumstances that could establish a fiduciary relationship," *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 449, 781 S.E.2d 1, 8 (2015), dismissal of a claim which hinges upon the existence of such a relationship would be appropriate. *See id.* at 448-51, 781 S.E.2d at 8-9 (upholding a trial court's order dismissing claims for fraud and unfair and deceptive practices given the failure of the complaint to sufficiently allege the existence of a fiduciary relationship between the parties).

"Though difficult to define in precise terms, a fiduciary relationship is generally described as arising when 'there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.' " *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367, 760 S.E.2d 263, 266 (2014) (quoting *Green v. Freeman*, 367 N.C. 136, 141, 749 S.E.2d 262, 268 (2013)). A fiduciary relationship may exist in law or in fact. *See Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). For that reason, even when a fiduciary relationship does not arise as a matter of law, that is, due to the "legal relations" between two parties, it may yet exist as a matter of fact in such instances when there is "confidence reposed on one side, and the resulting superiority and influence on the other." *Id.* at 598, 160 S.E. at 906 (quoting Pomeroy's Equity

Jurisprudence, 3d Ed., Vol. 2, § 956). As a result, the ultimate issue raised by plaintiffs' challenge to the trial court's decision to dismiss the plaintiffs' hybrid constructive fraud and breach of fiduciary duty claim is whether the amended complaint alleges facts that, if believed, would suffice to establish the existence of a fiduciary relationship between Mr. Barton and Mr. Boespflug.

As an initial matter, we find no merit in plaintiffs' challenge to the standard upon which the trial court relied in determining that plaintiff had failed to state a claim for constructive fraud or breach of fiduciary duty. Although *Lockerman* was, as plaintiffs note, decided in the context of a summary judgment motion rather than a motion to dismiss for failure to state a claim upon which relief can be granted, that fact does not indicate that the trial court required plaintiffs to satisfy a "heightened pleading standard" with respect to their hybrid constructive fraud and breach of fiduciary duty claim. Aside from the fact that the language from *Lockerman* upon which the trial court relied states a general legal standard that would not vary depending upon whether a court was considering a summary judgment motion or a dismissal motion lodged pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), the trial court clearly cited *Lockerman* for the purpose of indicating that, as is required by well-established North Carolina law, detailed factual allegations, rather than mere conclusory assertions, are necessary to demonstrate the existence of a fiduciary relationship as a matter of fact. *Watts*, 317 N.C. at 116, 343 S.E.2d at 884 (stating that, in order to "stat[e] a cause of action for constructive fraud, the plaintiff must allege facts and circumstances," among other things, " 'which created the relation of trust and confidence' ") (quoting *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950)). As a result, the trial court's decision to dismiss plaintiffs' hybrid constructive fraud and breach of fiduciary duty claim does not rest upon a misapprehension of the pleading standard that must be satisfied in order to survive a motion to dismiss for failure to state a claim upon which relief can be granted.

As a substantive matter, plaintiffs argue that they "specifically pleaded allegations" of a "broker-principal" relationship between Mr. Barton and Mr. Boespflug and that the existence of such a relationship suffices to show that there was a fiduciary relationship between Mr. Barton and Mr. Boespflug as a matter of law. In support of this assertion, plaintiffs point to the allegations in the amended complaint stating that, "[s]ince 1986, [Mr.] Barton has acted as [Mr.] Boespflug's deal broker, recommending real estate investments and advising [Mr.] Boespflug," and that "[a] special relationship of trust was formed between

[Mr.] Barton and [Mr.] Boespflug because [Mr.] Barton held himself out as a real estate investment expert generally and as [Mr.] Boespflug's advisor specifically." According to plaintiffs, these allegations "show that [Mr.] Boespflug reposed special trust and confidence on [Mr.] Barton as his real estate investment broker, property manager, and personal advisor, thereby giving rise to a fiduciary relationship between [Mr.] Barton and [Mr.] Boespflug as a matter of law." We do not find plaintiffs' argument persuasive.

A careful examination of the record indicates that plaintiffs made no effort to persuade the trial court that a fiduciary relationship existed between Mr. Barton and Mr. Boespflug as a matter of law. Instead, the only argument that plaintiffs made with respect to the fiduciary duty issue before the trial court involved an assertion that such a relationship existed between the two men as a matter of fact. In addition, the allegations contained in the amended complaint refer to Mr. Barton as a "deal broker" rather than a real estate broker, with plaintiffs having failed to present any authority defining a "deal broker," much less establishing that such a relationship is fiduciary in nature. Finally, even if plaintiffs did, in fact, allege that a real estate brokerage relationship existed between Mr. Barton and Mr. Boespflug, plaintiffs' hybrid constructive fraud and breach of fiduciary duty claim does not appear to rest upon any conduct in which Mr. Barton engaged in the context of any such relationship. As a result, for all of these reasons, we conclude that plaintiffs failed to allege the existence of a fiduciary relationship as a matter of law between Mr. Barton and Mr. Boespflug in their amended complaint.

Similarly, we are not persuaded that the allegations contained in the amended complaint suffice to establish the existence of a fiduciary relationship between Mr. Barton and Mr. Boespflug as a matter of fact. On the contrary, the amended complaint lacks allegations suggesting the existence of the "confidence reposed on one side, and the resulting superiority and influence on the other," necessary to show the existence of a fiduciary relationship as a matter of fact, *Abbitt*, 201 N.C. at 598, 160 S.E. at 906, and seems to suggest, instead, that the opposite conclusion is more appropriate. For example, plaintiffs' allegation that "[Mr.] Boespflug placed [Mr.] Barton in a position of trust and gave him some discretion to manage the Properties, reporting to [Mr.] Boespflug intermittently on the state of the portfolio" tends to suggest that Mr. Barton lacked the superior authority over the operation of the investment entities necessary to establish the existence of a fiduciary relationship in fact and, on the contrary, buttresses the trial court's description of the relationship between Mr. Barton and Mr. Boespflug as "one in which

both men played a key role: [Mr.] Boespflug contributed most of the capital while [Mr.] Barton contributed most of the real estate expertise."[15] Thus, we hold that the trial court did not err by dismissing plaintiffs' hybrid constructive fraud and breach of fiduciary duty claim for failure to state a claim upon which relief can be granted.

C. Unfair and Deceptive Practices Claim

[3] The result that we reached with respect to plaintiffs' challenge to the dismissal of their hybrid constructive fraud and breach of fiduciary duty claim controls with respect to their challenge to the dismissal of their unfair and deceptive practices claim. "In order to establish a *prima facie* claim for unfair trade practices, 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, 460-61, 400 S.E.2d 476, 482 (1991)). In support of their unfair and deceptive practices claim, plaintiffs alleged in the amended complaint that defendants' "conduct described herein and throughout this complaint, including its numerous instances of fraud, constructive fraud, and fraud by omission, has a tendency to deceive, is immoral, unethical, oppressive, and unscrupulous." In dismissing plaintiffs' unfair and deceptive practices claim, the trial court stated that, "[h]aving determined that [p]laintiffs did not adequately allege facts to support their claims for constructive fraud and fraudulent conveyance (the only 'fraud' claims asserted in their complaint)," "[p]laintiffs have not alleged facts to show that Defendants committed an unfair or deceptive act under" N.C.G.S. § 75-1.1." The only basis upon which plaintiffs contend that the trial court erred by dismissing their unfair and deceptive practices claim is that they "adequately alleged a claim for constructive fraud." Having already rejected the only arguments that plaintiffs have advanced in support of their challenge to the trial court's decision to dismiss their hybrid constructive fraud and breach of fiduciary duty claim, we are compelled to reject their challenge to the dismissal of their unfair and deceptive practices claim as

15. Although plaintiffs direct our attention to various allegations describing certain actions in which Mr. Barton allegedly engaged, including the issuance of promissory notes in exchange for Mr. Boespflug's share in the investment entities, selling various properties, and modifying certain investment entity operating agreements, these allegations, while relevant to show that Mr. Barton breached any fiduciary duty that might have existed between Mr. Barton and Mr. Boespflug, have no bearing upon the extent to which a fiduciary relationship actually existed between the two men. *See Watts*, 317 N.C. at 115-16, 343 S.E.2d at 884 (citations omitted).

well. As a result, we hold that the trial court did not err by dismissing plaintiffs' unfair and deceptive practices claim for failure to state a claim upon which relief can be granted.

D. Amendment Motion

[4] Finally, plaintiffs contend that the trial court erred by denying their second motion to amend their complaint. According to well-established North Carolina law, after the time for answering a pleading has expired, "a motion to amend is addressed to the discretion of the court, and its decision thereon is not subject to review except in case of manifest abuse." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972) (citations omitted). A trial court abuses its discretion in the event that its decision " 'is manifestly unsupported by reason' or 'so arbitrary that it could not have been the result of a reasoned decision.' " *Frost v. Mazda Motors of Am., Inc.*, 353 N.C. 188, 199, 540 S.E.2d 324, 331 (2000) (quoting *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986) (first quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985); and then quoting *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985))). "Among proper reasons for denying a motion to amend are undue delay by the moving party and unfair prejudice to the nonmoving party." *News & Observer Publ'g. Co. v. Poole*, 330 N.C. 465, 485, 412 S.E.2d 7, 19 (1992) (citing *Patrick v. Ronald Williams, P.A.*, 102 N.C. App. 355, 360, 402 S.E.2d 452, 455 (1991)).

In challenging the denial of their second amendment motion, plaintiffs note that N.C.G.S. § 1A-1, Rule 15(a) provides that "leave [to amend] shall be freely given when justice so requires" and contend that the trial court erroneously placed the burden of proof upon them to establish that their amendment motion should be allowed rather than requiring defendants to establish why their amendment motion should not be allowed, citing *Mauney v. Morris*, 316 N.C. 67, 72, 340 S.E.2d 397, 400 (1986) (stating that "[t]he burden is upon the opposing party to establish that that party would be prejudiced by the amendment" (citing *Roberts v. William N. & Kate B. Reynolds Mem'l Park*, 281 N.C. 48, 58, 187 S.E.2d 721, 727 (1972))). We do not find plaintiffs' argument persuasive.

Aside from the fact that the record contains no reason to believe that the trial court's order denying plaintiffs' second amendment motion rested upon an impermissible placement of the burden upon plaintiffs rather than defendants, a careful review of the relevant provisions of the trial court's order demonstrates that it had ample justification for denying plaintiffs' second amendment motion. As an initial matter, the trial court noted that it had already allowed plaintiffs to

file an amended complaint while admonishing plaintiffs to comply with the applicable Business Court rules in the future. However, instead of filing the amended complaint which had been attached to their amendment motion within the time specified in the trial court's amendment order, plaintiffs sought an extension of time within which to make the required filing. After the trial court, despite denying plaintiffs' extension motion, gave plaintiffs a new deadline within which to file their amended complaint, plaintiffs filed an amended complaint that differed from the amended complaint that had been attached to their amendment motion. Even so, the trial court allowed plaintiffs to file the amended complaint that had been attached to their amendment motion and treated it as their complaint for purposes of future proceedings in this case. Within only a few weeks after the filing of their amended complaint, plaintiffs sought leave to file a second amended complaint that was not accompanied by a brief or a statement of opposing counsels' position, and that essentially "undid" a significant number of the changes that had been made to their original complaint in their amended complaint. In light of these determinations, which plaintiffs concede are relevant to a proper analysis of whether an amendment motion should be allowed or denied and which provide ample support for the trial court's conclusion that plaintiffs' second amendment motion involved "undue delay," suggested a "dilatory motive," and was neither accompanied by a brief nor a statement of the position of opposing counsel as required by the applicable Business Court Rules, we have no hesitation in concluding that the trial court did not abuse its discretion by denying plaintiffs' second amendment motion.

III. Conclusion

Thus, for all of these reasons, we conclude that the trial court did not err by dismissing plaintiffs' amended complaint and denying plaintiffs' second amendment motion. As a result, the challenged trial court orders are affirmed.

AFFIRMED.

DR. ROBERT CORWIN AS TRUSTEE FOR THE BEATRICE CORWIN LIVING IRREVOCABLE TRUST, ON BEHALF OF A CLASS OF THOSE SIMILARLY SITUATED

v.

BRITISH AMERICAN TOBACCO PLC, REYNOLDS AMERICAN, INC., SUSAN M. CAMERON, JOHN P. DALY, NEIL R. WITHINGTON, LUC JOBIN, SIR NICHOLAS SCHEELE, MARTIN D. FEINSTEIN, RONALD S. ROLFE, RICHARD E. THORNBURGH, HOLLY K. KOEPPEL, NANA MENSAH, LIONEL L. NOWELL, III, JOHN J. ZILLMER, AND THOMAS C. WAJNERT

No. 56PA17

Filed 7 December 2018

1. Corporations—direct claim by shareholder—voter dilution—personal injury distinct from corporation—standing

Where the terms of an acquisition agreement between two tobacco companies diluted the voting power of a subset of the purchasing company's minority shareholders, plaintiff shareholder had standing to bring a direct claim against the 42% shareholder, British American Tobacco (BAT), for breach of fiduciary duty. The alleged dilution of plaintiff's voting power—based on BAT's 42% voting power being permitted to remain the same at the expense of other shareholders—harmed plaintiff and the non-BAT shareholders but not the corporation itself. Plaintiff's alleged personal injury in conjunction with his claim that BAT breached a fiduciary duty to himself and non-BAT shareholders was sufficient to confer subject matter jurisdiction on the Court.

2. Corporations—minority shareholder—fiduciary duties

Where plaintiff shareholder filed a class action suit asserting a claim for breach of fiduciary duty against a 42% shareholder, British American Tobacco (BAT), because the terms of an acquisition agreement resulted in the dilution of plaintiff's voting power, the allegations of the complaint, if true, failed to satisfy the actual control test under Delaware law for a minority shareholder to owe fiduciary duties to other shareholders. Considering the restrictions in the Governance Agreement on BAT's power along with the absence of allegations of coercive or otherwise controlling actions on the part of BAT, plaintiff failed to allege that BAT exercised such domination and control over the purchasing company's board that BAT was indistinguishable from a majority shareholder. The Court did not need to decide whether to follow Delaware's rule that a minority shareholder can owe fiduciary duties to other shareholders because the complaint would still fail under that rule.

Justice HUDSON dissenting.

Justices BEASLEY and MORGAN join in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 796 S.E.2d 324 (2016), affirming in part and reversing and remanding in part an order and opinion entered on 6 August 2015 by Judge James L. Gale, Chief Special Superior Court Judge for Complex Business Cases, in Superior Court, Guilford County. Heard in the Supreme Court on 9 January 2018.

Mullins Duncan Harrell & Russell PLLC, by Alan W. Duncan and Stephen M. Russell, Jr.; and Block & Leviton LLP, by Jason M. Leviton, pro hac vice, for plaintiff-appellee.

Robinson & Lawing, LLP, by H. Brent Helms; and Cravath, Swaine & Moore LLP, by Gary A. Bornstein, pro hac vice, for defendant-appellant British American Tobacco PLC.

Bell Davis & Pitt, P.A., by Alan M. Ruley and William K. Davis, for North Carolina Association of Defense Attorneys, amicus curiae.

MARTIN, Chief Justice.

This appeal arises from the agreement of Reynolds American, Inc. to purchase Lorillard, Inc. Defendant British American Tobacco PLC (BAT) owned 42% of the stock in Reynolds and agreed to fund part of the Lorillard transaction by purchasing enough of the newly acquired shares to maintain that 42% ownership interest. The terms of this agreement diluted the voting power of Reynolds' other minority shareholders, including plaintiff Dr. Robert Corwin. Plaintiff then filed a putative class action suit on behalf of similarly situated stockholders asserting a claim for breach of fiduciary duty against, among others, BAT.

In this appeal, we consider whether BAT owed fiduciary duties to those other shareholders in the context of the Lorillard acquisition. The Business Court concluded that BAT did not owe fiduciary duties to the other shareholders and granted BAT's motion to dismiss. We agree with the Business Court and therefore reverse the decision of the Court of Appeals.

I. Background

The matter before us is an appeal of a determination under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, so we accept all

of the facts pleaded in plaintiff's First Amended Class Action Complaint (the operative pleading here, which we will hereinafter refer to as the Complaint) as true. *See Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 7 (2015) (quoting *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970)). Our statement of the facts of this case is derived from the Complaint, as well as from other documents that the Complaint incorporates by reference.

Reynolds, an American tobacco company, was created after Reynolds' predecessor entity acquired Brown & Williamson (B&W), another tobacco company. B&W was a subsidiary of BAT, a tobacco holding company that is headquartered in London. As a result of the transaction, BAT became a 42% stockholder of Reynolds, and BAT and Reynolds entered into a governance agreement dated 30 July 2004 (the Governance Agreement).

The Governance Agreement contained specific limitations on BAT's power.[1] BAT could effectively nominate only five members to Reynolds' thirteen-member Board of Directors, and three of those nominees had to be "Independent Directors." The Governance Agreement defined the term "Independent Director" to mean a director who was considered independent of Reynolds under the New York Stock Exchange Rules[2] and who had not been a director, officer, or employee of BAT or its subsidiaries within the past three years. Reynolds' Corporate Governance and Nominating Committee (the Committee) had the right to nominate the remaining eight directors, seven of whom had to be Independent Directors. All members of the Committee itself had to be Independent Directors, and, provided that the Reynolds board was fully staffed, the majority of those directors had to be non-BAT-nominated Independent Directors. During a standstill period imposed by the Governance Agreement,[3] BAT could not seek removal of any of the directors that it did not nominate, unless the

1. Most of the provisions of the Governance Agreement that we discuss here refer not to BAT but to its subsidiary, B&W. However, the Governance Agreement specifically provides that "B&W may assign, in its sole discretion, any of or all its rights, interests and obligations under this Agreement to BAT or any of its Subsidiaries that agrees in writing to be bound by the provisions hereof." We can find no portion of the record indicating that B&W made such an assignment to BAT, but, because the courts below and both parties to this appeal treat BAT as having assumed B&W's rights and obligations under the Governance Agreement, we also do so for the purpose of our decision here.

2. This portion of the definition of the term "Independent Director" applies only if Reynolds is listed on the New York Stock Exchange. Because the Complaint alleges that Reynolds "trades on the New York Stock Exchange," though, that portion of the definition applies to the term for the purposes of this motion.

3. The standstill period was set to run from 30 July 2004—the effective date of the Governance Agreement—until either the tenth anniversary of the Governance Agreement

Reynolds board amended or waived that limitation. Further, a majority of the Independent Directors who were not nominated by BAT had to approve any material transaction between, or involving, Reynolds and BAT (with certain narrow exceptions that no party asserts as being relevant here). These restrictions, along with the rest of the Governance Agreement, would continue until BAT's ownership interest reached 100% or fell below 15% (or until a person or group other than BAT, with some other exceptions not relevant here, owned or controlled more than 50% of the voting power of all voting stock), at which point the Governance Agreement would terminate by its own terms.

Alongside these restrictions, the Governance Agreement conveyed certain contractual rights to BAT. The Governance Agreement required the approval of a majority of the BAT-nominated directors for certain actions such as stock issuances if that stock would have voting power greater than or equal to 5% of the voting power outstanding before that issuance. It also required the approval of BAT as a stockholder for certain actions such as the sale of specified intellectual property.

In September 2012, Reynolds, the second-largest tobacco company in the United States, began considering a merger with Lorillard, the third-largest tobacco company in the United States. Reynolds met with BAT before entering negotiations with Lorillard. BAT indicated that it would support the Lorillard merger only on terms that it approved of and expressed its desire to maintain its 42% ownership interest in Reynolds. BAT was willing to provide financing for the transaction through purchasing enough of the newly acquired shares to maintain its ownership interest, and the parties agreed to a term sheet regarding that financing. BAT insisted that this term sheet contain a provision that prevented BAT or Reynolds from seeking to change the Governance Agreement in connection with the proposed transaction. BAT also indicated that it was not willing to extend the standstill period specified in the Governance Agreement.

Initially, discussions proceeded toward what Lorillard hoped would be a merger of equals. The Other Directors—a term that the Governance Agreement defined (in its singular form) to mean an Independent Director of the Reynolds board who was not nominated by BAT—even discussed reducing BAT's ownership percentage after the merger to allow a greater

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or the date on which a significant transaction occurred, whichever was earlier. According to the Governance Agreement, a significant transaction would be "any sale, merger, acquisition . . . , consolidation, dissolution, recapitalization or other business combination involving Reynolds American or any of its Subsidiaries pursuant to which more than 30% of the Voting Power or the consolidated total assets of Reynolds American would be acquired or received" by an outside party.

ownership level for Lorillard's stockholders. But this change ultimately did not happen. Eventually, Lorillard terminated negotiations after concluding that the transaction was not truly a merger of equals given the power that BAT would wield over the combined company. Reynolds then decided to pursue an acquisition of Lorillard instead.

During subsequent negotiations, the Other Directors requested the removal of a provision in the proposed merger agreement that required BAT to vote its shares of Reynolds stock in favor of the transaction regardless of whether the Reynolds board changed its recommendation in favor of the transaction. Lorillard, however, insisted that this provision remain in the agreement. BAT said that it would consider Lorillard's demand but would not commit over the objections of the Other Directors. The Other Directors agreed to allow the provision to remain in the proposed merger agreement, so it did, in fact, remain there.

On 15 July 2014, the companies announced that they had reached a final agreement. Reynolds would purchase Lorillard and pay the Lorillard stockholders a combination of 0.2909 shares of Reynolds common stock plus $50.50 for each share of Lorillard stock that they owned. At the time, this price corresponded to a value of $68.88 per Lorillard share based on the closing price of Reynolds stock on 14 July 2014.

To help finance the acquisition, Reynolds would divest a package of assets, including several cigarette brands, to Imperial Tobacco Group PLC. Additionally, BAT would help finance the acquisition by purchasing enough additional shares of Reynolds for it to maintain its 42% ownership of Reynolds after the completion of the transaction. BAT would be permitted to purchase these additional Reynolds shares for $60.16 per share—the price of Reynolds stock on 2 July 2014, which was also used to determine the stock component of the Lorillard shareholders' consideration. This price was $3.02 less than the closing price of Reynolds stock on 14 July 2014, the day before the transaction was executed. Reynolds and BAT also agreed to pursue a technology-sharing initiative for next-generation tobacco products such as digital vapor cigarettes. The entire Reynolds board, including the Other Directors, unanimously approved these transactions.[4]

In response to the announcement of these transactions, plaintiff Dr. Robert Corwin filed a class action complaint against BAT, Reynolds, and

4. However, the Complaint indicates that plaintiff lacks specific information about whether a separate vote by the Reynolds board on the technology-sharing agreement occurred (or, by necessary implication, how the board voted if a vote did occur).

a group of Reynolds' directors (director defendants) in his capacity as trustee for the Beatrice Corwin Living Irrevocable Trust and on behalf of other stockholders similarly situated. The case was designated as a mandatory complex business case to be heard by the Business Court. The Complaint (which, again, is the operative pleading here) alleges, among other things, that BAT was a controlling stockholder of Reynolds, that BAT therefore owed fiduciary duties to plaintiff, and that BAT breached those fiduciary duties through its conduct in connection with the Lorillard transaction. Although BAT was not a majority stockholder of Reynolds, plaintiff bases his claim that BAT was nevertheless a *controlling* stockholder on various aspects of the Reynolds-BAT Governance Agreement and BAT's involvement in the Lorillard transaction. Plaintiff claims that BAT's control over Reynolds allowed BAT to negotiate benefits for itself that were not shared with other Reynolds stockholders.

BAT, Reynolds, and director defendants moved to dismiss plaintiff's Complaint. BAT argued that it was not a controlling stockholder of Reynolds and did not owe fiduciary duties to plaintiff under North Carolina law because it owned less than a majority of Reynolds stock. BAT also argued that plaintiff's claim was derivative and that plaintiff therefore lacked standing because he had not made a pre-suit demand on the Reynolds board, as North Carolina law requires before a plaintiff files a derivative suit. Plaintiff, on the other hand, urged the Business Court to adopt the standard that Delaware uses to determine whether a stockholder is a controlling stockholder, which would impose fiduciary duties on a minority stockholder who is found to be controlling.

The Business Court granted all of the defendants' motions to dismiss. Regarding BAT, the Business Court concluded that, even if the Delaware standard applied, the Complaint failed to allege that BAT exercised actual control over the Reynolds board regarding the transaction. In reaching this conclusion, the Business Court noted the "extraordinary" limitations that the Governance Agreement placed on BAT's ability to control the Reynolds board. Plaintiff appealed the dismissal of his claims to the Court of Appeals.

In a unanimous opinion, the Court of Appeals reversed the Business Court's dismissal of plaintiff's claims against BAT but affirmed the dismissal of plaintiff's claims against Reynolds and director defendants. *Corwin v. British Am. Tobacco PLC*, ___ N.C. App. ___, ___, 796 S.E.2d 324, 340 (2016). The Court of Appeals used the Delaware approach to determine whether BAT was a controlling stockholder and concluded that plaintiff alleged enough facts to support a reasonable inference that BAT was a controlling stockholder. *Id.* at ___, ___, 796 S.E.2d at 332,

337. The Court of Appeals also concluded that plaintiff had standing to bring a direct claim against BAT because plaintiff sufficiently pleaded that BAT owed plaintiff a special duty. *Id.* at ___, 796 S.E.2d at 338 (citing *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 658, 488 S.E.2d 215, 219 (1997)).

BAT petitioned this Court for discretionary review on various issues related to whether a minority stockholder could owe fiduciary duties to other stockholders under North Carolina law and whether the Court of Appeals correctly found that a controlling stockholder necessarily owes a special duty to other stockholders for standing purposes. This Court allowed BAT's petition.

II. Analysis

BAT moved to dismiss plaintiff's Complaint for lack of standing under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The Business Court assumed without deciding that plaintiff had standing, and then dismissed plaintiff's Complaint for failure to state any claim for breach of fiduciary duty. Nevertheless, we will consider the issue of standing before addressing the Rule 12(b)(6) issue because "standing is a 'necessary prerequisite to a court's proper exercise of subject matter jurisdiction.' " *Willowmere Cmty. Ass'n v. City of Charlotte*, 370 N.C. 553, 561, 809 S.E.2d 558, 563 (2018) (quoting *Crouse v. Mineo*, 189 N.C. App. 232, 236, 658 S.E.2d 33, 36 (2008)).

A. Standing

[1] The Court of Appeals concluded that plaintiff had standing to bring a direct claim against BAT because the Complaint contained enough allegations to support a determination that BAT owed a special duty to plaintiff. *Corwin*, ___ N.C. App. at ___, 796 S.E.2d at 338 (citing *Barger*, 346 N.C. at 658, 488 S.E.2d at 219). BAT argues, however, that plaintiff's claims are derivative and that plaintiff lacks standing because he failed to make a pre-suit demand on Reynolds. Because this appeal stems from a trial court's order granting a motion to dismiss under Rule 12(b)(1), we apply de novo review, accepting the allegations in the complaint as true and viewing them in the light most favorable to the non-moving party. *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008).

A derivative proceeding is defined as "a civil suit in the right of a domestic corporation." N.C.G.S. § 55-7-40.1 (2017). Before commencing a derivative proceeding, a stockholder must make a written demand

"upon the corporation to take suitable action." *Id.* § 55-7-42 (2017). In line with this requirement, this Court has stated that "[t]he general rule is that '[s]hareholders . . . generally may not bring individual actions to recover what they consider their share of the damages suffered by [a] corporation.' " *Green v. Freeman*, 367 N.C. 136, 142, 749 S.E.2d 262, 268 (2013) (second alteration in original) (quoting *Barger*, 346 N.C. at 660, 488 S.E.2d at 220-21). There are two exceptions to this general rule: shareholders "may bring an individual action . . . when (1) 'the wrongdoer owed [them] a special duty' or (2) they suffered a personal injury 'distinct from the injury sustained by . . . the corporation itself.' " *Id.* at 142, 749 S.E.2d at 268 (second and third alterations in original) (quoting *Barger*, 346 N.C. at 659, 661, 488 S.E.2d at 219, 221).

The first exception applies when the wrongdoer owes a duty that is "personal to plaintiffs as shareholders and [is] separate and distinct from the duty defendant[ ] owe[s] the corporation," such as a fiduciary duty owed to the stockholders. *Barger*, 346 N.C. at 659, 488 S.E.2d at 220. In this case, whether plaintiff had standing to bring a direct claim under the first exception depends on whether BAT was a controlling stockholder that owed plaintiff fiduciary duties. This issue is the same issue that we must decide in order to determine whether the Business Court properly dismissed plaintiff's Complaint under Rule 12(b)(6) for failure to state a claim. We will therefore determine whether plaintiff has standing under the second exception before addressing whether BAT owed plaintiff fiduciary duties, to ascertain whether it gives us an independent basis for asserting jurisdiction.

The second *Barger* exception applies when a plaintiff suffers an injury that is "distinct from the injury suffered by the corporation itself." *Green*, 367 N.C. at 144, 749 S.E.2d at 269 (quoting *Barger*, 346 N.C. at 661, 488 S.E.2d at 221). In this case, plaintiff asserts that he and the Reynolds stockholders other than BAT have been injured by the reduction of their percentage ownership of Reynolds. Before the transaction, BAT owned 42% of the outstanding shares, and plaintiff and other stockholders owned the remaining 58% of shares. Under the transaction agreement, however, former Lorillard stockholders would own approximately 15% of Reynolds shares, and BAT would be permitted to purchase additional shares to maintain its 42% ownership. That means that plaintiff and the other stockholders would only own 43% of Reynolds shares after the transaction. Plaintiff claims that this arrangement allowed BAT to "maintain[ ] its own ownership stake and control over [Reynolds] while diluting the stake of Plaintiff and the Class by means of the BAT Share Purchase." This dilution translates to a reduction in voting power

for plaintiff and the other non-BAT stockholders, and that alleged injury affects the voting power of plaintiff and the non-BAT stockholders rather than the corporation itself. We therefore conclude that plaintiff had standing to bring a direct claim against BAT under the second *Barger* exception due to the alleged dilution of plaintiff's voting power.

While this Court has never before addressed whether a stockholder can bring a direct claim for voting power dilution, caselaw from Delaware permits it, and we find that caselaw to be persuasive. In *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, the Supreme Court of Delaware held that whether an action is direct or derivative is determined by "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)[.]" 845 A.2d 1031, 1033 (Del. 2004) (en banc). Before *Tooley*, Delaware applied a "special injury" test, which *Tooley* rejected. *Id.* at 1038-39. At first glance, it might appear that Delaware precedent should therefore be irrelevant to our analysis, on the assumption that the special injury test that *Tooley* rejected is similar to our Court's current "distinct injury" exception under *Barger*. The special injury test in Delaware, however, was different than the distinct injury exception in North Carolina. The phrase "special injury" referred to a "wrong . . . inflicted upon the stockholder alone" and not shared by the other *stockholders*, *see id.* at 1037, whereas "distinct injury" in North Carolina means that the injury to the stockholder is distinct from the injury suffered by the *corporation*, *Green*, 367 N.C. at 144, 749 S.E.2d at 269. So the *Tooley* analysis, like the second *Barger* exception, focuses on whether the stockholder suffered a harm that is distinct from the harm suffered *by the corporation*. Focusing on the stockholder's harm compared to the corporation's harm rather than on the harm of one stockholder compared to the harm of other stockholders makes sense because, as *Tooley* explained, "a direct, individual claim of stockholders that does not depend on harm to the corporation can also fall on all stockholders equally, without the claim thereby becoming a derivative claim." 845 A.2d at 1037.

The Supreme Court of Delaware has recognized in *In re Tri-Star Pictures, Inc., Litigation*, furthermore, that voting power dilution is a harm to stockholders when the minority stockholders' voting power is decreased while the majority stockholder's power is increased. 634 A.2d 319, 330 (Del. 1993). In *Tri-Star*, the Supreme Court of Delaware noted that the plaintiffs, who were minority stockholders, "suffer[ed] harm by voting power dilution which, in essence, is no more than a relative diminution in the minority's proportionate influence over corporate

affairs." *Id.* The court further explained that "[v]oting power dilution is a harm distinct and separate from" other harms suffered by the minority stockholders, such as alleged nondisclosure in proxy materials, because "[t]he harm from voting power dilution goes to the impact of an individual stockholder's vote." *Id.* at 330 n.12. Although *Tri-Star* was decided before *Tooley*, Delaware courts, including the Supreme Court of Delaware, have continued to cite the pertinent analysis from *Tri-Star* while applying the *Tooley* test for distinguishing between direct and derivative claims. *See*, *e.g.*, *Gentile v. Rossette*, 906 A.2d 91, 101-03 (Del. 2006) (noting that *Tri-Star* provides the "analytical framework" for claims based on dilution of stockholder voting power and then applying *Tooley* to determine that the claim at issue was direct rather than derivative because the harm to minority stockholders was unique from any injury suffered by the corporation and because the only available relief would exclusively benefit those minority stockholders).

Using the *Tooley* test, the Delaware Court of Chancery has determined that a claim of voting power dilution can be a direct claim "where a significant stockholder's interest is increased at the sole expense of the minority." *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 818 (Del. Ch. 2005) (quoting *In re Paxson Commc'n Corp. S'holders Litig.*, No. Civ.A. 17568, 2001 WL 812028, at *5 (Del. Ch. July 12, 2001)).[5] The Court of Chancery has explained that "[v]oting power dilution may constitute a direct claim, because it can directly harm the shareholders without affecting the corporation, and any remedy for the harm suffered under those circumstances would benefit the shareholders." *Oliver v. Boston Univ.*, No. Civ.A. 16570-NC, 2006 WL 1064169, at *17 (Del. Ch. Apr. 14, 2006) (unreported).[6]

In this case, BAT's voting power did not increase, but it was allowed to remain constant at the sole expense of plaintiff and the other non-BAT

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5. The Supreme Court of Delaware has likewise clarified that, although *Tri-Star* itself speaks of, and the facts in *Tri-Star* involved, a majority stockholder's power being increased, the *Tri-Star* rule applies when a "*significant or controlling* stockholder['s]" interest is increased. *See In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 774-75 (Del. 2006) (en banc) (emphasis added) (quoting *In re Paxson*, 2001 WL 812028, at *5).

6. Delaware allows unpublished cases to be cited as precedent. Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. App. Prac. & Process 473, 481 (2003). Specifically, the Rules of the Court of Chancery of the State of Delaware refer to both reported and unreported Delaware cases as "principal Delaware decisions" that can be included in a party's compendium of authorities for the court to review along with its brief. Del. Ch. Ct. R. 171(i). In ascertaining the nature of Delaware law, therefore, we cite both reported and unreported Delaware Court of Chancery cases throughout this opinion and consider them to have equal authority for the purposes of our analysis.

stockholders, whose voting power significantly decreased. This voting power dilution did not harm the corporation itself, but it did harm the non-BAT stockholders. Thus, although this case is the first time that this Court has considered whether voting power dilution is a direct claim, we agree with the relevant reasoning of the Delaware courts that we have discussed, and hold that plaintiff has pleaded "a personal injury." *See Green*, 367 N.C. at 142, 749 S.E.2d at 268. We further hold that the alleged personal injury, in conjunction with plaintiff's legal claim that BAT breached a purported fiduciary duty to himself and his fellow non-BAT minority stockholders, is enough to confer subject-matter jurisdiction on this Court. Because we have concluded that plaintiff had standing to bring a direct claim for voting power dilution, we will now address whether the Business Court properly granted BAT's motion to dismiss under Rule 12(b)(6).

B. Fiduciary Duties

[2] On appeal from the dismissal of a complaint pursuant to North Carolina Rule of Civil Procedure 12(b)(6), we conduct de novo review to determine "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51, 790 S.E.2d 657, 659 (2016) (quoting *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013)). It is well established that dismissal pursuant to Rule 12(b)(6) is proper 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)).[7]

7. The dissent relies heavily on the Rule 12(b)(6) standard recited in cases such as *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 559, 681 S.E.2d 770, 774 (2009), and *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 444, 666 S.E.2d 107, 116 (2008), which, in turn, finds its genesis in *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957), *abrogated by Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007). We decline to address what admittedly may be a lack of doctrinal consistency in our standard of review for Rule 12(b)(6) motions when that question was not among "the issues stated in . . . the petition for discretionary review and the response thereto filed." N.C. R. App. P. 16(a). In any event, this Court routinely uses the Rule 12(b)(6) standard that we apply here in assessing the sufficiency of complaints in the context of complex commercial litigation. *See, e.g.*, *Krawiec v. Manly*, 370 N.C. 602, 606, 811 S.E.2d 542, 546 (2018); *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5, 802 S.E.2d 888, 891 (2017).

This Court held in *Gaines v. Long Manufacturing Company* that the majority stockholder of a corporation owes fiduciary duties to the minority stockholders. 234 N.C. 340, 344, 67 S.E.2d 350, 353 (1951). This Court reasoned that majority stockholders owe fiduciary duties to minority stockholders because majority stockholders "have a community of interest with the minority holders in the same property and because the latter can act and contract in relation to the corporate property only through the former." *Id.* at 344, 67 S.E.2d at 353 (quoting 13 Am. Jur. *Corporations* § 423 (1938)). "It is the fact of control of the common property held and exercised . . . that creates the fiduciary obligation on the part of the majority stockholders in a corporation for the minority holders." *Id.* at 344-45, 67 S.E.2d at 353 (quoting 13 Am. Jur. *Corporations* § 423). Under *Gaines*, BAT did not necessarily owe fiduciary duties to the other stockholders because BAT was not a majority stockholder.

This Court has never held that a *minority* stockholder owes fiduciary duties to other stockholders, but it has also never held that a minority stockholder *cannot* owe fiduciary duties to other stockholders. We do not need to decide that question today, however. Even if we agreed with Delaware courts that a minority stockholder may owe fiduciary duties to other stockholders based on its exercising actual control over the board of directors, the complaint in this case would still fail to state a claim upon which relief can be granted because the Complaint does not adequately allege that BAT exercised actual control over the Reynolds board here.

In Delaware, "[i]t is well settled law that only a 'controlling stockholder' owes fiduciary duties to other stockholders." *In re Primedia Inc. Derivative Litig.*, 910 A.2d 248, 257 (Del. Ch. 2006) (citing *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1113-14 (Del. 1994)). A stockholder is considered controlling if it owns more than 50% of the corporation's voting power or if it "exercises control over the business and affairs of the corporation." *Id.* (quoting *Kahn*, 638 A.2d at 1113 (emphasis omitted)). Put another way, a minority stockholder is considered a controlling stockholder if the minority stockholder exercises "domination . . . through actual control of corporate conduct." *In re Morton's Rest. Grp., Inc. S'holders Litig.*, 74 A.3d 656, 664 (Del. Ch. 2013) (quoting *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 70 (Del. 1989)). This inquiry focuses on actual control over *the board of directors*. *Id.* at 664 65; *In re KKR Fin. Holdings LLC S'holder Litig.*, 101 A.3d 980, 993-94 (Del. Ch. 2014), *aff'd sub nom. Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015). Actual control exists only when the allegedly controlling stockholder "exercises such

formidable voting and managerial power that [it], as a practical matter, [is] no differently situated than if [it] had majority voting control." *In re KKR*, 101 A.3d at 993 (alterations in original) (quoting *In re Morton's*, 74 A.3d at 665) (internal quotations omitted). As a necessary prerequisite for a minority stockholder to exercise actual control, then, the stockholder's "power must be so potent that independent directors . . . cannot freely exercise their judgment, fearing retribution." *Id.* (emphasis omitted) (quoting *In re Morton's*, 74 A.3d at 665 (alteration in original)) (internal quotations omitted).

To survive a motion to dismiss in Delaware, a claim for breach of fiduciary duty by a minority stockholder must contain more than "[t]he bare conclusory allegation that a minority stockholder possessed control . . . . Rather, the [c]omplaint must contain well-pled facts showing that the minority stockholder '*exercised* actual domination and control over . . . [the] directors.' " *In re Morton's*, 74 A.3d at 664-65 (emphasis added) (fourth and fifth alterations in original) (quoting *In re Sea-Land Corp. S'holders Litig.*, No. Civ.A. 8453, 1988 WL 49126, at *3 (Del. Ch. May 13, 1988) (unreported)). Even at the motion to dismiss stage, Delaware courts have noted that "[t]his actual control test is 'not an easy one to satisfy' as 'stockholders with very potent clout have been deemed, in thoughtful decisions, to fall short of the mark.' " *Sciabacucchi v. Liberty Broadband Corp.*, No. CV 11418-VCG, 2017 WL 2352152, at *16 (Del. Ch. May 31, 2017) (unreported) (quoting *In re PNB Holding Co. S'holders Litig.*, No. Civ.A. 28-N, 2006 WL 2403999, at *9 (Del. Ch. Aug. 18, 2006) (unreported)).

That the actual control standard emphasizes the exercise of actual control over the board—an affirmative act by the minority stockholder—and not just the mere possession of power means that an allegation that a minority stockholder has some leverage over the board of directors is not enough. *See In re Sea-Land*, 1988 WL 49126, at *3 (stating that allegations that amount to significant "leverage" will not allow a complaint to survive because " 'leverage' is not actual domination and control"). A party may, after all, use its leverage to negotiate favorable terms in a transaction with another party even when it has no control (and thus has exercised no control) over that other party. Applying this standard in the context of a Rule 12(b)(6) motion, plaintiff's Complaint necessarily fails if it "reveals the absence of facts" that BAT engaged in some affirmative act to direct or compel the Reynolds board to enter into the Lorillard transaction on the terms that plaintiff takes issue with here. *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). In other words, the complaint must allege, through well-pleaded facts, *actual control*, *see Sciabacucchi*, 2017 WL 2352152,

at *16, which refers to control that prevents a company's directors from "freely exercis[ing] their judgment in determining whether or not to approve and recommend" a transaction, *In re KKR*, 101 A.3d at 993.

In the same vein, the fact that a stockholder possesses contractual rights permitting it to restrict corporate action and thereby giving it leverage over board decisions does not necessarily mean that the stockholder is exercising actual control. *Thermopylae Capital Partners, L.P. v. Simbol, Inc.*, C.A. No. 10619-VCG, 2016 WL 368170, at *13 (Del. Ch. Jan. 29, 2016) (unreported). Unexercised contractual rights alone, such as board veto power, do not equate to actual control over a board. *Williamson v. Cox Commc'ns, Inc.*, No. Civ.A. 1663-N, 2006 WL 1586375, at *5 (Del. Ch. June 5, 2006) (unreported). Even a stockholder who *exercises* its contractual rights to further its own goals "is simply exercising [its] own property rights, not that of others, and is no fiduciary." *Thermopylae*, 2016 WL 368170, at *14. For example, in *Superior Vision Services, Inc. v. ReliaStar Life Insurance Co.*, No. Civ.A. 1668-N, 2006 WL 2521426 (Del. Ch. Aug. 25, 2006) (unreported), the allegedly controlling stockholder had a contractual right to withhold its consent and effectively veto any dividend payment that the board voted to approve, *id.* at *4. The stockholder exercised that right, but the Delaware Court of Chancery concluded that the stockholder was not controlling solely by virtue of "exercis[ing] a duly-obtained contractual right." *Id.* at *5. The court reasoned that to hold otherwise would mean that "any strong contractual right, duly obtained by a significant shareholder (a somewhat elusive term in itself), would be limited by and subject to fiduciary duty concerns." *Id.*

A minority stockholder who exercises contractual rights may, however, be considered a controlling stockholder if the stockholder "achieved control or influence over a majority of directors through non-contractual means." *Thermopylae*, 2016 WL 368170, at *14. Additionally, it could be possible to determine that a stockholder is a controlling one "where the holding of contractual rights [is] coupled with a significant equity position and other factors, . . . especially if those contractual rights are used to induce or to coerce the board of directors to approve (or refrain from approving) certain actions." *Superior Vision*, 2006 WL 2521426, at *5. In *Williamson v. Cox Communications, Inc.*, for example, the court found that unexercised veto power was significant in denying a motion to dismiss because the stockholder had veto power over *all* board decisions and could use that veto power "to shut down the effective operation of the . . . board of directors." 2006 WL 1586375, at *5. The veto power therefore gave that stockholder coercive leverage

because the board effectively had to get the stockholder's approval in order to take any action whatsoever. *Id.* But "a significant shareholder, who exercises a duly-obtained contractual right that somehow limits or restricts the actions that a corporation otherwise would take, does not become, without more, a 'controlling shareholder' for that particular purpose." *Superior Vision*, 2006 WL 2521426, at *5.

On the other hand, the existence of contractual *restrictions* on a stockholder's ability to exercise control may prevent a finding of control at the pleading stage. *See Sciabacucchi*, 2017 WL 2352152, at *17-18. In *Sciabacucchi v. Liberty Broadband Corp.*, for instance, contractual restrictions prevented the allegedly controlling stockholder from designating a majority of the board, soliciting proxies, or obtaining more than 35% of the voting stock. *Id.* at *18. The restrictions also required certain directors and unaffiliated stockholders to approve specific transactions like the one at issue. *Id.* The court concluded that these "contractual handcuffs," among other things, prevented a finding that the plaintiff had adequately pleaded actual control. *Id.* at *20.

Threats and demands, however, may support a claim that the stockholder exercised actual control. *See Kahn*, 638 A.2d at 1114. In *Kahn v. Lynch Communication Systems, Inc.*, the Supreme Court of Delaware affirmed the Court of Chancery's determination that a minority stockholder was controlling when the 43.3% stockholder threatened the board, saying, "[Y]ou must listen to us. We are 43 percent owner. You have to do what we tell you." *Id.* There was also evidence in *Kahn* that board members were intimidated by this stockholder and therefore complied with its demands instead of exercising their own independent business judgment. *Id.* at 1114-15. Thus, *Kahn* suggests that allegations of a threat by a significant minority stockholder, plus allegations that the board was intimidated by that threat, may be enough to establish actual control.

As we have already said, we do not need to decide whether to adopt the Delaware approach to determining controlling-stockholder status in order to decide this case. Even under the Delaware approach, we conclude that plaintiff has failed to allege facts that, if true, would establish that BAT exercised actual control over the Reynolds board of directors, and therefore that plaintiff has failed to plead a breach-of-fiduciary-duty claim.

Plaintiff claims that the Governance Agreement gave BAT the ability to control the Reynolds board. In fact, the exact opposite is true. In several ways, the Governance Agreement placed "contractual handcuffs" on BAT that prevented it from controlling the Reynolds board. *See Sciabacucchi*, 2017 WL 2352152, at *20. BAT could nominate only five of

the thirteen Reynolds directors, and three of those directors could not currently be (or have been in the past three years) an officer, director, or employee of BAT. Generally, BAT was required to vote all of its shares in favor of electing the directors that it did not nominate, and, if their removal was sought, BAT was required to vote all of its shares against their removal. And BAT could not seek to remove any of the directors that it did not nominate. BAT therefore had no means of retribution against the majority of the directors that could have impaired the ability of those directors to exercise independent judgment. *See In re KKR*, 101 A.3d at 993-94. BAT also could not increase its ownership percentage during the standstill period, which was in effect when this transaction occurred. And the Other Directors who were not nominated by BAT or recently affiliated with BAT had to approve this transaction in a separate vote—which they did unanimously.

Plaintiff argues that BAT's contractual approval rights over the issuance of shares and the sale of intellectual property in this transaction gave BAT actual control, but contractual approval rights do not equate to actual control. *Superior Vision*, 2006 WL 2521426, at *4-5. Although BAT could stop this transaction from happening, BAT could not *make* it happen. To be a controlling stockholder, the minority stockholder must have "such formidable voting and managerial power that [it], as a practical matter, [is] no differently situated than if [it] had majority voting control." *In re PNB*, 2006 WL 2403999, at *9. Merely being able to stop a transaction does not give a minority stockholder the same level of power that a majority stockholder would have, because a majority stockholder would have the power both to stop a transaction *and to make it happen*. *See Gaines*, 234 N.C. at 344, 67 S.E.2d at 353 (noting that a majority stockholder has "the power, by the election of directors and by the vote of [its] stock, to do everything that the corporation can do" (quoting 13 Am. Jur. *Corporations* § 422)). Although a minority stockholder with veto power might be able to exercise that same level of power through coercion, *see Williamson*, 2006 WL 1586375, at *5, merely having veto power over the Board's ability to enter into this particular transaction is not enough. To be clear, plaintiff does not allege that Reynolds *had to* enter into this transaction—much less to enter into this transaction as it was structured, which is what triggered BAT's contractual right to veto it. So the fact of BAT's contractual rights did not, on its own, give BAT the kind of coercive power over the Reynolds board that could allow BAT to exercise actual control. *Cf. Kahn*, 638 A.2d at 1112-13 (noting that the Lynch board had determined that Lynch needed to obtain certain technology to remain competitive and that Lynch's "alternatives to [the] cash-out merger" that its significant stockholder Alcatel had proposed "had been investigated but were impracticable").

As we have already said, of course, a stockholder who holds contractual rights could be considered a controlling stockholder "where the holding of contractual rights [is] coupled with a significant equity position and other factors." *Superior Vision*, 2006 WL 2521426, at *5. But as we discuss more fully below, plaintiff has failed to plead sufficient "other factors" to support such a finding in this case.

Plaintiff claims that BAT's involvement in the negotiations demonstrates actual control. Plaintiff does not allege that BAT ever threatened the Reynolds board in any way, however—unlike, for example, the stockholder who was considered controlling in *Kahn*, 638 A.2d at 1114-15—even though BAT was involved in many of the discussions regarding the Lorillard transaction from an early date. Admittedly, BAT did represent that it would support the transaction only on terms that were agreeable to BAT. BAT wanted to maintain its 42% ownership interest after the transaction and did not want the transaction to affect the terms of the Governance Agreement, but in expressing that, BAT was making a statement only about exercising its veto power. And a statement that does not express the intent to do anything other than exercise veto power does not make BAT a controlling stockholder, because, in making that statement, BAT was merely informing the board of how it would exercise its contractual rights—rights that were the property of BAT alone and that could not turn BAT into a fiduciary. *See Thermopylae*, 2016 WL 368170, at *14.

Plaintiff also alleges that BAT had additional leverage in the transaction due to the threat that BAT would buy the remaining 58% of Reynolds' shares at the expiration of the standstill. But the Complaint does not actually allege that BAT ever threatened to do that. It merely refers to news outlet reports that speculated that BAT would buy the remaining shares at that time: specifically, to a report from the *Telegraph* stating "that Citigroup analysts had 'talked up the likelihood' that BAT would buy the remaining 58% of Reynolds" and to a report from the *Daily Mail* that there was "growing speculation [that BAT] is ready to splash out billions of pounds buying the 58 per cent of US rival Reynolds American it does not already own." And the Complaint alleges that the CEO of BAT told stockholders at its 2014 annual stockholder meeting "that BAT looks at acquiring Reynolds on a yearly basis." Accepting these allegations in the complaint as true merely requires us to accept that the *Telegraph* and the *Daily Mail* reported on this "speculation" and that BAT's CEO told stockholders that BAT considered acquiring Reynolds every year. None of these allegations, if taken as true, indicate that BAT was actually planning to acquire Reynolds, or, more importantly, that

BAT had actually threatened Reynolds with the idea of purchasing the remaining shares at the expiration of the standstill if BAT's preferences were not accommodated. And, more generally, taking as true plaintiff's allegation that "[t]he threat of a complete takeover gave BAT additional leverage to impose its terms on the Reynolds Board during [ ] negotiations," we must note again that the mere existence of leverage does not equate to the exercise of actual control. *See In re Sea-Land*, 1988 WL 49126, at *3. Where, as here, the "threat" to which a complaint refers is the mere *ability* to take over a company, that ability does not amount to actual control because it does not involve a stockholder who *prevents* board members from exercising their own independent judgment.

Plaintiff suggests in the complaint that the board was not independent of BAT in this transaction for other reasons. Plaintiff claims that the Other Directors—who were not nominated by BAT or recently affiliated with BAT—did not engage independent legal counsel soon enough and should have also engaged independent financial advisors. Plaintiff alleges that there is no evidence that Reynolds explored other financing options until just weeks before the transaction was executed. Plaintiff also suggests that many of Reynolds' directors had conflicts of interest in the transaction because seven of the directors were either current or former officers, directors, or attorneys for BAT or its affiliates. And, at times, BAT-appointed Reynolds directors even spoke on behalf of BAT during meetings about the proposed transactions, according to plaintiff's allegations.

But, aside from the fact that any BAT nominees representing BAT's interests to the board were necessarily in the minority, the presence of board members who merely share interests with a significant stockholder does not give that stockholder actual control of the board; the proper focus is on whether the allegedly controlling stockholder exercised power over the board rather than on whether the directors had conflicts of interest. *See Sciabacucchi*, 2017 WL 2352152, at *17. To the extent that plaintiff relies on any of the above actions by the directors to state that BAT exercised actual control over the board, moreover, plaintiff's allegations are insufficient because plaintiff does not allege any act by BAT to direct, compel, or coerce the actions of the directors. As to the claim at issue here, after all, plaintiff is claiming a breach of fiduciary duty *by BAT*, not by any of the Reynolds directors (whether they be directors designed by or otherwise connected to BAT or not).

The dissent's reliance on plaintiff's allegations that the board failed to obtain outside and independent advice and counsel is marked by the same erroneous reasoning. Even if the Reynolds board should have

engaged, but failed to engage, independent counsel, or otherwise failed to comply with its own legal obligations (which we take no position on), that would in no way show that BAT "prevent[ed] the . . . board from freely exercising its independent judgment in considering the [transaction]." *In re KKR*, 101 A.3d at 995. Plaintiff cannot simply allege that the Reynolds board failed to comply with all of its legal duties (assuming, for the sake of argument, that he has at least done that); he must allege facts that would show that BAT prevented the board from *acting independently*. He has failed to do so.

Plaintiff points to recommendations of the Other Directors that were ultimately rejected as further evidence that BAT had actual control over the board. During negotiations, the Other Directors discussed reducing BAT's ownership percentage after the merger to allow a greater ownership level for Lorillard's stockholders, but this change ultimately never happened. Plaintiff does not allege any facts showing that the ultimate rejection of this change was due to BAT's intervention, though; the mere fact that this change was considered and rejected does not mean that BAT had actual control of the board. And even if BAT *had* influenced the decision on this particular aspect of the transaction, that does not mean that BAT exerted actual control over the board with respect to the transaction as a whole. Once again, its influence on the decision would be readily explained by BAT's leverage over the transaction, as a major financer of the transaction and as a holder of contractual rights implicated by the transaction. Because that leverage did not equate to actual control over the Reynolds board with respect to the transaction, anything that arose from that leverage does not equate to actual control, either.

Similarly, the Other Directors sought to remove a provision in the proposed merger agreement that required BAT to vote its shares of Reynolds stock in favor of the transaction regardless of whether the Reynolds board changed its recommendation on the transaction. Lorillard, however, insisted that the provision remain in the agreement. Far from controlling this decision, BAT said that it would not commit to the provision over the objections of the Other Directors. The Other Directors ultimately agreed to allow the provision to remain in the proposed merger agreement, though, and remain it did. This change, then, was not rejected because of BAT's control over the Reynolds board. Instead, it was rejected because of Lorillard's demands and the Other Directors' acquiescence to those demands. Anyway, it is unclear why plaintiff thinks that the retention of this provision is helpful to his cause. All that the provision did was to *restrict* BAT's ability to freely decide whether to vote in favor of the transaction.

To the extent that plaintiff argues that terms in the agreement that are favorable to BAT demonstrate control, those arguments also fail. It is reasonable to infer, based on the pleadings, that Reynolds wanted BAT's support for the transaction and that BAT had some leverage because of the number of shares that it owned and its willingness to help finance the transaction (and because BAT could veto a transaction that, like the one proposed, was structured in a way that stock representing over 5% of Reynolds' stockholders' voting power had to be issued). Leverage is not the same as actual control, though, and does not, on its own, transform a minority stockholder into a controlling stockholder. *See In re Sea-Land*, 1988 WL 49126, at *3.

At best, the allegations that some terms in the transaction agreement were favorable to BAT show only that BAT's contractual rights gave it the ability to secure some favorable terms from the board. Those allegations do not show that BAT exercised *control* over the board—that is, to make it take action. If they did, then every contractual right that allowed a stockholder to exert some leverage over a transaction would automatically convert the stockholder into a controlling stockholder. That, in turn, would contravene the principle that a "contractual right . . . , without more," does not turn "a significant shareholder" into "a 'controlling shareholder.' " *Superior Vision*, 2006 WL 2521426, at *5.

The terms of the agreement allowed BAT to maintain its 42% ownership interest in Reynolds by purchasing shares at a rate lower than the closing price for Reynolds shares the day before the transaction agreements were signed. That purchase price was based on the closing price of Reynolds stock on 2 July 2014, which was the date used to set the financial terms of the acquisition. Setting the purchase price ahead of time makes sense because Reynolds would have needed to know how much money it would receive from BAT in order to secure the rest of the financing required to complete the transaction. Further, using this date allowed the purchase price to be set before news of the proposed transaction was publicly released and affected stock prices. This term of the agreement therefore does not indicate actual control.

Reynolds and BAT also agreed to pursue a technology-sharing initiative for next generation tobacco products such as digital vapor cigarettes. Plaintiff alleged that "the Director Defendants . . . agreed to allow BAT to access Reynolds'[ ] game-changing technology without adequate compensation," thereby removing any "need for BAT to pay the Public Shareholders a control premium to buy the rest of the Company." But it is unclear how this agreement demonstrates that BAT had actual control of the Reynolds board with respect to the transaction to purchase

Lorillard. The dissent points to the perceived threat of a takeover by BAT and to the allegation that this technology-sharing agreement made Reynolds a "significantly less attractive takeover target for BAT" and contends that these allegations, taken as true, show that BAT exercised actual control over the board. Again, though, leverage to obtain favorable terms in an agreement does not necessarily indicate that the beneficiary of those favorable terms was a controlling stockholder.

Overall, plaintiff's allegations and the incorporated Governance Agreement demonstrate that BAT did not have majority voting power either on the board or as a stockholder, that BAT could not retaliate against the non-BAT appointed directors who made up a majority of the board, and that the Lorillard transaction could not be approved without the separate approval of the Other Directors, who were Independent Directors not nominated by BAT. Because of these facts, BAT could not and did not exercise actual control over the Reynolds board. Additionally, plaintiff has filled his Complaint with allegations of BAT's leverage and bargaining power—contractual or otherwise—and has also demonstrated that BAT was able to obtain favorable terms for itself during Reynolds' acquisition of Lorillard. But again, BAT's having bargaining power and negotiating a good deal because of it does not mean that BAT engaged in any coercive behavior or otherwise exercised actual control over the board.

Considering the restrictions in the Governance Agreement that we discuss above, and considering the absence of allegations of coercive or otherwise controlling actions on the part of BAT, plaintiff has failed to allege that BAT exercised such domination and control over the Reynolds board that BAT was indistinguishable from a majority stockholder. *See In re KKR*, 101 A.3d at 993-94. Under the Delaware controlling-stockholder standard, therefore, plaintiff's Complaint "on its face reveals the absence of facts sufficient to make a good claim" that BAT owed plaintiff fiduciary duties because it controlled the Reynold's board, and it also "discloses some fact[s] that necessarily defeat[ ] the plaintiff's claim" that BAT could even exercise such control. *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).

III. Conclusion

For the reasons stated above, the Court of Appeals erred in concluding that plaintiff's allegations, if true, would satisfy the actual control test as that test is elucidated in Delaware caselaw. Because BAT was not a majority or controlling stockholder, it did not owe fiduciary duties to

the other Reynolds stockholders, and the Business Court properly dismissed plaintiff's breach-of-fiduciary-duty claim against BAT. We accordingly reverse the decision of the Court of Appeals on this issue. Plaintiff has not appealed the dismissal of his claims against defendant directors or Reynolds to this Court. The dismissal of those claims is therefore not before us, and the decision of the Court of Appeals as to those claims remains undisturbed.

REVERSED.

Justice HUDSON dissenting.

Here the majority concludes that plaintiff's complaint fails to adequately allege actual control by BAT over the Reynolds board of directors in the context of the Lorillard acquisition and that, as a result, we need not decide whether, in accordance with Delaware courts that have addressed the issue, "a minority stockholder may owe fiduciary duties to other stockholders based on its exercising actual control over the board of directors." Accordingly, the majority holds that the Business Court properly dismissed plaintiff's breach of fiduciary duty claim against BAT. In my opinion the complaint sufficiently alleges actual control by BAT; therefore, I would proceed to address whether this Court follows the Delaware approach on the issue of whether a minority stockholder who exercises actual control over the board of directors owes fiduciary duties to other stockholders. As such, I respectfully dissent.

The relevant inquiry in reviewing a trial court's ruling on a motion to dismiss under Rule 12(b)(6) is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted." *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 203 (2005) (quoting *Meyer v. Walls*, 347 N.C. 97, 111, 489 S.E.2d 880, 888 (1997)). Under N.C.G.S. 1A-1, Rule 8(a)(1) (2017), a complaint must contain "[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." (Emphasis added.) "The system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss." *Wray v. City of Greensboro*, 370 N.C. 41, 46, 802 S.E.2d 894, 898 (2017) (quoting *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 334 S.E.2d 751, 755 (1985)); *see also id.* at 50, 802 S.E.2d at 900 ("In light of the low bar for notice pleading under Rule 12(b)(6), . . . the averments in plaintiff's first amended complaint are sufficient

. . . ."). "The complaint should be liberally construed and should not be 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.' " *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 559, 681 S.E.2d 770, 774 (2009) (quoting *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 444, 666 S.E.2d 107, 116 (2008) (brackets omitted)); *see also id.* at 559, 681 S.E.2d at 774 (stating that the complaint must be viewed "in the light most favorable to plaintiffs, giving them the benefit of every reasonable inference that can be drawn therefrom"). "We review appeals from dismissals under Rule 12(b)(6) de novo." *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)).

I agree with much of the majority's discussion of the Delaware approach, under which a minority stockholder is considered to be a controlling stockholder—therefore owing fiduciary duties to other stockholders—if the minority stockholder exercises "domination . . . through actual control of corporate conduct." *In re Morton's Rest. Grp. S'holders Litig.*, 74 A.3d 656, 664 (Del. Ch. 2013) (quoting *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 70 (Del. 1989)); *see also id.* at 664-65 ("[T]he Complaint must contain well-pled facts showing that the minority stockholder 'exercised actual domination and control over . . . [the] directors.' " (second and third alterations in original) (quoting *In re Sea-Land Corp. S'holders Litig.*, Civ.A. No. 8453, 1988 WL 49126, at *384 (Del. Ch. May 13, 1988))). A complaint must allege facts from which it is reasonable to infer that the allegedly controlling stockholder could "prevent the [company's] board from freely exercising its independent judgment in considering the [transaction] or . . . exact retribution by removing the [company's] directors from their offices." *In re KKR Fin. Holdings LLC S'holder Litig.*, 101 A.3d 980, 995 (Del. Ch. 2014), *aff'd sub nom. Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015). A plaintiff is not required to plead actual control by a minority stockholder of the "day-to-day operations" of the board of directors; rather, a "[p]laintiff can survive the motion to dismiss by alleging actual control with regard to the particular transaction that is being challenged." *Williamson v. Cox Commc'ns, Inc.*, No. Civ.A. 1663-N, 2006 WL 1586375, at *4 (Del. Ch. June 5, 2006) (citing *In re W. Nat'l Corp. S'holders Litig.*, No. 15927, 2000 WL 710192, at *20 (Del. Ch. May 22, 2000)); *see also Super. Vision Servs. v. ReliaStar Life Ins. Co.*, No. Civ.A. 1668-N, 2006 WL 2521426, at *4 (Del. Ch. Aug. 25, 2006) (explaining that "pervasive control over the corporation's actions is not required" and a plaintiff can allege " 'actual control with regard to the particular transaction that is being challenged' " (quoting *Williamson*, 2006 WL 1586375, at *4)).

Here the allegations of control are "with regard to a particular transaction that is being challenged"—the Lorillard acquisition. Among the allegations that in my view sufficiently allege actual control by BAT are the following[1]:

> 5. As a July 15, 2014 CNBC story put it, "the real victor" in the Proposed Transaction is neither Reynolds nor Lorillard, but BAT, which "***solidified its position in a larger company without paying a premium.***" The Proposed Transaction enriches BAT by extracting and transferring value from all other Reynolds shareholders (the "Public Shareholders") to BAT. As a result of the Proposed Transaction, the Public Shareholders will not only lose out on the economic value of the "game changing" e-cigarette and heat-not-burn technology being transferred to BAT, but their share of the combined company will be notably diluted and they will lose out on the control premium that BAT should have been required to pay to maintain its effective control over the Company.
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> . . . .
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> 34. In addition to the power to designate five board members, the Governance Agreement gives BAT significant additional means by which it exerts control over Reynolds. For example, as Reynolds disclosed in its most recent Form 10-K, BAT has a veto over "the sale or transfer of certain RAI intellectual property associated with B&W brands having an international presence, other than in connection with a sale of [Reynolds]; and [Reynolds's] adoption of any takeover defense measures that would apply to the acquisition of equity securities of Reynolds by [BAT] or its affiliates, other than the re-adoption of the [Reynolds] rights plan in its present form." Moreover, "the approval of a majority of [BAT's] designees on [Reynolds's] Board is required in connection with the following matters: any issuance of [Reynolds] securities in excess of 5% of its outstanding voting stock, unless at such time [BAT's] ownership interest in [Reynolds] is less than 32%; and any repurchase of [Reynolds] common stock, subject

1. Allegations pertaining to the threat of takeover are summarized with that part of the discussion below.

to a number of exceptions, unless at such time [BAT's] ownership interest in [Reynolds] is less than 25%."

35. Finally, the mere size of BAT's stake gives it significant control over Reynolds. As the Preliminary Proxy notes, "[u]nless substantially all RAI shareholders other than BAT vote together on matters presented to RAI shareholders, BAT would have the power to determine the outcome of matters submitted to a shareholder vote, which could result in RAI taking actions that RAI's other shareholders do not support."

36. The Governance Agreement will terminate, however, if BAT owns either 100% or less than 15% of Reynolds. The Governance Agreement will also terminate, automatically, if a third party acquires a majority stake in Reynolds.

. . . .

41. Reynolds's release also disclosed that BAT would receive two significant benefits stemming from the Proposed Transaction that were not shared with Public Shareholders: (i) the Technology Sharing Agreement will give BAT access to Reynolds's "game-changing" e-cigarette technology; and (ii) the BAT Share Purchase will allow BAT to maintain its pre-acquisition share of the Company and avoid being diluted along with the Public Shareholders by purchasing new shares at a discount to the Company's trading price:

> **. . . . As part of the transaction, BAT will maintain its 42 percent ownership in RAI through an investment of approximately $4.7 billion (based on RAI's closing share price of $60.16 as of July 2, 2014, the same share price used to determine the stock component of Lorillard shareholders' consideration).**
>
> **In addition, RAI and BAT have agreed in principle to pursue an ongoing technology-sharing initiative for the development and commercialization of next-generation tobacco products, including heat-not-burn cigarettes and vapor products.**

. . . .

C. BAT's De Facto Control Over the Reynolds Board Enabled It To Dominate The Board's Decision Making Process

42. The "Background of the Merger" section in the Form S-4 that Reynolds filed with the Securities and Exchange Commission on October 17, 2014 (the "Preliminary Proxy") underscores that the Proposed Transaction was driven by the interests of BAT, at the expense of the Public Shareholders.

43. BAT was involved in the negotiation of the Proposed Transaction from the beginning. According to the Preliminary Proxy, Reynolds met with BAT before it presented any proposal to Lorillard or Imperial. In discussions between Reynolds and BAT in January 2013, BAT's representatives made clear that BAT would dictate the terms of any transaction:

> BAT's representatives reiterated BAT's support, as a RAI shareholder, for a business combination of RAI and Lorillard. They also indicated BAT would wish to maintain its approximately 42% beneficial ownership interest in RAI after the transaction and was willing to provide equity financing for such a transaction in order to maintain its ownership interest. BAT's representatives also stated that decisions as to whether and how to pursue a business combination between RAI and Lorillard were to be made by the RAI board of directors, but that BAT, in its capacity as a substantial financing source and holder of contractual approval rights, would cooperate with combining the companies only on transactional terms and with an execution strategy of which it approved. Such issues included, among others, the brands to be divested, the subscription price for any additional BAT investment, maintaining the terms of the governance agreement, avoiding a RAI commitment to pay any material 'reverse termination fee' due to the failure to obtain regulatory clearance and an executive succession plan for the combined company.

44. In June 2013, BAT and RAI agreed to a term sheet "with respect to the subscription by BAT for additional shares of RAI common stock in order to provide financing for the potential transaction involving RAI and Lorillard and to maintain BAT's approximately 42% beneficial ownership interest in RAI" (the "2013 Term Sheet"). At "the insistence of BAT," the 2013 Term Sheet included a provision "that neither BAT nor RAI would seek any changes in the governance agreement in connection with the possible acquisition of Lorillard." The Preliminary Proxy does not disclose any other material terms of the 2013 Term Sheet.

45. According to the Preliminary Proxy, the 2013 Term Sheet was approved by a vote of "the independent directors of RAI [*i.e.*, directors who are neither officers nor employees of Reynolds] not designated by B&W, referred to as the Other Directors." Yet there is no indication in the Preliminary Proxy that the Other Directors hired independent counsel or an independent financial advisor to assist them in evaluating or negotiating the 2013 Term Sheet.

46. Indeed, it does not appear that the Other Directors played any significant role in the negotiations with BAT over the 2013 Term Sheet. Rather, according to the Preliminary Proxy, the Board established a strategic matters review committee ("SMRC"), which existed and operated on behalf of Reynolds from September 2012 to May 2014. The Preliminary Proxy does not disclose the members of the SMRC. Between September 2012 and the signing of the 2013 Term Sheet in June 2013, Reynolds's primary negotiator was Daniel M. Delen, the then-CEO of Reynolds. Mr. Delen worked for BAT from 1989 through 2006.

47. Later in the summer of 2013, "representatives of BAT indicated to representatives of RAI that BAT was not prepared to provide financial support to a transaction that would include a divestiture of the 'e-vapor' brand blu, as requested by Imperial, although eventually it changed its position." Reynolds and BAT then worked hand-in-hand to negotiate the divestments. According to the Preliminary Proxy, "[i]n July 2013, with the support of the RAI board of directors, [Thomas R.] Adams [an RAI executive], along with Scott M. Hayes, then group head of mergers & acquisitions for BAT, contacted representatives of

another potential divestiture partner to inquire about the possibility of such party's participation in a brand divestiture transaction."

48. Mr. Hayes continued to function as a de facto member of the Reynolds team. According to the Preliminary Proxy, on November 21, 2013, Reynolds's SMRC met with "representatives of RAI's senior management, [Reynolds's legal advisors] Jones Day, [and] Richards Layton and [Reynolds's financial advisor] Lazard. Mr. Hayes also participated in part of the meeting." And, "[a]t the request of the SMRC, Mr. Hayes presented BAT's view of a possible transaction with Lorillard and expressed BAT's support for such a transaction."

49. BAT continued to give strong direction to the Reynolds Board. On December 4 and 5, 2013, "the RAI board of directors met . . . with representatives of Jones Day, Richards Layton and Lazard. . . . Representatives of BAT provided BAT's view of the potential transaction, including BAT's belief that the transaction was value enhancing for all RAI shareholders and important from a competitive perspective and that, given the status of discussions with Imperial, BAT supported renewing contact with Lorillard." After that presentation, "the RAI board of directors authorized Mr. Wajnert to contact Mr. Kessler [Lorillard's Chairman and CEO] to explore the possibility of a potential transaction between RAI and Lorillard on the terms reviewed at the meeting."

50. According to the Preliminary Proxy, on December 19, 2013, Mr. Wajnert conveyed the following proposal to Mr. Kessler:

- the proposed business combination would be a market based transaction structured in a manner similar to a 'merger-of-equals,' in which Lorillard shareholders would receive consideration consisting of a mix of cash and stock at market value without a premium and both Lorillard's and RAI's shareholders would realize future value creation through the realization of meaningful synergies and changed market dynamics;

- BAT would maintain a significant beneficial ownership interest in the combined company, including through an investment of approximately $4.5 billion in cash at the consummation of the proposed business combination transaction;
- the leadership and governance of the combined company would be structured as a balance between the two organizations, subject to BAT's expressed desire to preserve its right to designate five members to the board of directors of the combined company (three of whom would be required to be independent of both BAT and the combined company); and
- in connection with a proposed business combination, RAI's subsidiaries' WINSTON, SALEM and KOOL and Lorillard's Maverick cigarette brands and Lorillard's 'e-vapor' brand blu (including SKYCIG) would be divested to Imperial in an effort to enhance the receipt of antitrust clearance from the regulatory authorities.

51. After discussions amongst the Lorillard Board, Mr. Kessler contacted Mr. Wajnert on January 11, 2014 to inform him that "while the Lorillard board of directors was potentially interested in the strategic and long-term financial aspects of a potential business combination between the companies, they did not think the RAI proposal provided sufficient value to Lorillard shareholders. Mr. Kessler indicated, however, that the Lorillard board of directors was willing to explore a business combination that was structured like a 'merger-of-equals' if the key terms were improved[.]"

52. According to the Preliminary Proxy, the Reynolds Board met by phone on January 14, 2014. At that meeting, "[a] representative of Lazard reported that he had contacted representatives of UBS Limited and Deutsche Bank AG, financial advisors to BAT, referred to as UBS and Deutsche Bank, respectively, to discuss potential

pro forma ownership." There is no indication that any of the BAT Designees recused themselves from this call. It appears that the Other Directors had not retained independent counsel or an independent financial advisor prior to Lazard initiating negotiations with UBS and Deutsche Bank regarding BAT's stake in the combined company.

53. Indeed, the Preliminary Proxy does not reference any separate action by the Other Directors—other than a separate vote on the 2013 Term Sheet—until January 18, 2014, more than a year after serious discussions began. On January 18, 2014, the Other Directors held a telephone meeting with Lazard, Jones Day, and Richards Layton separately from the other Reynolds directors.

54. That same day, a "representative of Lazard . . . introduc[ed] a [possible] alternative approach in which cash available as consideration would be distributed on a pro rata basis to Lorillard shareholders and to RAI shareholders other than BAT." Lazard also reported on discussions regarding "potential solutions that would be in the best interests of RAI shareholders other than BAT and continue to meet the objectives of both Lorillard and BAT. These discussions included the possibility that BAT and/or RAI shareholders other than BAT could have decreased post-closing ownership interest in the combined company." This appears to be the first time that the Reynolds Board considered the obvious tension between the interests of BAT and the Public Shareholders.

55. According to the Preliminary Proxy, the Other Directors did not discuss obtaining independent counsel until February 2014. During meetings between February 4 and 7, 2014, "[r]epresentatives of Lazard presented a variety of modifications to the proposal made in December in connection with the exploration of an alternative proposal to present to Lorillard. The modifications considered included providing a premium on cash paid to Lorillard shareholders, a premium on shares of RAI common stock issued, changes to the BAT investment and incremental changes to RAI's leverage and cash allocation. It was the consensus of the Other Directors that RAI shareholders other than BAT should receive at least 30% of the equity ownership of the combined company and ***receive a pro***

rata portion of the cash distribution. The Other Directors discussed engaging independent legal counsel."

56. The Other Directors finally engaged separate legal counsel on February 12, 2014—retaining Moore & Van Allen. Based on the Preliminary Proxy, however, it appears that the Other Directors *never* retained any independent financial advisors. Moreover, as set forth below, Moore & Van Allen appears to have frequently been excluded from crucial negotiations.

57. At the February 12, 2014 meeting of the Other Directors, "[t]here was extensive discussion regarding the consideration to be received by RAI shareholders other than BAT and BAT's willingness to move from its initial position regarding post-transaction equity ownership." According to the Preliminary Proxy, later in February 2014, there were discussions regarding a proposal to provide extra equity to Lorillard shareholders by reducing BAT's stake: "the ownership level of Lorillard shareholders in the combined company would be approximately 36.5%, with RAI shareholders other than BAT and BAT holding approximately 30% and 33.5% of the outstanding common stock of the combined company, respectively" (subject to a provision allowing BAT to subscribe for additional shares in phases over two years).

58. Ultimately, however, BAT's ironclad control over the Board won out. The Public Shareholders will receive ***no*** separate consideration and BAT did not move from its initial position regarding post-transaction equity ownership.

59. Similarly, during the course of discussions in February 2014, "[r]epresentatives of Cravath[, BAT's attorneys,] indicated that BAT was not prepared to extend the standstill covenant in the governance agreement in connection with the proposed business combination transaction[.]" As with its other demands, BAT got its way. The Standstill would still expire on schedule on July 30, 2014.

60. On March 10, 2014, the Lorillard board met and discussed the fact that the proposed transaction was not appropriately viewed as a merger of equals given BAT's control over the combined company. According to the Preliminary Proxy, Lorillard's board believed that the proposed

transaction would not be a merger-of-equals because "BAT would continue to be the most significant shareholder of the combined company with the right to board representation in accordance with the governance agreement and . . . BAT would resist agreeing to an extension of the standstill agreement in the governance agreement[.]"

61. On March 13, 2014, the Lorillard board "determined not to proceed with the proposed business combination transaction and to terminate the related discussions with RAI, BAT and Imperial. Among other things . . . the Lorillard board of directors did not believe that the proposed transaction in fact reflected a 'merger-of-equals'-like transaction[.]" Lorillard informed Reynolds of its decisions and discussions between Lorillard and Reynolds ceased until May 10, 2014.

62. On May 1, 2014, Ms. Cameron was elected CEO of Reynolds, following Mr. Delen's retirement.

63. The Preliminary Proxy states that on May 7, 2014, "the Other Directors met with RAI senior management, representatives of RAI's outside legal and financial advisors and Moore & Van Allen to consider further the possibility of an acquisition of Lorillard." The Preliminary Proxy claims that "[t]here was extensive discussion, among other things, of the potential benefits to [the Public Shareholders] of BAT's commitment to purchase additional shares of RAI common stock as part of the financing for the proposed transaction, including that it was unlikely RAI would be able to obtain equity financing from a third party on terms as favorable as those offered by BAT."

64. There is no indication in the Preliminary Proxy, however, that Reynolds, its advisors or the Other Directors had, at this point, (i) compared the terms of BAT's proposed equity financing to potential *debt* financing options that might be available (including the potential tax benefits thereof); (ii) actually contacted other potential sources of equity financing or (iii) determined that BAT was unwilling to offer more favorable terms.

65. According to the Preliminary Proxy, the Reynolds Board dissolved the SMRC on May 7 or 8, 2014 "in light of the role required by the governance agreement of the

Other Directors in considering the transaction and the fact that the SMRC was not otherwise operative at this time." The Preliminary Proxy does not explain why it was appropriate for the SMRC—instead of the Other Directors—to act on behalf of Reynolds, for approximately a year and a half prior to May 2014, during which period all of the fundamental aspects of BAT's role in the Proposed Transaction were negotiated.

66. On May 10, 2014, Mr. Wajnert sent Mr. Kessler a proposal for Reynolds to acquire Lorillard for cash and stock worth approximately $65 per share. The proposal provided for BAT to maintain its 42% stake in exchange for an additional cash investment of approximately $5 billion.

67. Reynolds and Lorillard engaged in negotiations over this proposal between May 15 and May 20, 2014. "Representatives of Centerview [Lorillard's financial advisor] telephoned representatives of Lazard and indicated that Mr. Kessler would be prepared to discuss with the Lorillard board of directors the proposed acquisition if RAI increased its offer to $68 per share."

68. At a May 20, 2014 meeting of the Reynolds Board, Reynolds's Directors "determined it would not agree to a 'reverse' termination fee"—which was, of course, one of BAT's conditions—but authorized a proposal to Lorillard with a range of $67 to $68 per share. The Preliminary Proxy states that, during the discussions, "representatives of BAT on the RAI board of directors reported, on behalf of BAT, support for the proposed transaction at the higher price."

69. The fact that the BAT Designees were designated by BAT does not change the fact that they owed independent fiduciary duties to Reynolds and its public shareholders. It was inappropriate for the BAT Designees to act "on behalf of BAT," in any capacity, while acting as members of the Reynolds Board. That the BAT Designees were speaking for BAT while sitting as Reynolds directors in a Reynolds board meeting underscores BAT's dominance over Reynolds's decision making.

70. On May 27, 2014, Reynolds and Imperial executed a non-binding memorandum of understanding with respect to the proposed asset sale. According to the Preliminary Proxy, "Over the next several weeks, representatives of RAI, Imperial, Lorillard, and in some cases BAT, engaged in discussions regarding the divestiture transaction, including with respect to 'route to market,' reciprocal contract manufacturing and other commercial arrangements." Then, "[f]rom June 11, 2014 through July 15, 2014, legal counsel to RAI, BAT and Lorillard, with the assistance of RAI's and Lorillard's senior managements and financial advisors, engaged in extensive negotiations concerning, and exchanged numerous drafts of, the proposed merger agreement and its key terms, including the allocation of antitrust risk and required efforts in the proposed transaction."

71. The Preliminary Proxy identifies only one specific recommendation made by the Other Directors during this period. That recommendation was ultimately rejected. According to the Preliminary Proxy, "on July 2, 2014, Moore & Van Allen reviewed the proposed draft of the subscription and support agreement with the Other Directors, who requested that BAT's draft provision for an unconditional commitment to vote the shares of RAI common stock it beneficially owned in favor of the transaction (regardless of any change in recommendation of the RAI board of directors) be deleted." Yet, on July 5, 2014 "Simpson Thacher [counsel for Lorillard] advised Jones Day [counsel for Reynolds] that Lorillard was insistent, as a condition of proceeding, on having a commitment from BAT to vote the shares of RAI common stock it beneficially owned in favor of the transaction even if the RAI board of directors changed its recommendation of the transaction. Cravath [counsel for BAT] advised Jones Day that BAT would consider this demand but would not give such a commitment over the objections of the Other Directors. The Other Directors agreed to accept that commitment."

72. The Preliminary Proxy suggests that even after Moore & Van Allen—independent counsel to the Other Directors—was retained, the firm was frequently excluded from discussions amongst counsel for the parties. For example:

- Between February 20 and February 24, 2014, "representatives of Jones Day [for Reynolds], Cravath [for BAT] and Simpson Thacher [for Lorillard] began to discuss the outlines of other potential terms in the 'merger-of-equals'-like transaction.";
- "[C]ommencing on May 21, 2014, representatives of Jones Day, Cravath and Simpson Thacher began discussing various process matters, including those relating to structure, due diligence, documentation and various matters relating to the Imperial asset divestiture.";
- "On June 3, 2014, representatives of Jones Day, Cravath and Simpson Thacher held a telephonic meeting to discuss certain legal matters, ***including the potential key terms of the definitive transaction agreements*** expected to be entered into among the parties, including the allocation of antitrust risk and required efforts."; and
- "On July 5, 2014, . . . representatives of Jones Day, Cravath and Simpson Thacher met to discuss the proposed merger agreement, ***including the allocation of antitrust risk*** and required efforts in the proposed transaction, and the status of the other definitive transaction documents, including the subscription and support agreement"

73. The Other Directors should have insisted—yet apparently did not—that Moore & Van Allen be included in every discussion amongst counsel for the parties, including those listed above.

74. On July 13 and 14, 2014, the Other Directors reviewed and unanimously approved the Proposed Transaction. They did not retain any independent financial advisor to assist them in evaluating the fairness of the Proposed Transaction to the Public Shareholders. The Reynolds Board also unanimously approved the Proposed Transaction.

> **II. THE PROPOSED TRANSACTION UNFAIRLY BENEFITS BAT AT THE EXPENSE OF PUBLIC SHAREHOLDERS**
>
> **A. The Proposed Transaction Will Give BAT Access To Reynolds's "Game-Changing" E-Cigarette Technology Without Adequately Compensating Public Shareholders**
>
> . . . .
>
> **B. The Proposed Transaction Will Dilute Public Shareholders But Permit BAT To Retain Its Blocking Position Without Paying A Control Premium**
>
> . . . .
>
> 87. Under the terms of the Subscription and Support Agreement dated as of July 15, 2014, BAT will purchase the additional shares at a reference price of $60.16 per share. This is $3.02 per share ***less*** than Reynolds's closing price on July 14, 2014 of $63.18 per share—representing a ***negative*** 4.8% premium. In a truly arm's-length negotiation, Reynolds should have required BAT to pay a significant, ***positive*** premium to purchase sufficient shares to maintain its controlling blocking position.

Construing the complaint liberally and drawing every reasonable inference therefrom, the complaint alleges that BAT used its significant forty-two percent minority stake (the Preliminary Proxy, incorporated by reference, reveals that the next largest ownership block was five percent) and its veto power over the board to dictate the terms of the Lorillard acquisition in order to enrich itself at the expense of other shareholders, namely, by gaining access to Reynolds's lucrative e-cigarette technology and by maintaining its acquisition share while other shareholders' shares were diluted. The complaint further alleges that BAT employed additional coercive leverage to control the board in the Lorillard acquisition, including by implicitly threatening a takeover of Reynolds made possible by the impending expiration of the Standstill, as well as by acting as a major source of financing for the transaction. The complaint also alleges that during discussions the representatives of BAT on the board spoke "on behalf of BAT," in contravention of their fiduciary duties as board members, further underscoring BAT's coercive influence over the board. Finally, the complaint alleges that, as a result of

BAT's control of the board in this transaction, the other board members (several of whom are alleged to have close ties with BAT) delayed in retaining separate legal counsel and then failed to adequately utilize that counsel, never retained an independent financial advisor, never received a separate fairness opinion regarding the BAT share purchase, and never considered other options to finance the transaction besides BAT equity financing. In my view, "[i]n light of the low bar for notice pleading under Rule 12(b)(6)," *Wray*, 370 N.C. at 50, 802 S.E.2d at 900, these allegations are more than sufficient to allege that BAT exercised actual control over the board and prevented the board from "freely exercising its independent judgment" in considering the Lorillard acquisition.

The majority recognizes that the complaint alleges that BAT possessed significant veto power and used this to its advantage in the transaction, but the majority concludes that in the absence of "other factors," the veto power, as the mere exercise of a contractual right, cannot alone support a finding of actual control. *See Super. Vision*, 2006 WL 2521426, at *5 ("There may be circumstances where the holding of contractual rights, coupled with a significant equity position and other factors, will support the finding that a particular shareholder is, indeed, a 'controlling shareholder,' especially if those contractual rights are used to induce or to coerce the board of directors to approve (or refrain from approving) certain actions."). In light of the complaint's allegations of the threat posed by an acquisition of Reynolds by BAT, BAT's role as the major source of equity financing, and the alleged "inappropriate" role played by representatives of BAT on the board, I conclude these allegations include such other factors.

The majority dismisses any alleged leverage over the board posed by the threat of a takeover of Reynolds by BAT, asserting that the complaint merely alleges that news outlets reported on "speculation" of a takeover and that the complaint fails to allege that BAT actually threatened Reynolds with purchasing the remaining shares at the end of the Standstill period. The majority further asserts that "BAT could not seek to remove any of the directors that it did not nominate" and "therefore had no means of retribution against the majority of the directors that could have impaired the ability of those directors to exercise independent judgment." In my view, the majority reads the complaint's allegations regarding the threat of a takeover too narrowly and also ignores the fact that the restriction on BAT's seeking to remove any of the Other Directors, similar to the prohibition on BAT increasing its ownership percentage, was one of the governance agreement restrictions set to expire with the impending cessation of the Standstill period, which,

according to the complaint, " 'BAT was not prepared to extend[.]' . . . As with its other demands, BAT got its way. The Standstill would still expire on schedule on July 30, 2014." Following the expiration of the Standstill period, BAT could seek the removal of Other Directors, or it could effect their removal by doing precisely what the Standstill had prevented for ten years—acquiring Reynolds. As the complaint alleges, "[t]he timing of the Proposed Transaction is no coincidence." Turning back to the complaint, which alleges regarding the control exercised over the board by the threat of a takeover:

> 3. The Proposed Transaction is Reynolds's first significant strategic transaction since 2004. The Proposed Transaction was announced just two weeks before the expiration of a ten-year *standstill provision (the "Standstill") that prevented BAT from purchasing the Company in its entirety*.
>
> 4. The timing of the Proposed Transaction is no coincidence. The Proposed Transaction forestalls a takeover by making Reynolds a significantly less attractive takeover target for BAT.
>
> . . . .
>
> **A. *The Impending Expiration Of The Standstill Put The Directors' Jobs At Risk***
>
> 32. Reynolds was created as a result of the 2004 acquisition of BAT's U.S. subsidiary, B&W, by Reynolds's predecessor entity, the R.J. Reynolds Tobacco Company. As part of the Brown & Williamson Acquisition, BAT acquired a 42% stake in Reynolds.
>
> 33. In connection with the Brown & Williamson Acquisition, BAT and Reynolds adopted a July 30, 2004 Governance Agreement (the "Governance Agreement"), which included *a provision that prohibited BAT from increasing its percentage ownership of Reynolds until July 30, 2014—i.e., the Standstill*.
>
> . . . .
>
> 37. . . . . BAT cannot replace the Reynolds Board in its entirety without purchasing 100% of the Company.
>
> 38. In the weeks leading up to the expiration of the Standstill, there were reports suggesting that BAT might

be interested in doing just that. On March 10, 2014, the Telegraph reported that Citigroup analysts had "talked up the likelihood" that BAT would buy the remaining 58% of Reynolds. At BAT's annual shareholder meeting in April 2014, BAT CEO Nicandro Durante made a point of noting that BAT looks at acquiring Reynolds on a yearly basis. Such commentary resurfaced in early July 2014 when the Daily Mail reported on "growing speculation [that BAT] is ready to splash out billions of pounds buying the 58 per cent of US rival Reynolds American it does not already own."

39. At the time of these reports, the Proposed Transaction was already being negotiated. *The threat of a complete takeover gave BAT additional leverage to impose its terms on the Reynolds Board during those negotiations.*

40. *The Director Defendants adopted a plan that had the purpose and effect of allowing them to keep their jobs.* On July 15, 2014, Reynolds issued a press release announcing the Proposed Transaction[.]

. . . .

93. . . . .

- All members of the Reynolds Board have an incentive to safeguard their comfortable and lucrative positions, which could be lost in the event of a BAT takeover of Reynolds.

. . . .

97. As detailed in the Company's most recent annual proxy, Reynolds's non-officer directors are paid hundreds of thousands of dollars each year to serve on the Board[.]

(Emphases added.) Construing these allegations liberally, there appears to be more than a reasonable inference that the threat of a takeover of Reynolds by BAT loomed large; indeed, the specter of a BAT takeover would seem to be a familiar shadow to Reynolds by then, given that it was apparently the entire purpose of the ten-year-old Standstill provision. In my view, the distinct message of plaintiff's allegations is that after the expiration of the Standstill period a takeover could well

follow along with the loss of a board position if the Other Directors did not agree to BAT's transaction terms in the Lorillard acquisition. These allegations set forth a scenario in which BAT in effect coerced the Other Directors into acceding to exceedingly favorable terms for BAT in order to maintain their positions in the company. The likelihood that plaintiff could ultimately prove these allegations is an entirely different issue, and one on which I express no opinion. The majority appears to focus on likely proof of the allegations, rather than sufficiency of the allegations themselves; our review in accord with Rule 12(b)(6) requires focus on the latter.

In that respect, I note that the majority also asserts that "[p]laintiff does not allege that BAT ever threatened the Reynolds board in any way, however—unlike, for example, the stockholder who was considered controlling in *Kahn*[ ]—even though BAT was involved in many of the discussions regarding the Lorillard transaction from an early date." *See Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1113-15 (Del. 1994) (concluding that a minority stockholder was controlling when the minority stockholder intimidated the board and at one point threatened them, saying, "[y]ou must listen to us. We are 43 percent owner. You have to do what we tell you."). But *Kahn* was not decided on a motion to dismiss for failure to state a claim; rather, the Court of Chancery determined that the minority stockholder was controlling after a three-day trial. *Id.* at 1111. As the majority states, "[t]here was also *evidence* in *Kahn* that board members were intimidated by this stockholder and therefore complied with its demands instead of exercising their own independent business judgment." An explicit statement like the one in *Kahn*, or testimonial evidence that board members were intimidated, would certainly be beneficial to a claimant in plaintiff's position, but these are examples of evidence that will only be made known or available through discovery or at trial.

On the other hand, portions of the complaint pertaining to information available to a stockholder situated like plaintiff are summarily dismissed by the majority. For instance, plaintiff alleges that the other board members delayed in retaining separate legal counsel and then failed to adequately utilize that counsel, never retained an independent financial advisor, never received a separate fairness opinion regarding the BAT share purchase, and never considered other options to finance the transaction besides BAT equity financing. The majority briefly touches on some of these allegations but concludes that because they focus on the actions of the Other Directors rather than on the actions of BAT, these allegations "would *in no way show* that BAT" exercised actual

control of the board in the Lorillard transaction. (Emphasis added.) Given that plaintiff—with his allegations that BAT dictated the terms of the Lorillard transaction by means of its significant forty-two percent minatory stake, its veto power over the board, its role as a major source of equity financing for the transaction, and the threat of a takeover and the termination of the Other Directors following the expiring Standstill, as well as the allegation that BAT's representatives on the Board acted in breach of their fiduciary duties—has alleged that BAT exercised actual control of the board in this transaction, i.e. "prevent[ing] the [company's] board from freely exercising its independent judgment in considering the [transaction]," *In re KKR*, 101 A.3d at 995, and given that these allegations reflect that the other board members were in fact not "freely exercising [their] independent judgment," *id.*, I find perplexing the majority's conclusion that such allegations are essentially irrelevant.

Similarly, with regard to the complaint's allegations of the "Technology Sharing Agreement" concerning "the development and commercialization of next-generation tobacco products, including heat-not-burn cigarettes and vapor products," the majority dismisses these allegations with an oft-repeated refrain, stating "[a]gain, though, leverage to obtain favorable terms in an agreement does not necessarily indicate that the beneficiary of those favorable terms was a controlling stockholder." Indeed, in the majority's view, nearly everything can be reduced to the "mere existence of leverage." *See In re Sea-Land*, 1988 WL 49126, at *3 ("Plaintiffs allege only that LLC and its affiliates had significant 'leverage,' (*i.e.*, a superior bargaining position) because they owned 39.5% of Sea-Land's stock. But 'leverage' is not actual domination and control."). But as the majority recognizes elsewhere in its opinion, a minority stockholder may employ means beyond its mere ownership percentage or contractual rights that amount to "coercive leverage" and actual control over the board. *See Williamson*, 2006 WL 1586375, at *5 ("Cox and Comcast's potential veto power is significant for analysis of the control issue, however, because it supports plaintiff's allegation that Cox and Comcast had *coercive leverage* over At Home. Cox and Comcast had the ability to shut down the effective operation of the At Home board of directors by vetoing board actions. Plaintiff may be able to prove facts showing that this leverage (together with the special business relationships and other circumstances mentioned above) was enough for Cox and Comcast to obtain a far better deal th[a]n they would have in an arm's-length transaction." (emphasis added)). In light of the allegations of coercive leverage discussed above, I also view as relevant the allegations regarding the "Technology Sharing Agreement," which is alleged to have been significant, if not vital, to the Lorillard transaction;

these allegations demonstrate that BAT was able "to obtain a far better deal th[a]n [it] would have in an arm's-length transaction." *Id.*

For instance, the complaint included numerous allegations about the importance to Reynolds of its "game-changing" VUSE brand of e-cigarettes, as well as its heat-not-burn technology, asserting that e-cigarettes are "the future of the tobacco industry" and that before the Lorillard acquisition, Reynolds was predicted to "have $4 billion in revenue from e-cigs in 2021, compared with $3.9 billion from conventional cigarettes." The complaint alleges further that news reports prior to the transaction had recognized that "gaining access to Reynolds's e-cigarette and heat-not-burn technology was one of the primary reasons that BAT might want to buy the Company." Due to BAT's control of the board, however, "the Director Defendants have agreed to allow BAT to access Reynolds's game-changing technology without adequate compensation, [and] there is no need for BAT to pay the Public Shareholders a control premium to buy the rest of the Company." The complaint alleges that this "forestalls a takeover by making Reynolds a significantly less attractive takeover target for BAT," or in other words, it allows BAT to "get the milk without buying the cow." Based on these allegations, I disagree with the majority's assertion that "it is unclear how this agreement demonstrates that BAT had actual control of the Reynolds board with respect to the transaction to purchase Lorillard."

In sum, looking solely at the allegations in the complaint and taking them as true, I conclude that plaintiff has sufficiently alleged actual control by BAT over the board in the Lorillard acquisition. As such, I respectfully dissent.

Justices BEASLEY and MORGAN join in this dissenting opinion.

WILLIAM HAIRSTON, JR.
v.
ASHWELL BENNETT HARWARD, JR.

No. 416A17

Filed 7 December 2018

Motor Vehicles—underinsured motorist coverage—collateral for purposes of collateral source rule

In a case arising from an automobile accident, the trial court erred by crediting a $145,000 payment made to plaintiff under his own underinsured motorist (UIM) coverage against the $230,000 judgment that plaintiff obtained against defendant where plaintiff's UIM carrier elected to waive its statutory subrogation rights. Payments from UIM coverage are collateral for purposes of the collateral source rule. In this case, one party or the other would receive a "windfall" as a result of the Supreme Court's decision, and the better option, which was most consistent with the policy reasons for the collateral source rule, was to allow the plaintiff to retain the windfall that resulted from his foresight in voluntarily electing to purchase UIM coverage rather than allowing defendant, who failed to purchase enough liability coverage, to be the ultimate beneficiary of plaintiff's prudent decision.

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. ___, 808 S.E.2d 286 (2017), affirming a judgment entered on 1 December 2015 by Judge Joseph N. Crosswhite in Superior Court, Davidson County. Heard in the Supreme Court on 30 August 2018.

Maynard & Harris, Attorneys at Law, PLLC, by C. Douglas Maynard, Jr.; Higgins Benjamin, PLLC, by John F. Bloss; and Roane Law, by James M. Roane, III, for plaintiff-appellant.

Davis and Hamrick, LLP, by Kent L. Hamrick and Ann C. Rowe, for defendant-appellee Ashwell Bennett Harward, Jr.

Burton, Sue & Anderson, LLP, by Stephanie W. Anderson, for unnamed defendant-appellee Erie Insurance Exchange.

Pinto Coates Kyre & Bowers, PLLC, by Deborah J. Bowers and Andrew G. Pinto, for North Carolina Association of Defense Attorneys, amicus curiae.

ERVIN, Justice.

The question before us in this case is whether the trial court erred by crediting a payment made to plaintiff William Hairston, Jr., under his own underinsured motorist coverage against the amount of the judgment that plaintiff obtained against defendant Ashwell Bennett Harward, Jr., arising from a motor vehicle collision. After carefully considering the record in light of the applicable law, we hold that the trial court erred by crediting the amount of this payment against the amount that defendant owed to plaintiff under the judgment and remand this case to the Court of Appeals for further remand to the Superior Court, Davidson County, for further proceedings.

On 20 November 2009, defendant was driving an automobile that, as a result of defendant's negligence, collided with a motor vehicle operated by plaintiff at an intersection in Lexington. At the time of the collision, plaintiff was insured under an automobile liability insurance policy issued by Erie Insurance Exchange that included, among other things, underinsured motor vehicle coverage subject to a coverage limit of $250,000 per person,[1] while defendant was insured under an automobile liability insurance policy issued by State Farm Mutual Automobile Insurance Company that was subject to a per person liability limit of $100,000.

On 27 July 2011, plaintiff filed a complaint against defendant alleging that the collision in which plaintiff was injured resulted from defendant's negligence and seeking a judgment against defendant encompassing compensation for past and future medical expenses, lost wages, permanent injuries, and pain and suffering. On 15 January 2013, plaintiff

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1. Plaintiff's policy provided, among other things, that:

> We will also pay compensatory damages which an insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of bodily injury sustained by an insured and caused by an accident. The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the underinsured motor vehicle. We will pay for these damages only after the limits of liability under any applicable liability bonds or policies have been exhausted by payments of judgments or settlements, unless we:
>
> 1. Have been given written notice in advance of settlement between an insured and the owner or operator of the underinsured motor vehicle; and
>
> 2. Consent to advance payment to the insured in the amount equal to the tentative settlement.

(Bold typeface deleted.)

moved to amend his complaint to assert a medical negligence claim against his treating physician arising from the treatment that was provided to plaintiff following the motor vehicle accident, with this motion having been allowed on the following day. On 17 April 2013, Erie made an appearance in this case as an unnamed defendant. On 14 March 2014, plaintiff took a voluntary dismissal with prejudice of his medical negligence claim against his treating physician.

Plaintiff's case against defendant came on for trial before the trial court and a jury at the 11 August 2014 civil session of the Superior Court, Davidson County. On 14 August 2014, the jury returned a verdict finding defendant to be negligent and awarding plaintiff $263,000 in compensation for his personal injuries.

On 11 September 2014, Erie issued a check to plaintiff in the amount of $145,000, which, according to Erie, represented "the amount of [underinsured motorist coverage to which plaintiff was entitled] under [plaintiff's] Erie policy."[2] On 15 September 2014, defendant filed a motion seeking to have the trial court determine the amount to be set off and credited against the amount that the jury had awarded plaintiff in which defendant alleged, among other things, that plaintiff had already received $3,000 from defendant's liability carrier and at least $30,000 from his treating physician arising from the settlement of plaintiff's medical negligence claim, with these amounts to be deducted from the jury's damage award prior to the entry of judgment. In addition, defendant, in light of the fact that Erie had waived its right to be subrogated to plaintiff's rights against defendant, sought to obtain a credit against the amount of damages determined to be appropriate by the jury in the amount of $145,000 arising from the payment that Erie made to plaintiff. On 3 October 2014, plaintiff executed a "settlement agreement and full and final release of all claims against Erie only." (All capital letters in original.) On 9 October 2014, State Farm sent plaintiff a check for $97,000.

On 16 October 2014, the trial court entered an order finding that "the parties agree that Defendant is entitled to setoffs or credits totaling $33,000.00," "that the judgment amount will be $230,000.00," and that prejudgment interest would cease accruing as of 1 October 2014. In addition, the trial court found that "[t]he parties continue to disagree over whether . . . to credit the judgment ultimately entered in this case by the amount of the $145,000.00 underinsured motorists coverage

2. The appropriateness of the making of this $145,000 payment and the manner in which it was calculated are not in dispute between the parties.

payment made by [Erie] to Plaintiff" and, pursuant to an agreement between the parties, delayed making a determination regarding whether the amount of the payment that plaintiff received from Erie should be deducted from the judgment amount "until the mandate from the North Carolina Supreme Court in the case of Wood v. Nunnery . . . inasmuch as the Wood case may be dispositive of this disagreement between the parties." On 10 April 2015, this Court filed an opinion in *Wood v. Nunnery*, 368 N.C. 30, 771 S.E.2d 762 (2015) (per curiam), stating that discretionary review had been improvidently allowed in that case.

On 17 September 2015, plaintiff filed a response to defendant's motion for setoffs and credits in which he requested the trial court to enter judgment against defendant prior to considering defendant's motion for setoffs and credits and moving to strike an affidavit submitted by defendant's counsel in support of defendant's claim that Erie had waived its subrogation rights on the grounds that "[w]hether or not [Erie], as Plaintiff's UIM carrier[,] has waived its subrogation right (and reimbursement right) is not relevant to the judgment entered against a tortfeasor." In addition, plaintiff requested the trial court, in the event that it considered the affidavit or "other evidence on the waiver of subrogation," to authorize plaintiff "to take post-verdict depositions of appropriate Erie and State Farm personnel and their agents to determine . . . whether the doctrines of estoppel, waiver, unclean hands, or some other legal or equitable remedy preclude [Defendant Harward] and State Farm from arguing such waiver would inure to the benefit of Defendant [Harward]." On 25 September 2015, Erie filed an affidavit stating that Erie had waived its subrogation rights against defendant. On 29 October 2015, plaintiff filed a motion seeking to have Erie's affidavit stricken or allowing post-verdict depositions to be taken, with this relief being sought on the same grounds that led to the filing of plaintiff's earlier motion to the same effect.

On 1 December 2015, the trial court entered an order allowing defendant's motion for credits and setoffs in which it concluded as a matter of law that "[Defendant] is entitled to credit for the $145,000.00 payment made by the UIM carrier." In reaching this result, the trial court, acting in reliance upon *Baity v. Brewer*, 122 N.C. App. 645, 470 S.E.2d 836 (1996), and *Seafare Corp. v. Trenor Corp.*, 88 N.C. App. 404, 363 S.E.2d 643, *disc. rev. denied*, 322 N.C. 113, 367 S.E.2d 917 (1988), focused upon "the common law principle that a plaintiff should not be permitted a double recovery for a single injury." The trial court distinguished the initial decision of the Court of Appeals in *Wood v. Nunnery*, 222 N.C. App. 303, 730 S.E.2d 222 (2012), in which the Court of Appeals held that

payments made by the plaintiff's underinsured motor vehicle insurance carrier should not be credited to the defendant,[3] with the trial court emphasizing that in *Wood*, unlike this case, the underinsured motorist carrier had not waived its subrogation rights. In view of the fact that "no subrogation rights remain[ed]" for Erie, the trial court determined that defendant was entitled to a credit for the amount that Erie had paid to plaintiff. Finally, the trial court made no ruling on plaintiff's argument that the payment that he had received from Erie should be treated as a collateral source on the grounds that "such issue would be more properly addressed by the Appellate Courts."[4] Based upon these findings and conclusions, the trial court entered a judgment providing that plaintiff have and recover $46,527.12 from defendant.[5] Plaintiff noted an appeal to the Court of Appeals from the trial court's judgment.

In seeking relief from the trial court's judgment before the Court of Appeals, plaintiff contended that the trial court's decision to reduce the judgment amount by the $145,000 payment that plaintiff had received from Erie violated the collateral source rule, which prohibits a "plaintiff's recovery [from] be[ing] reduced . . . by some source collateral to the defendant," *Young v. Baltimore & Ohio Railroad Co.*, 266 N.C. 458, 466, 146 S.E.2d 441, 446 (1966), on the theory that the payment that plaintiff had received from Erie "is completely independent from" and,

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3. In *Wood*, 222 N.C. App. at 308, 730 S.E.2d at 226, the Court of Appeals vacated a portion of the trial court's order and remanded the case to the trial court for further proceedings. The order that the trial court entered on remand in *Wood* was also appealed to and affirmed by the Court of Appeals, 232 N.C. App. 523, 757 S.E.2d 526, 2014 WL 640884 (2014) (unpublished), with this Court ultimately determining that it had improvidently allowed discretionary review of the Court of Appeals' decision concerning the validity of the trial court's remand order in *Wood*. *Wood,* 368 N.C. at 30, 771 S.E.2d at 762.

4. In addition, the trial court denied plaintiff's motions to strike the affidavits that had been filed for the purpose of informing the parties and the trial court that Erie had waived its subrogation rights and refused to authorize the taking of post-verdict depositions. The Court of Appeals affirmed the trial court's decisions with respect to these issues and plaintiff did not seek to bring them forward for consideration by this Court.

5. The trial court calculated the amount that plaintiff was entitled to recover from defendant set out in the judgment by reducing the jury's $263,000 award to $230,000 based upon the parties' agreement that the judgment amount should be reduced by the $3,000 amount that had been advanced to plaintiff by State Farm and the $30,000 amount that plaintiff had received as a result of the medical negligence claim that plaintiff had asserted against his treating physician. After increasing the damage award by $58,777.52 in prejudgment interest, the trial court credited $97,000 against the judgment amount relating to the additional payment that plaintiff received from State Farm and the $145,000 payment that plaintiff received from Erie before ordering that plaintiff recover $46,527.12 in damages from defendant.

for that reason, collateral to, defendant. In addition, plaintiff argued that the trial court's failure to determine whether the monies that plaintiff had received from Erie represented payment from a collateral source constituted an independent legal error, citing *Pierson v. Ray*, 386 U.S. 547, 554, 87 S. Ct. 1213, 1218, 18 L. Ed. 2d 288, 294 (1967) (stating that "[i]t is a judge's duty to decide all cases within his jurisdiction that are brought before him"). According to plaintiff, the trial court's order conflicted with the decision of the Court of Appeals in *Wood*, 222 N.C. App. at 303, 730 S.E.2d at 222, which, in plaintiff's view, required the trial court to reach a result diametrically opposed to the one embodied in the order that it entered in this case given that the Court of Appeals decided to refrain from crediting the defendant in *Wood* with the amount of the payment that the plaintiff had received from his own underinsured motorist carrier on the grounds that, "[b]y the plain language of N.C.[G.S.] § 1-239, [a] defendant is responsible for satisfying the judgment entered against him"; that "the amounts owed by defendant as the tortfeasor in this matter and the amount owed by Firemen's as an underinsured motorist carrier" had been conflated by the trial court; and that "[w]hether Firemen's agreed to waive its subrogation rights as to defendant is a matter for resolution between Firemen's and defendant and is of no concern to plaintiff," quoting *id.* at 305, 730 S.E.2d at 224. In addition, plaintiff asserted that the fact that the underinsured motorist carrier in *Wood* retained subrogation rights did not mean that a situation involving payment made by an underinsured motorist carrier that did waive its subrogation rights should be treated any differently. As a result, plaintiff urged the Court of Appeals to reverse the trial court's judgment.

Defendant, on the other hand, argued before the Court of Appeals that "[w]ell-established North Carolina case law sets forth the common law principle that plaintiffs should not be permitted a double recovery for a single injury," with this principle being applicable "both when payments are made by joint tortfeasors and when payments are made by sources other than joint tortfeasors." According to defendant, this Court's statement in *Holland v. Southern Public Utilities Co.*, 208 N.C. 289, 292, 180 S.E. 592, 593-94 (1935), that "any amount paid by anybody, whether they be joint tort-feasors or otherwise, for and on account of any injury or damage, should be held for a credit on the total recovery in any action for the same injury or damage" should be deemed controlling in this case, in which "the payment by Erie . . . was made 'on account of ' the injury claimed by [p]laintiff in the lawsuit." Any failure to order that the amount paid to plaintiff by Erie be credited against the amount owed to plaintiff by defendant would, according to defendant, permit "a double recovery, in contravention of North Carolina law." In defendant's

view, the Court of Appeals did not allow a double recovery for the plaintiff in *Wood* given the absence of any evidence that the underinsured motorist carrier had waived its subrogation rights.

Defendant argued that the underinsured motorist payment that plaintiff received from Erie should not be deemed subject to the collateral source rule in light of this Court's holding in *Williams v. Nationwide Mutual Insurance Co.*, 269 N.C. 235, 237, 152 S.E.2d 102, 105 (1967), that an insured cannot obtain a recovery from his or her uninsured motorist carrier unless he or she is "legally entitled to recover damages." According to defendant, *Williams* requires that the defendant's fault be established before the underinsured motorist carrier becomes liable to the plaintiff, rendering "the right to recover under a UIM endorsement" "derivative and conditional," citing *Braddy v. Nationwide Mutual Liability Insurance Co.*, 122 N.C. App. 402, 406, 470 S.E.2d 820, 822, *appeal dismissed and disc. rev. denied*, 343 N.C. 749, 473 S.E.2d 610-11 (1996). In defendant's view, a payment source that is "derivative and conditional" upon a defendant's liability cannot be considered collateral for purposes of the collateral source rule.

On 7 November 2017, the Court of Appeals filed a divided opinion holding "that the trial court did not err in allowing defendant Harward the credit against the judgment for . . . Erie's payment." *Hairston v. Harward*, ___ N.C. App. ___, ___, 808 S.E.2d 286, 288 (2017). As an initial matter, the Court of Appeals rejected plaintiff's argument "that UIM benefits are a collateral source, so defendant Harward cannot reduce his tort liability for those benefits," on the grounds that the collateral source rule does not apply when neither party attempts to introduce or exclude evidence relating to a payment made by a collateral source at trial. *Id.* at ___, 808 S.E.2d at 290 (quoting *Wilson v. Burch Farms, Inc.*, 176 N.C. App. 629, 638, 627 S.E.2d 249, 257 (2006) (brackets, citations, and internal quotation marks omitted) (stating that "[t]he purpose of the collateral source rule is to exclude evidence of payments made to the plaintiff by sources other than the defendant when this evidence is offered for the purpose of diminishing the defendant tortfeasor's liability to the injured plaintiff.") (emphasis omitted); *id.* at ___, 808 S.E.2d at 290-91 (citing and quoting *Badgett v. Davis*, 104 N.C. App. 760, 764, 411 S.E.2d 200, 203 (1991) (same), *disc. rev. denied*, 331 N.C. 284, 417 S.E.2d 248 (1992)).

After noting that "whether UIM coverage should be credited against payments made on a tort judgment when subrogation and the right of reimbursement have been waived is an issue this Court has not explicitly addressed," *id.* at ___, 808 S.E.2d at 291, the Court of Appeals held that

Erie's waiver of its right to be subrogated to plaintiff's claims required treating Erie's payments to plaintiff as a credit against the amount of the judgment entered against defendant, *id.* at ___, 808 S.E.2d at 292. According to the Court of Appeals, its own statement in *Wood* that a defendant could not receive credit for a payment made by plaintiff's underinsured motorist carrier "[b]ecause of [the insurance carrier's] statutory right of subrogation" supported a decision to reach this result. *Id.* at ___, 808 S.E.2d at 291 (quoting *Wood*, 222 N.C. App. at 307, 730 S.E.2d at 225). The Court of Appeals believed that "factoring in subrogation" at the judgment stage "helps prevent a windfall profit" for plaintiff, citing *Baity*, 122 N.C. App. at 646-47, 470 S.E.2d at 837-38, which applied the rule enunciated in *Holland*, 208 N.C. at 292, 180 S.E. at 593-94, that "any amount paid by anybody, whether they be joint tort-feasors or otherwise, for and on account of any injury or damage should be held for a credit on the total recovery in any action for the same injury or damage" in order to prevent a plaintiff from recovering twice for the same injury. *Hairston*, ___ N.C. App. at ___, 808 S.E.2d at 291-92 (quoting *Holland*, 208 N.C. at 292, 180 S.E. at 593-94). As a result, the majority of the Court of Appeals affirmed the trial court's order.

Judge Hunter dissented from the majority's decision on the grounds that "Defendant's tort liability is a separate entity from . . . Erie's contractual obligation," so that Erie's "release[ ] from its contractual liability to Plaintiff . . . does not mean Defendant is released from the $263,000.00 judgment he owes Plaintiff." *Id.* at ___, 808 S.E.2d at 293 (Hunter, Jr., J., dissenting). In concluding that the trial court's order should be reversed, Judge Hunter placed principal reliance upon the Court of Appeals' decision in *Wood*, which he described as "essentially identical to the case at bar," *id.* at ___, 808 S.E.2d at 293, and N.C.G.S. § 20-279.21(b)(4), and which, according to Judge Hunter, "provides no language stating that a tortfeasor is entitled to a credit from a plaintiff's UIM insurer" or that "a tortfeasor has a right to avoid the enforcement of a judgment," *id.* at ___, 808 S.E.2d at 294. Instead, Judge Hunter stated his belief that N.C.G.S. § 20-279.2(b)(4) "reveals the North Carolina public policy of an injured party's right to either enforce or not enforce a judgment against a tortfeasor." *Id.* at ___, 808 S.E.2d at 294. In Judge Hunter's opinion, N.C.G.S. § 20-279.2 "balances the interests of the tortfeasor, its liability insurer, the injured victim and the [underinsured motorist] insurer" by allowing a liability insurer to "protect[ ] its insured" by requiring that insurer to "seek resolution of the claim within its policy limits," while, at the same time, "provid[ing] opportunities for the UIM [carrier] to recoup the payments made to its insured," effectively protecting the interests of the underinsured motorist insurance carrier and "the victim's

contractual rights." *Id.* at ___, 808 S.E.2d at 294. Judge Hunter opined that allowing a tortfeasor to receive credit against the judgment amount based upon underinsured motorist payments would "upset[ ] the statutory balance among competing interests" and render "the statutory right of subrogation . . . meaningless." *Id.* at ___, 808 S.E.2d at 294. Plaintiff noted an appeal to this Court from the Court of Appeals' decision on the basis of Judge Hunter's dissent.

In seeking to persuade us to reverse the Court of Appeals' decision, plaintiff argues that "[t]he Court of Appeals erred when it failed to recognize that the collateral source rule is a substantive rule of law on damages in this State." In support of this contention, plaintiff asserts that "[t]he collateral source rule is well established in the common law and public policy nationally as both a rule of evidence and the substantive law on damages." According to plaintiff, the substantive component of the collateral source rule is demonstrated by this Court's statement in *Young*, 266 N.C. at 466, 146 S.E.2d at 446, that "the plaintiff's recovery will not be reduced . . . by some source collateral to defendant." In plaintiff's view, "[t]he collateral source rule is a rule of evidence *because it is the substantive law of the State*," citing *Cates v. Wilson*, 321 N.C. 1, 5, 361 S.E.2d 734, 737 (1987) (stating that "a plaintiff's recovery may not be reduced because [of] a source collateral to the defendant"), and *Brown v. Griffin*, 263 N.C. 61, 65-66, 138 S.E.2d 823, 826-27 (1964). Plaintiff suggests that "this Court should clarify that the collateral source/benefit rule is a substantive law on damages in this State in addition to a rule of evidence."

Moreover, plaintiff urges this Court to "adopt the overwhelming majority rule that UM/UIM coverage is a collateral source/collateral benefit and does not reduce the amount a tortfeasor owes on a judgment." Plaintiff argues that, like health and life insurance, underinsured motorist coverage is independent of and collateral to compensation provided by tortfeasors and asserts that a failure to treat payments made by a plaintiff's underinsured motorist carrier as a collateral benefit provides a windfall to tortfeasors. "To the extent [that] one party may be entitled to a 'windfall,' " plaintiff contends that "sound public policy dictates that it be the injured victim . . . and not the negligent person who caused the injury."

In plaintiff's view, the relevant North Carolina statutory provisions, through which an underinsured motorist carrier has subrogation and reimbursement rights that "typically work hand in hand" with the collateral source rule to prevent a plaintiff from receiving a double recovery, clearly indicate that underinsured motorist coverage should be considered a collateral source. Plaintiff argues that a contrary result "would

extinguish the [underinsured motorist] carrier's statutory subrogation and contractual reimbursement rights." According to plaintiff, an underinsured motorist "carrier may still seek recovery of any overpayment through the exercise of its rights to subrogation or reimbursement," with the ability of the carrier "to recoup any overpayment" "divest[ing]" "insureds [ ] of any so-called 'windfall,' " quoting *Lunsford v. Mills*, 367 N.C. 618, 628-29 n.1, 766 S.E.2d 297, 304 n.1 (2014).

Defendant, on the other hand, argues that this Court should affirm the Court of Appeals' decision because plaintiff cannot be allowed a "double recovery for a single injury" and because underinsured motorist coverage is not a collateral source. Defendant asserts that there is "a crucial distinction between collateral sources recognized by North Carolina law and underinsured motorists coverage," with sources of payment such as health and disability insurance, social security payments, and unemployment benefits being categorized as collateral sources because they "are all independent of the tortfeasor." Defendant contends that this Court should not categorize payments from underinsured motorist carriers as a collateral source on the grounds that such a decision would enable plaintiffs to recover underinsured motorist benefits without having to show that the other driver was at fault, resulting in what amounts to "no-fault accident insurance." In defendant's view, this Court should uphold the Court of Appeals' decision on public policy grounds given that a holding that underinsured motorist payments constitute a collateral source would likely result in increased automobile insurance premiums and fail to give "force and effect" to the jury's verdict and given that the General Assembly has not mandated that underinsured motorist proceeds be treated as a collateral source.

A careful review of the record reveals that no factual issues are in dispute between the parties. For that reason, the only issue before us in this case is whether the trial court and the Court of Appeals reached the correct legal conclusion with respect to whether defendant was entitled to have the amount that Erie paid to plaintiff credited against the judgment in light of the undisputed facts disclosed by the present record. "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) (citation omitted). As a result, the ultimate issue before us in this case is whether, following a de novo review, the trial court correctly decided to credit defendant with the payment made to plaintiff by Erie.

The proper resolution of this case hinges, in our opinion, upon the extent to which the payment made to plaintiff by Erie does or does not constitute a payment received from a collateral source.

> According to [the collateral source] rule a plaintiff's recovery may not be reduced because a source collateral to the defendant, such as "a beneficial society," the plaintiff's family or employer, or an insurance company, paid the plaintiff's expenses. *Id.* Rather, an injured plaintiff is entitled to recovery " '. . . for reasonable medical, hospital, or nursing services rendered him, whether these are rendered him gratuitously or paid for by his employer.' "

Cates v. Wilson, 321 N.C. at 5, 361 S.E.2d at 737 (ellipsis in original) (quoting *Young*, 266 N.C. at 466, 146 S.E.2d at 446); *see also* Restatement (Second) of Torts § 920A cmt. b (Am. Law. Inst. 1977) (stating that "[p]ayments made or benefits conferred by other sources are known as collateral-source benefits [and] do not have the effect of reducing the recovery against the defendant" and that "[t]he law does not differentiate between the nature of the benefits, so long as they did not come from the defendant or a person acting for him"); *Collateral-Source Rule*, *Black's Law Dictionary* (10th ed. 2014) (defining "collateral-source rule" as "[t]he doctrine that if an injured party receives compensation for the injuries from a source independent of the tortfeasor, the payment should not be deducted from the damages that the tortfeasor must pay. Insurance proceeds are the most common collateral source – Also termed *collateral- benefit rule*"); 1 Dan B. Dobbs, *Law of Remedies* § 3.8(1) at 372-73, (2d ed. 1993) (stating that "benefits received by the plaintiff from a source collateral to the defendant may not be used to reduce that defendant's liability for damages").

As the Court of Appeals noted, "the collateral source rule excludes evidence of payments made to the plaintiff by sources other than the defendant when this evidence is offered for the purpose of diminishing the defendant tortfeasor's liability to the injured plaintiff." *Hairston*, ___ N.C. App. at ___, 808 S.E.2d at 290 (majority opinion) (emphasis omitted) (quoting *Burch Farms*, 176 N.C. App. at 638, 627 S.E.2d at 257 (brackets, citations, and internal quotation marks omitted)). Like "a reference to the presence or absence of liability coverage for defendant," *Spivey v. Babcock & Wilcox Co.*, 264 N.C. 387, 390, 141 S.E.2d 808, 811 (1965) (*superseded by statute*, N.C.G.S. § 97-10.2(e) (1991), *as stated in Frugard v. Pritchard*, 338 N.C. 508, 511, 450 S.E.2d 744, 745-46 (1994)), evidence that a plaintiff received certain benefits "is inadmissible because it is not only irrelevant but also incompetent," id. at 390, 141 S.E.2d at 812, given "the probability that juries will consider the availability of collateral sources as indicative of the lack of any real damages" and alter their verdicts accordingly, *Cates*, 321 N.C. at 10, 361 S.E.2d at

740 (citation omitted). In addition to treating the collateral source rule as one governing the admission or exclusion of evidence, this Court has given substantive effect to the principle that a plaintiff's recovery should not be reduced by a payment received from a collateral source.

In *Young*, this Court recognized that the collateral source rule is a substantive rule concerning damages. 266 N.C. at 466, 146 S.E.2d at 446. In that case, the admission of evidence tending to show that the plaintiff's medical expenses had been paid by his employer's hospital insurance was not challenged before this Court on appeal. *Id.* at 466, 146 S.E.2d at 446. Had a challenge been made to the *admission* of such evidence, *Young* could be fairly read as treating the collateral source rule as nothing more than a rule of evidence. However, the actual error that this Court identified in *Young* involved the manner in which the trial court instructed the jury concerning the calculation of the plaintiff's damages. More specifically, this Court examined the correctness of the trial court's instruction that "[i]n this case the things you may consider in determining what amount you will award to the plaintiff, if you award him anything, are *actual monetary losses* he has had from medical expenses." *Id.* at 466, 146 S.E.2d at 446 (emphasis in the original). We concluded that this instruction was erroneous because, in light of the evidence that "the plaintiff's medical expenses had been paid by his employer as the result of hospital insurance carried for the benefit of its employees . . . the foregoing charge may well have led the jury to believe that no amount was to be included in its verdict on account of medical expenses unless paid by the plaintiff himself." *Id.* at 466, 146 S.E.2d at 446. In essence, we concluded that the trial court erred because, in instructing the jury concerning the substantive law governing the calculation of the plaintiff's damages, the trial court's instructions could have led the jury to reduce the plaintiff's recovery by the amount of his medical expenses that was paid by his employer-provided hospital insurance. In concluding that the trial court had erred in this manner, this Court necessarily treated the collateral source rule as a substantive rule of law concerning damages. Put another way, we would not have reached this result in the event that the collateral source rule is, as the Court of Appeals indicated, a simple rule of evidence. As a result, we must now determine whether payments received by a plaintiff who has purchased underinsured motorist coverage should be deemed to be a payment from a collateral source that cannot be used to reduce the amount of the judgment that plaintiff is entitled to have entered against defendant.

Although the collateral source rule is a well-established principle of North Carolina law, this Court has not clearly enunciated the factors

that should be taken into account in determining whether a payment source is or is not collateral to a defendant for purposes of the collateral source rule. On the one hand, we have long held that a payment made to an injured person by one person liable for an injury should be credited against a judgment entered against others who have been held liable for the same injury, rendering payments made by a joint tortfeasor to the plaintiff not subject to the collateral source rule. *See McNair v. Goodwin*, 262 N.C. 1, 4, 136 S.E.2d 218, 220 (1964) (stating that "[t]he remaining tort-feasors are entitled, however, to have the amount paid for the covenant [not to sue] credited on any judgment thereafter obtained against them by the injured party"). More generally, this Court stated in *Holland*, 208 N.C. at 292, 180 S.E. at 593-94, that "any amount paid by anybody, whether they be joint tort-feasors or otherwise, for and on account of any injury or damage should be held for a credit on the total recovery in any action for the same injury or damage." Although defendant places considerable reliance upon this language in arguing that the judgment amount in this case should be credited with the payment that plaintiff received from Erie, the continued viability of the collateral source rule clearly indicates that the quoted language from *Holland* cannot be properly understood as meaning that "any amount paid by anybody" that benefits plaintiff or covers costs that plaintiff incurred as the result of a compensable injury must be credited against the judgment amount.[6] *See Cates*, 321 N.C. at 4, 9, 361 S.E.2d at 737, 739 (holding that Medicaid benefits, checks received pursuant to the "Aid for Dependent Children" program, and child support payments constituted collateral sources); *Young*, 266 N.C. at 466-67, 146 S.E.2d at 446-47 (holding that medical expenses "paid by [the plaintiff's] employer as the result of hospital insurance carried for the benefit of its employees" should not be used to reduce the amount that the defendant owed the plaintiff); *Brown*, 263 N.C. at 65-66, 138 S.E.2d at 826-27 (determining that the trial court erred by reducing a jury verdict in the amount of payments from Southeastern Fire Insurance Company to plaintiff "under the Medical Payments coverage of [his] policy"). Thus, the extent to which

6. The principle enunciated in *Holland* has been applied, for the most part, in cases involving joint tortfeasors or persons in essentially the same position such as the parties in *Holland*, 208 N.C. at 292-93, 180 S.E. at 594; Baity, 122 N.C. App. at 647, 470 S.E.2d at 838, and *Seafare Corp.*, 88 N.C. App. at 416, 363 S.E.2d at 652, and cases involving the receipt of both a tort recovery and worker's compensation benefits, such as *Schenk v. HNA Holdings, Inc.*, 170 N.C. App. 555, 562-63, 613 S.E.2d 503, 509, *disc. rev. denied*, 360 N.C. 177, 626 S.E.2d 649 (2005), and *Manning v. Fletcher*, 102 N.C. App. 392, 402 S.E.2d 648 (1991), *aff'd per curiam*, 331 N.C. 114, 413 S.E.2d 798 (1992). Using similar logic, we believe that gratuitous payments made against the judgment would also have to be credited against the judgment amount.

a judgment amount should or should not be reduced by the making of a particular payment hinges upon whether that payment was made from a collateral source for purposes of the collateral source rule.

Although the parties appear to agree that the defining characteristic of a collateral source is its independence from the tortfeasor, *see Fisher v. Thompson*, 50 N.C. App. 724, 731, 275 S.E.2d 507, 513 (1981) (stating that "[a] tort-feasor should not be permitted to reduce his own liability for damages by the amount of compensation the injured party receives from an independent source"), they focus upon differing sets of facts in attempting to determine whether a particular payment source is or is not sufficiently independent of the tortfeasor to justify treating that payment source as truly collateral. Plaintiff, on the one hand, contends that our analysis should focus upon the fact that, like other forms of insurance that have been deemed to be encompassed within the collateral source rule, plaintiff paid for the underinsured motorist coverage from which the payment at issue in this case was made and that this fact establishes the independence necessary to make such a payment subject to the collateral source rule. Defendant, on the other hand, focuses upon the fact that plaintiff would not have been entitled to receive payments on the basis of the underinsured motorist coverage that he purchased from Erie in the absence of the tortfeasor's negligence and argues that the payment at issue in this case was not independent of the tortfeasor for that reason. *See Williams*, 269 N.C. at 237, 152 S.E.2d at 105 (stating that, before being "entitled to the benefits of the endorsement," the insured "must show (1) he is legally entitled to recover damages, (2) from the owner or operator of an uninsured automobile, (3) because of bodily injury, (4) caused by accident, and (5) arising out of the ownership, maintenance, or use of the uninsured automobile"). In other words, plaintiff focuses upon the fact that he purchased the uninsured motorist coverage that led to the making of Erie's payment to plaintiff, while defendant focuses upon the fact that plaintiff would not have been entitled to receive any payment from Erie had he not been injured as the result of defendant's negligence.

Admittedly, this Court has not previously addressed whether payments made from underinsured motorist carriers are or are not within the scope of the collateral source rule. For that reason, defendant can, with perfect propriety, argue that no North Carolina decision reaches the result contended for by plaintiff while plaintiff can, with equal propriety, assert that no North Carolina decision reaches the result advocated for by defendant. Put another way, none of the sources of payment that this Court has determined to be collateral appear to require proof of

the defendant's negligence as a prerequisite for payment, while none of our decisions applying the collateral source rule hold that the fact that the payment in question stemmed from a source that a plaintiff had purchased, standing alone, renders that payment collateral in nature. As a result, the question before us is a close one that is not controlled by any of our earlier decisions. On balance, however, we are persuaded that treating payments made as the result of a plaintiff's decision to purchase optional underinsured motorist coverage as subject to the collateral source rule is more consistent with the policy justifications underlying the collateral source rule and the relevant statutory provisions than is the result contended for by defendant in this case.

"[T]he primary purpose of [the Motor Vehicle Safety and Financial Responsibility Act] is to compensate innocent victims of financially irresponsible motorists . . . ." *Bray v. N.C. Farm Bureau Mut. Ins. Co.*, 341 N.C. 678, 684, 462 S.E.2d 650, 653 (1995). As is the case with certain of the other sorts of payments that have been held to be subject to the collateral source rule, the payment that Erie made to plaintiff resulted from plaintiff's foresight in deciding to acquire underinsured motorist coverage. Such conduct is exactly the sort of action that the tort system should encourage. Even though plaintiff would not have been entitled to receive the payment in question in the absence of defendant's negligence, the fact remains that he would have been equally unable to receive it had he not voluntarily purchased optional underinsured motorist coverage. A decision that a plaintiff must credit the payment that he or she receives as a result of the decision to purchase such optional coverage against the judgment entered against the defendant whose negligence caused the plaintiff's injuries strikes us as likely to discourage North Carolina citizens from purchasing uninsured motorist coverage, a result that would have obvious deleterious consequences.

In seeking to persuade us to reach a different result, defendant argues that failing to require that the payment that plaintiff received from Erie be credited against the judgment amount could cause plaintiff to receive greater compensation for his injuries than the jury awarded him contrary to our general principle against double or multiple recoveries enunciated in decisions such as *Baity*, 122 N.C. App. at 647, 470 S.E.2d at 837-38, and *Seafare Corp.*, 88 N.C. App. at 416, 363 S.E.2d at 652. Aside from the fact that "[t]he law contains no rigid rule against overcompensation," with several well-established legal "doctrines, such as the collateral benefits rule, [serving to] recognize that making tortfeasors pay for the damage they cause can be more important than preventing overcompensation," *McDermott, Inc. v. AmClyde*, 511 U.S.

202, 219, 114 S. Ct. 1461, 1470-71, 128 L. Ed. 2d 148, 162-63 (1994) (footnote omitted), a narrow focus upon avoiding overcompensation in this case would create a countervailing inequity. Although a failure to credit the amount of the payment that Erie made to plaintiff against the judgment amount certainly creates a risk that plaintiff will receive more money as a result of his injuries than the total amount of the jury's verdict, a decision in defendant's favor with respect to the issue that is before us in this case would also mean that a defendant whose negligence caused a plaintiff's injuries would not be required to pay the full amount that he or she legally owed him for the injuries that the defendant caused the plaintiff to sustain. In other words, there is no escaping the fact that one party to this case or the other will receive what could be fairly characterized as a "windfall" as a result of our decision in this case. In light of that fact, we believe that the better option is to allow plaintiff to retain the "windfall" that results from his foresight in voluntarily electing to purchase underinsured motorist coverage rather than allowing defendant, who failed to purchase enough liability coverage to adequately compensate plaintiff for his injuries, to be the ultimate beneficiary of plaintiff's decision to procure additional insurance coverage.

The approach that we believe to be appropriate in this case is also consistent with the manner in which the General Assembly elected to address the "double recovery" problem upon which defendant relies in seeking to obtain a decision in his favor in this case. According to N.C.G.S. § 20-279.21(b)(4):

> [I]f an underinsured motorist insurer, following the approval of the application, pays in settlement or partial or total satisfaction of judgment moneys to the claimant, the insurer shall be subrogated to or entitled to an assignment of the claimant's rights against the owner, operator, or maintainer of the underinsured highway vehicle.

In accordance with this statutory provision, an underinsured motorist carrier has the right to recoup payments made by the insurer to a plaintiff who has purchased underinsured motorist coverage from the defendant in the event that the defendant has sufficient resources to make such a payment. As a result, in the event that Erie had refrained from waiving its subrogation rights, it could have sought to recoup some or all of the monies that it paid to plaintiff from defendant using its statutory subrogation rights. In fact, the existence of this right of subrogation was one of the factors that North Carolina appellate courts have considered in determining that other payment sources were collateral for purposes of the collateral source rule. *See Cates*, 321 N.C. at 6, 361 S.E.2d

at 738 (justifying its holding that Medicaid and other public benefit payments were a collateral source based, in part, upon the fact that N.C.G.S. § 108A-57 "entitles the state to full reimbursement for any Medicaid payments made on a plaintiff's behalf in the event the plaintiff recovers an award for damages" and prevents "any 'windfall profit' for the plaintiff"); *see also Lunsford*, 367 N.C. at 628, 766 S.E.2d at 304 (stating that, "given the General Assembly's provision of subrogation and reimbursement rights for the financial protection of insurers, we cannot agree with Farm Bureau's argument that the trial court's order resulted in a 'windfall' for Lunsford" in that "Farm Bureau could have preserved its subrogation rights by advancing its UIM policy limits"); *Kaminsky v. Sebile*, 140 N.C. App. 71, 80, 535 S.E.2d 109, 115 (2000) (noting that, "[u]nder *Cates*, if a plaintiff recovers for the past Medicaid payments he or she received and the state fails to seek reimbursement, the plaintiff would not then be required to return the money to the defendant-tortfeasor" and that, "[s]imilarly, defendant here should not receive a windfall because the government abandoned its right under the [Federal Medical Care Recovery Act]"). Had Erie refrained from waiving its subrogation rights and attempted to assert those rights against defendant, the same protection against a windfall recovery would exist in this case. We see no reason why defendant should be entitled to different treatment simply because Erie elected to waive its statutory subrogation rights rather than attempting to enforce them. As a result, the approach advocated by defendant in this case is simply inconsistent with the approach to addressing the double recovery problem embodied in N.C.G.S. § 20-279.21(b)(4) given that the underinsured motorist carrier, rather than the negligent tortfeasor, is benefitted by the statutory mechanism for addressing the double recovery problem.

Our decision that payments from underinsured motorist coverage are collateral for purposes of the collateral source rule is consistent with the decisions that have been made by almost every other state court that has been called upon to examine this issue. *See*, *e.g.*, *Int'l Sales-Rentals Leasing Co. v. Nearhoof*, 263 So. 2d 569, 570 (Fla. 1972) ("agree[ing] with and adopt[ing] the view" of the lower state court that "uninsured motorist coverage is equivalent to a separate contract such as hospitalization insurance so that recovery thereunder may not be set-off from a judgment against a tortfeasor"); *State Farm Mut. Auto. Ins. Co. v. Kern*, 976 N.E.2d 716, 720 (Ind. Ct. App. 2012) (concluding that a judgment "entered against a third-party tortfeasor . . . is not satisfied when the plaintiff's insurer compensates the plaintiff due to the third-party tortfeasor's being underinsured" on the grounds that the tortfeasor "is not entitled to benefit from [the plaintiff's] carefulness and assiduousness

in obtaining underinsured motorist insurance coverage"); *Schwartz v. Hasty*, 175 S.W.3d 621, 628-29 (Ky. Ct. App. 2005) (noting that "[t]he collateral source rule has two aspects: evidentiary and substantive," and "agree[ing] with the majority view that [underinsured motorist] payments fall within the collateral source rule"); *Estate of Rattenni v. Grainger*, 298 S.C. 276, 277-78, 379 S.E.2d 890, 890 (1989) (finding "no persuasive reason to distinguish underinsurance proceeds from other insurance proceeds that are subject to the collateral source rule" and agreeing with the trial court's determination "that the collateral source rule applied because the benefits received were from the injured party's own underinsurance policy for which she paid the premiums"); *Johnson v. Gen. Motors Corp.*, 190 W. Va. 236, 244, 438 S.E.2d 28, 36 (1993) (stating that UIM is a collateral source on the grounds that "the party at fault should not be able to minimize his damages by offsetting payments received by the injured party through his own independent arrangements" (quoting *Ratlief v. Yokum*, 167 W. Va. 779, 787, 280 S.E.2d 584, 590 (1981))). For this reason, our decision that payments received as the result of the purchase of underinsured motorist coverage should not be credited against the amount of the judgment entered against defendant in this case, rather than being some sort of outlier, is fully consistent with the general thrust of American jurisprudence with respect to this issue.

Thus, for all of these reasons, we hold that the Court of Appeals erred by affirming the trial court's determination that the payment that plaintiff received from Erie should be credited against the judgment that should be entered against defendant in this case. As a result, the Court of Appeals' decision is reversed with respect to that issue. This case is remanded to the Court of Appeals for further remand to the Superior Court, Davidson County, for further proceedings not inconsistent with this opinion. The remaining issues addressed by the Court of Appeals are not before this Court and its decisions as to these matters remain undisturbed.

REVERSED AND REMANDED.

IN THE MATTER OF THE WILL OF JAMES PAUL ALLEN, DECEASED

No. 227PA17

Filed 7 December 2018

Wills—handwritten codicil—reference to amended portion—present testamentary intent ambiguous

Where a properly attested self-proving will contained a handwritten codicil that referenced a provision of the will—"DO NOT HONOR ARTICLE IV VOID ARTICLE IV"—the will and the holographic codicil together clearly evinced testamentary intent by referencing the portion of the will to amend. But a genuine issue of material fact existed as to whether the phrase "begin[n]ing 7-3-03" showed the testator's then-present testamentary intent.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 801 S.E.2d 380 (2017), reversing an order of summary judgment in favor of propounder entered on 14 September 2016 by Judge Jeffery B. Foster in Superior Court, Beaufort County, and remanding for entry of summary judgment in favor of caveators. Heard in the Supreme Court on 28 August 2018.

Ward and Smith, P.A., by John M. Martin; and Ranee Singleton for propounder-appellant Melvin Ray Woolard.

Lanier, King & Paysour, PLLC, by Jeremy Clayton King and Steven F. Johnson II, for caveator-appellees Hope Robinson and Christian Robinson.

NEWBY, Justice.

This case presents the question of whether a handwritten codicil that references a provision of a self-proving will is valid. The intent of the testator controls, and the language of the codicil must inform as to that intent. In this case the self-proving will and holographic codicil together clearly evince testamentary intent by simply referencing the applicable portion of the will to amend. Nonetheless, a genuine issue of material fact exists whether the phrase "begin[n]ing 7-7-03" shows the testator's then-present testamentary intent. Accordingly, this issue is not appropriate for summary judgment but instead presents a question of fact for the jury to resolve. As such, we reverse the decision of the Court of Appeals and remand this case to that court for further remand to the trial court to continue with the proceedings.

On 29 August 2002, the testator, James Paul Allen, executed a typewritten will, drafted by his attorney, that constituted a properly attested self-proving will according to the requirements of North Carolina General Statutes section 31-3.3 (hereinafter "the will"). N.C.G.S. § 31-3.3 (2017). The will included the following relevant dispositions:

> ARTICLE III
>
> I will, devise and bequeath all of my real and personal property of every sort, kind and description, both tangible and intangible, wheresoever located, in fee simple absolute unto, RENA T. ROBINSON . . . .
>
> ARTICLE IV
>
> In the event, RENA T. ROBINSON, does not survive me, I will and devise a life estate unto, MELVIN RAY WOOLARD, in all real property located in Beaufort, Hyde and Washington Counties with a vested remainder therein unto, HOPE PAIYTON ROBINSON and CHRISTIAN ANN ROBINSON, in equal shares, in fee simple absolute, subject to the life estate herein devised unto MELVIN RAY WOOLARD.
>
> ARTICLE V
>
> In the event, RENA T. ROBINSON, does not survive me, I will and bequeath, all remaining real and personal property both tangible and intangible, wheresoever located, to include all farming equipment unto my nephew, MELVIN RAY WOOLARD, in fee simple.

Thus, according to the will, Rena T. Robinson, with whom the testator had a relationship, received the testator's real and personal property in fee simple absolute should she survive him. If she did not, the testator's nephew, Melvin Ray Woolard (Woolard), would receive "all remaining real and personal property both tangible and intangible, wheresoever located." Woolard would likewise receive a life estate "in all real property located in Beaufort, Hyde and Washington Counties" subject to "a vested remainder therein [to] Hope Paiyton Robinson and Christian Ann Robinson" (the Robinsons), the granddaughters of Ms. Robinson.

Sometime after the will's execution, the following handwritten notation[1] was added to the will within the text of Article IV (pages 5 through 6 of the will):

---

1. This opinion references the handwritten notation as "the codicil" based on the term's definition in *Black's Law Dictionary*, which includes that, "[w]hen admitted to probate, the codicil becomes a part of the will." *Codicil*, *Black's Law Dictionary* (10th ed. 2014).

MAYO & MAYO
ATTORNEYS AT LAW
WASHINGTON, N. C.

ARTICLE IV

In the event, RENA T. ROBINSON, does not survive me, I will and devise a life estate unto, MELVIN RAY WOOLARD, in all

BEGINING 7-7-03 DO NOT HONOR ARTICLE IV
VOID ARTICLE IV
James Paul Allen

real property located in Beaufort, Hyde and Washington Counties with a vested remainder therein unto, HOPE PAIYTON ROBINSON and CHRISTIAN ANN ROBINSON, in equal shares, in fee simple absolute, subject to the life estate herein devised unto MELVIN RAY WOOLARD.

Given that the will included no provision benefitting the Robinsons other than Article IV, that notation, if a valid codicil, modifies the will and disinherits the Robinsons in favor of Woolard.

Ms. Robinson died on 5 July 2012, and the testator died on 8 March 2014. On 13 March 2014, Woolard filed an affidavit for probate of the will with the codicil. The testator's niece averred that she found the will among the testator's valuable papers or effects, and two others averred that the codicil matched the testator's handwriting. On 1 October 2015, the Robinsons contested the will, asserting that the handwritten notes did not constitute a holographic codicil to the will. On 10 March 2016, the Clerk of Court transferred the matter to Superior Court, Beaufort County, which granted summary judgment in favor of Woolard and ordered the Clerk of Superior Court to probate the will as modified by the codicil. The Robinsons appealed, arguing that the trial court erred by ruling that the handwritten note disinheriting the Robinsons constituted a valid holographic codicil to the will.

On appeal the Court of Appeals held that, even if the testator handwrote the notation in the margin of the 29 August 2002 will, that notation did not meet the requirements for a valid holographic codicil to the will. *In re Will of Allen*, ___ N.C. App. ___, 801 S.E.2d 380, 385 (2017). Relying on *In re Will of Goodman*, 229 N.C. 444, 50 S.E.2d 34 (1948), and *In re Will of Smith*, 218 N.C. 161, 10 S.E.2d 676 (1940), the court reasoned that, "where the meaning or effect of holographic notes on a will requires reference to another part of the will, the holographic notations are not a valid holographic codicil to the will." *Id.* at ___, 801 S.E.2d at 384. Moreover, the court noted that, "[i]n addition to the requirement

discussed above, a codicil, whether typewritten or handwritten, must establish a present testamentary intention of the decedent, and not merely a plan for a possible future alteration to the decedent's will." *Id.* at ___, 801 S.E.2d at 385. Because the court found it "necessary to incorporate or refer to the contents of 'Article IV' to which the note refers" to understand the handwritten notation and determined that the provision "begin[n]ing 7-7-03" could have been an intent to make a future change to the will, it concluded that the handwritten notation is not a valid holographic codicil to the will. *Id.* at ___, 801 S.E.2d at 385. Thus, the Court of Appeals held the trial court erred in granting summary judgment for Woolard and directed the trial court to grant summary judgment for the Robinsons, the caveators. *Id.* at ___, 801 S.E.2d at 385-86. This Court allowed discretionary review. *In re Will of Allen*, 370 N.C. 693, 811 S.E.2d 158 (2018).

"This Court reviews appeals from summary judgment de novo." *Ussery v. Branch Banking & Trust Co.*, 368 N.C. 325, 334-35, 777 S.E.2d 272, 278 (2015) (citation omitted). A trial court may grant summary judgment if, when viewed in a light most favorable to the nonmoving party, "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 a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2017). Thus, "[t]he movant is entitled to summary judgment . . . when only a question of law arises based on undisputed facts." *Ussery*, 368 N.C. at 334, 777 S.E.2d at 278 (citation omitted). "A genuine issue of material fact 'is one that can be maintained by substantial evidence.' " *Id.* at 335, 777 S.E.2d at 278 (quoting *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' and means 'more than a scintilla or a permissible inference.' " *Id.* at 335, 777 S.E.2d at 278-79 (quoting *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977)).

Regarding wills and codicils, above all, "[t]he discovery of the intent of the testator as expressed in his will is the dominant and controlling objective of testamentary construction, for the intent of the testator[,] as so expressed[,] is his will." *Moore v. Langston*, 251 N.C. 439, 443, 111 S.E.2d 627, 630 (1959) (quoting *Wachovia Bank & Tr. v. Schneider*, 235 N.C. 446, 451, 70 S.E.2d 578, 581 (1952)). Thus, the initial question is whether the language of the codicil can be understood to express testamentary intent. If so, the question for the trial court when considering a motion for summary judgment in a will caveat proceeding is whether that court can determine the testator's intent as a matter of law or

whether there is enough uncertainty about testamentary intent to present the issue as a jury question. *See generally In re Will of McCauley*, 356 N.C. 91, 100-01, 565 S.E.2d 88, 94-95 (2002) (noting that where conflicting evidence exists, summary judgment is inappropriate). "[I]f there is any question as to the weight of evidence[,] summary judgment should be denied." *In re Will of Jones*, 362 N.C. 569, 573-74, 669 S.E.2d 572, 576-77 (2008) (quoting *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 220, 513 S.E.2d 320, 325 (1999)).

A decedent may direct the distribution of his estate upon his death by executing a will. *See* N.C.G.S. § 31-3.2 (2017). "A holographic will is a will . . . (1) [w]ritten entirely in the handwriting of the testator . . . (2) [s]ubscribed by the testator . . . and (3) [f]ound after the testator's death among the testator's valuable papers or effects . . . ." *Id.* § 31-3.4(a) (2017). "A written will, or any part thereof, may be revoked only . . . [b]y a subsequent written will or codicil or other revocatory writing executed in the manner provided . . . for the execution of written wills . . . ." *Id.* § 31-5.1(1) (2017).

"A codicil is a supplement to a will, annexed for the purpose of expressing the testator's after-thought or amended intention." *Smith v. Mears*, 218 N.C. 193, 197, 10 S.E.2d 659, 661 (1940) (citation omitted). "[T]he mere making of a codicil gives rise to the inference of a change in the testator's intention, importing some addition, explanation, or alteration of a prior will." *Armstrong v. Armstrong*, 235 N.C. 733, 735, 71 S.E.2d 119, 121 (1952) (citations omitted). When a codicil does not revoke the entire will, "[t]he codicil and the will considered together as a whole constitute the final disposition of [the] testator's property." *In re Goodman*, 229 N.C. at 446, 50 S.E.2d at 35 (citations omitted).

Whether will or codicil, "[t]he maker [of the instrument] must intend at the time of making that the paper itself operate as a will, or codicil; an intent to make some future testamentary disposition is not sufficient." *In re Will of Mucci*, 287 N.C. 26, 30, 213 S.E.2d 207, 210 (1975); *see also In re Will of Johnson*, 181 N.C. 303, 306, 106 S.E. 841, 842 (1921) (concluding that a decedent's letter asking a friend to prepare a will for him and describing some of the intended provisions in the will, but which the decedent retained in lieu of mailing it to the addressee, was not a will because "[t]here [was] nothing in the paper to show a present purpose that it should be the final disposition of his property"). For holographic wills and codicils specifically, "the instrument itself" must indicate the existence of testamentary intent and be "found among the deceased's valuable papers after his death or in the possession of some person with whom the deceased had deposited it for safekeeping." *In re Mucci*,

287 N.C. at 30-31, 213 S.E.2d at 210 (citations omitted). Otherwise, "the instrument may not, as a matter of law, be admitted to probate." *Id.* at 31, 213 S.E.2d at 211. On the other hand, if "a holographic instrument on its face is *equivocal* on the question of whether it was written with testamentary intent and there is evidence that the instrument was found among the [deceased's] valuable papers . . . the [intent] issue is for the jury and parole evidence relevant to the issue may be properly admitted." *Id.* at 31, 213 S.E.2d at 211 (emphases added) (citations omitted).

Given the nature of a codicil as "an addition, explanation, or alteration of a prior will," a codicil by definition modifies a prior will. *Armstrong*, 235 N.C. at 735, 71 S.E.2d at 121. To be valid a codicil need not quote in its entirety any language of the will it intends to alter, and a court should not isolate the handwritten text from the will itself in construing the codicil. A testator's reference to a specific provision of the will without restating the entire provision is not an impermissible reference to the will. When considering the surrounding circumstances, particularly when the codicil is written on the will itself, the codicil must simply "manifest[ ] the final disposition [a decedent] wished made of her property." *Id.* at 446, 50 S.E.2d at 36. Any requirement to the contrary would undermine the stated purpose of will construction, which is to determine testamentary intent.

Though a holographic codicil by its name implies that all words must be entirely in the testator's handwriting, any typed words appearing on the paper "would not necessarily prevent the probate of a will" if those typed words are "not essential to the meaning of the words in such handwriting." *Id.* at 446, 50 S.E.2d at 35. For example, in *In re Will of Goodman* this Court held that the testator's handwritten notations placed throughout her typewritten, fully executed will constituted "a valid holographic codicil." *Id.* at 447, 50 S.E.2d at 36. There the testator handwrote the following provisions at various places on her typed will, followed by her signature: "To my nephew Burns Elkins 50 dollars"; "Mrs. Stamey gets one-half of estate if she keeps me to the end"; and "My diamond ring to be sold if needed to carry out my will, if not, given to my granddaughter Mary Iris Goodman." *Id.* at 444-45, 50 S.E.2d at 34. In assessing the handwritten provisions, the Court looked to both the handwritten notations themselves and the typed will to determine that the handwritten additions were "not so inconsistent with the provisions of the will as to constitute revocation." *Id.* at 445, 50 S.E.2d at 35. The Court then determined that "[t]he additional words placed by [the testator] on this will written in her own handwriting and again signed by her [were] sufficient, standing alone, to constitute a valid holograph will" because, looking at the surrounding circumstances, the handwritten

portions and typewritten will taken together "manifest[ed] the final disposition she wished made of her property." *Id.* at 446, 50 S.E.2d at 36. While understanding the language "one-half of estate" and "sold if needed" required referencing various provisions of the will, such references did not invalidate the codicil.

The rules applicable to will construction exist to help discern testamentary intent, which is the paramount consideration in evaluating testamentary devises. *See In re Will of Bennett*, 180 N.C. 5, 8, 103 S.E. 917, 918 (1920) (noting that "[t]he object of" the rules governing will construction "is that there may be no doubt as to the intention of the supposed testator"). Therefore, the rules must be applied to accomplish such a purpose, as occurred in *In re Goodman*.

Here the evidence, when viewed in a light most favorable to the nonmoving parties, clearly indicates that the will, including the handwritten provisions, was found among the testator's valuable papers and effects.[2] Moreover, the handwritten notation itself, "DO NOT HONOR ARTICLE IV VOID ARTICLE IV," evinces a clear intent regarding the desired disposition for the items contained in Article IV. Those words themselves explicitly show that the will should be modified to eliminate Article IV. Contrary to the Court of Appeals' conclusion, the testator did not need to rewrite all of Article IV for the handwritten notation to be sufficient.

Given that the language is sufficient to indicate testamentary intent to void Article IV of the will, the remaining question becomes whether the phrase "begin[n]ing 7-7-03" sufficiently indicates *present* testamentary intent. Had the testator simply written the date, no ambiguity would exist. The term "beginning," however, is sufficiently ambiguous to create a genuine issue of material fact sufficient to preclude summary judgment as to whether that provision indicates the required present testamentary intent. *See In re Johnson*, 181 N.C. at 306, 106 S.E. at 842 ("There is nothing in the paper to show a present purpose that it should be the

---

2. As previously noted, a holographic codicil must be entirely in the testator's handwriting. N.C.G.S. § 31-3.4(a)(1). The trial court granted summary judgment in favor of the propounder, concluding no genuine issue of material fact existed regarding whether the testator handwrote every portion of the codicil. Though the parties advanced arguments at the Court of Appeals about whether the provision was entirely in the testator's handwriting, the Court of Appeals did not reach that issue because it reversed the trial court's ruling and remanded for entry of summary judgment for the caveators. *In re Allen*, ___ N.C. App. at ___, 801 S.E.2d at 385. Because the parties did not advance arguments about the handwriting at this Court, we do not reach that issue in this opinion. On remand, the trial court may determine whether to revisit the handwriting issue, i.e., whether a genuine issue of material fact exists whether the handwritten provision was entirely in the testator's handwriting.

final disposition of his property . . . ."). In a case in which an ambiguity exists regarding present testamentary intent, the issue is one for the jury to determine. *See In re Mucci*, 287 N.C. at 31, 213 S.E.2d at 211. Such a factual question related to the language of the notation makes summary judgment inappropriate here.

Thus, while the will and the codicil together clearly evince testamentary intent by simply referencing the applicable portion of the will to amend, a genuine issue of material fact exists whether the phrase "begin[n]ing 7-7-03" indicates present testamentary intent. Therefore, summary judgment is inappropriate here because the issue presents a question of fact properly resolved by the jury. As such, we reverse the decision of the Court of Appeals, and remand this case to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

ANDREA MORRELL, G. PONY BOY MORRELL, AND THE PASTA WENCH, INC.
v.
HARDIN CREEK, INC., JOHN SIDNEY GREENE, AND HARDIN CREEK TIMBERFRAME AND MILLWORK, INC.

No. 318A17

Filed 7 December 2018

1. Landlord and Tenant—lease—exculpatory clause—insurance coverage

The trial court improperly granted summary judgment in favor of defendant Hardin Creek, the landlord in a landlord-tenant dispute, where the lease included a clause waiving liability for negligence. The lease explicitly exempted the parties from all claims and liabilities arising from or caused by any hazard covered by insurance on the leased premises regardless of the cause of the damage or loss.

2. Appeal and Error—record—insufficient

In a case concerning a leaking sprinkler system in a leased building, claims against several defendants were remanded for reconsideration where the record was not sufficiently developed for consideration of the involvement of those defendants.

3. Landlord and Tenant—lease—exculpatory clause—insurance coverage—counterclaims

The trial court correctly granted summary judgment for plaintiffs on a defendant's counterclaims in an action that rose from a leaking sprinkler system in a leased building. An exculpatory clause in the lease for damages covered by insurance barred the counterclaims.

Justice BEASLEY concurring in part and dissenting in part.

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. ___, 803 S.E.2d 668 (2017), reversing an order of summary judgment entered on 27 April 2016 by Judge William Coward in Superior Court, Watauga County, and remanding for further proceedings. On 1 November 2017, the Supreme Court allowed defendants' petition for discretionary review of additional issues. Heard in the Supreme Court on 14 May 2018 in session in the Old Burke County Courthouse in the City of Morganton pursuant to N.C.G.S. § 7A-10(a).

Capua Law Firm, P.A., by Paul A. Capua and Genevieve A. Mente, for plaintiff-appellees.

Wall Babcock LLP, by Joseph T. Carruthers and Lee D. Denton, for defendant-appellants.

MORGAN, Justice.

This contract interpretation case concerns the operation of the provisions of a commercial real estate lease, specifically those terms regarding insurance and liability, when a lessee seeks damages allegedly caused by the lessor's negligence. The specific question before this Court is whether the pertinent provisions of the lease at issue serve as a complete bar to plaintiff lessees' negligence-based claims against some or all of the named defendants, one of which is the lessor. The language of the lease arrangements indicates the clear intent of the parties to discharge each other from all claims and liabilities for damages resulting from hazards covered by insurance, and it is undisputed that the damages claimed by plaintiff lessees resulted from a hazard that was subject to their insurance coverage. Having elected to enter into the lease at issue here, plaintiff lessees are bound by the explicit terms of the contract and therefore are barred from bringing their claims against other

parties to whom the lease applies. Accordingly, we reverse the portion of the decision of the Court of Appeals holding that a critical paragraph in the lease is ambiguous and that, as a result, interpretation of the contract was a matter for a jury to resolve. We remand this matter for further proceedings as described below.

Factual and Procedural Background

Beginning in early 2011, defendant Hardin Creek, Inc. (Hardin Creek), a North Carolina company, began leasing commercial premises in Boone to plaintiff The Pasta Wench, Inc., a specialty pasta manufacturing and distribution business owned and operated by plaintiffs Andrea Morrell and her husband, G. Pony Boy Morrell (G. Morrell). The initial lease, dated 2 February 2011, covered the time period from February 2011 through February 2014, and defined "Landlord" as "Hardin Creek, Inc." and "Tenant" as "Andrea Morrell and G. Morrell (D.B.A.) The Pasta Wench, Inc." Defendant John Sidney Greene (S. Greene) signed the lease as President of Hardin Creek, and both Andrea and G. Morrell signed on behalf of themselves and The Pasta Wench. No other parties or third-party beneficiaries were named in or signed the lease.

The lease was a standard form lease prepared by Hardin Creek, and it included, *inter alia*, several provisions regarding insurance and liability. Relevant to the parties' arguments in this case are portions of two paragraphs. Paragraph 5, titled "Alterations," discusses The Pasta Wench's right, as "Tenant," to alter or remodel the premises to suit its needs and further states in pertinent part:

> (b) Tenant's Neglect. Subject to the provisions set forth in the following sentence, Tenant shall pay for the cost of any repairs or damage resulting from the negligence or the wrongful acts of his employees, representatives or visitors. However, and notwithstanding any other provision of this lease to the contrary, Landlord and Tenant and all parties claiming under them agree and discharge each other from all claims and liabilities arising from or caused by any hazard covered by insurance on the leased premises, or covered by insurance in connection with the property owned or activities conducted on the leased premises, regardless of the cause of the damage or loss, provided that such cause does not prevent payment of insurance proceeds to Landlord under the provisions of the applicable policy.

Paragraph 8, titled "Insurance," provides in its entirety:

> Tenant shall maintain insurance in accordance with the provisions of sub[-]paragraphs (a) and (b) of this paragraph, and Tenant shall indemnify Landlord in accordance with the provisions of sub-paragraph (c).
>
> (a) Property Insurance: Tenant shall hold Landlord harmless for loss or damage by fire with regard to all of Tenant's furniture, fixtures, and equipment about or within the leased premises.
>
> (b) Liability Insurance: Tenant shall provide and keep in force for the protection of the general public and Landlord liability insurance against claims for bodily injury or death upon or near the leased premises and the sidewalks, streets and service and parking areas adjacent thereto to the extent of not less than $500,000.00 in respect to bodily injur[i]es or death to any one person and the extent of not less than $500,000.00 for bodily injuries or death to any number of persons arising out of one accident or disaster, and property damage with limits of not less than $100,000.00. The Tenant shall furnish Landlord with satisfactory evidence of such insurance within thirty (30) days of execution of this lease.

Despite the reference in the first sentence of Paragraph 8 to "subparagraph (c)," there is no subparagraph (c) in Paragraph 8.

In early 2012 an inspection by the North Carolina Department of Agriculture and Consumer Services (NCDA&CS) revealed the need for modifications to the interior layout of the premises to comply with pertinent state regulations governing The Pasta Wench's food production activities. Specifically, the inspection noted the need for the addition of an enclosed ceiling for the "open" kitchen that was being used by lessees Andrea and G. Morrell in their business. Lessees discussed the NCDA&CS requirements with S. Greene and his son, John Ellis Greene (E. Greene). Both S. and E. Greene are licensed general contractors, with the two of them having different business connections to the leased premises. E. Greene owned the building containing the premises that plaintiffs leased, as well as the real property on which the building sits. In addition to owning lessor Hardin Creek, S. Greene also owned and operated defendant Timberframe and Millwork, Inc. (Timberframe), a construction company in the business of building and remodeling residential and commercial buildings.

After learning of the applicable regulatory requirements, Hardin Creek agreed to undertake the kitchen ceiling enclosure project in exchange for the Morrells' promise to extend the term of the lease from February 2014 through December 2018. An "Amending Agreement" attached to the 2011 lease also imposed a series of rent increases, the first of which went into effect on 1 June 2012. However, the Amending Agreement specifically provided that "[a]ll other terms and conditions from the original lease . . . will stay in effect." The parties do not dispute that the insurance and liability-related provisions of the 2011 lease quoted and discussed herein therefore remained in operation at all times relevant to this case.

The kitchen ceiling enclosure project was completed, but in their respective pleadings and depositions in the present case, the parties dispute who performed and supervised the renovation work. S. Greene denied that either he or Timberframe was involved and claimed that the Morrells themselves had supervised the project as the lessees. But, Adam Voss, an employee of Timberframe, testified that he performed the work while employed and being paid by Timberframe and at the direction of S. Greene. Voss also testified that all work on the ceiling project was conducted under the supervision of S. Greene and Timberframe alone. G. Morrell likewise testified that S. Greene had supervised and completed the project using Timberframe personnel.

The kitchen ceiling enclosure project was later discovered to have violated both general building codes and mechanical codes for fire sprinkler systems. The flawed nature of the work to enclose the ceiling of the kitchen was discovered after the mountain municipality of Boone experienced extremely low temperatures in January 2014, causing the fire sprinkler pipes on the leased premises to burst, to flood the Morrells' leased business space, and to destroy the lessees' inventory, ingredients, and specialty equipment. As the lessees, the Morrells claimed that these losses prevented The Pasta Wench from filling pending orders and that they halted new sales. Although the lessees had obtained insurance on the premises that covered the hazard of flooding, nevertheless the benefit limits of the policy that they purchased were insufficient to cover their alleged losses such that The Pasta Wench went out of business.

On 3 December 2014, plaintiff lessees filed an action in Superior Court, Watauga County, alleging negligence and breach of the duty of workmanlike performance against Hardin Creek, S. Greene, and Timberframe; constructive eviction and breach of contract against Hardin Creek; and unfair trade practices against S. Greene and Hardin

Creek. In their complaint, plaintiffs asserted that, after the flooding, they discovered acts and omissions attributable to Hardin Creek, Timberframe, and S. Greene which plaintiffs claim caused, or contributed to, the frozen pipes in the sprinkler system. These allegedly negligent acts and omissions included leaving a vent open near the roof so as to allow the entry of cold air, and establishing a thermal barrier between the newly enclosed kitchen and the open area above it, so as to render the thermostat ineffective for regulating the temperature above the kitchen ceiling where the fire sprinkler system pipes were located.

On 2 March 2015, defendants Hardin Creek, S. Greene, and Timberframe (the original defendants) filed an answer. Along with general denials and admissions, the answer averred that "plaintiffs and defendant Hardin Creek" were the only parties to the lease and that "the other two defendants [S. Greene and Timberframe] did not provide any services to plaintiffs in their (i.e., defendants') names." The original defendants also raised four affirmative defenses: plaintiffs' contributory negligence, assumption of risk, failure to mitigate damages, and the economic loss doctrine. Hardin Creek also reserved its "right to assert other affirmative defenses that become known through discovery." The original defendants also moved to dismiss plaintiffs' negligence, breach of warranty, and unfair and deceptive trade practices claims pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). On 8 March 2016, Hardin Creek amended the answer and added two counterclaims, one alleging that plaintiffs had breached their duty to maintain the premises and the other contending that plaintiffs had violated the terms of the lease. Hardin Creek sought monetary damages for these counterclaims.

On 14 April 2016, the original defendants moved for summary judgment contending, *inter alia*, that plaintiffs' claims against S. Greene and Timberframe must be dismissed because they were not parties to the lease and any work that was performed by Timberframe was on Hardin Creek's behalf. In addition, the original defendants asserted that the lease discharged Hardin Creek "from all claims and liabilities arising from or caused by any hazard covered by insurance . . . regardless of the cause of the damage or loss" pursuant to Paragraph 5(b) of the lease. On the next day, plaintiffs moved to amend their complaint to add E. Greene as a party defendant, alleging negligence and breach of the implied warranty of workmanlike performance. On the same date, plaintiffs filed a motion to continue and to extend the previously determined scheduling deadlines. On 22 April 2016, plaintiffs filed a third-party complaint against E. Greene, bringing all claims alleged in their complaint against him.

On 25 April 2016, the Honorable William Coward heard arguments on all parties' motions. On 27 April 2016, the trial court granted summary judgment in favor of defendants and dismissed the complaint with prejudice. The trial court found that: (1) plaintiffs "presented no plausible reasons why further discovery would shed any light on [P]aragraph 5(b) in the Lease," and (2) "[P]aragraph 5(b) in the lease is not ambiguous and is a complete defense to the claims raised in the Complaint." The trial court *sua sponte* granted summary judgment in favor of plaintiffs on Hardin Creek's counterclaims. Finally, the trial court dismissed with prejudice plaintiffs' third-party complaint against E. Greene and dismissed as moot plaintiffs' motion to amend complaint and motion to continue. Plaintiffs filed their notice of appeal to the Court of Appeals on 20 May 2016.

At the Court of Appeals, plaintiffs argued that the trial court erred in granting summary judgment in favor of defendants. Specifically, plaintiffs contended that the language of Paragraph 5(b) of the lease—that the parties "discharge[d] each other from all claims and liabilities arising from or caused by any hazard covered by insurance . . . regardless of the cause of the damage or loss, provided that such cause does not prevent payment of insurance proceeds to Landlord under the provisions of the applicable policy"—was ambiguous in that it did not clearly reflect the intent of the parties to bar *negligence* claims against each other. A majority of the Court of Appeals panel agreed with plaintiffs, concluding that the trial court's summary judgment ruling was erroneous. *Morrell v. Hardin Creek, Inc.*, ___ N.C. App. ___, 803 S.E.2d 668, 675 (2017). In reaching that result, the majority opined that the references in Paragraph 5(b) to "any hazard covered by insurance" and "payment of insurance proceeds" require that this provision be read in conjunction with Paragraph 8 of the lease, which

> purports to define the type and amount of insurance [d]efendants required [p]laintiffs to carry. Paragraph 8 also includes the terms under which [p]laintiffs would indemnify [d]efendants for damages covered by insurance. However, Paragraph 8 is incomplete. The opening sentence of Paragraph 8 states "Tenant shall maintain insurance in accordance with the provisions of subparagraphs (a) and (b) of this paragraph, and Tenant shall indemnify Landlord in accordance with the provisions of sub-paragraph (c)." The text of subparagraphs (a) and (b) follow this sentence. Subparagraph 8(a), titled "Property Insurance," contains indemnification language and states [p]laintiffs hold Hardin

> Creek harmless for damages or losses caused by fire to [p]laintiffs' furniture, fixtures, and equipment. Subparagraph 8(b), titled "Liability Insurance," defines the types and amounts of liability insurance [d]efendants required [p]laintiffs to carry. There is not a Subparagraph 8(c).
>
> Both [P]aragraph 5(b) and Paragraph 8 refer to limits on Hardin Creek's liability under the lease. The incomplete construction of Paragraph 8 creates an ambiguity as to the type and amount of insurance Hardin Creek required of [p]laintiffs. The incomplete construction of Paragraph 8 also creates an ambiguity relating to the scope of [P]aragraph 5(b). The language the trial court relied on in [P]aragraph 5(b) refers to any "hazard covered by insurance on the leased premises." However, when [P]aragraph 5(b) is read in connection with Paragraph 8, the exact meaning of the term "covered by insurance" is ambiguous. It is unclear whether that term refers to hazards covered only by insurance coverage as required by the lease, or whether that term is modified by the language in the missing subparagraph on indemnification.

Id. at ___, 803 S.E.2d at 674. The majority went on to observe that, even if the lease was unambiguous as to indemnification, the majority still would have concluded that Paragraph 5(b) did not serve as a bar against claims arising out of negligence because a "contract will never be so interpreted [to exempt liability for negligence] in the absence of clear and explicit words that such was the intent of the parties.' *Id.* at ___, 803 S.E.2d at 674 (alteration in original) (quoting *Winkler v. Appalachian Amusement Co.*, 238 N.C. 589, 596, 79 S.E.2d 185, 190 (1953)). Based upon its own cases applying this reasoning, the Court of Appeals reversed the trial court's entry of summary judgment in favor of all defendants and remanded the matter for further proceedings. *Id.* at ___, 803 S.E.2d at 674-76. The court further determined that it could not "review or resolve the issue of the various [d]efendants' degree of involvement in modifying the sprinkler system from our record on appeal" and added that "[t]his is an issue for the trial court which the trial court may be able to resolve upon motion for directed verdict." *Id.* at ___, 803 S.E.2d at 675-76. On remand, the trial court was also directed to "resolve and reconsider [p]laintiffs' motion to add E. Greene as [ ] a defendant to this action" because the trial court's denial of that motion in the first instance was a consequence of its order granting summary judgment in defendants' favor. *Id.* at ___, 803 S.E.2d at 676.

The dissenting judge would have held that the trial court's grant of summary judgment in favor of defendants was proper, based on his conclusion that Paragraph 5(b) "is unambiguous and operates as a complete defense to [all] claims raised by [p]laintiffs." *Id.* at ___, 803 S.E.2d at 676 (Berger, J., dissenting). Quoting *Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 467, 144 S.E.2d 393, 400 (1965), for the proposition that "when the language of the contract and the intent of the parties are clearly exculpatory, the contract will be upheld," the dissenting judge found that the language in Paragraph 5(b)—"notwithstanding any other provision of this lease to the contrary, Landlord and Tenant . . . agree and discharge each other from all claims and liabilities arising from or caused by any hazard covered by insurance . . . , regardless of the cause of the damage or loss"—showed that "the parties clearly and explicitly waived all claims, including claims for negligence." *Id.* at ___, 803 S.E.2d at 676-78. In addition, rather than finding ambiguity in the terms of Paragraph 8 regarding the parties' intent to waive negligence claims against each other, the dissenting judge determined that "[i]ncluding an insurance requirement is evidence of the parties' intent to relieve the other from any liability or damages, including damages related to negligence." *Id.* at ___, 803 S.E.2d at 679.

On 20 September 2017, defendants filed a notice of appeal based upon the dissent in the Court of Appeals. They also filed a petition for discretionary review of additional issues, which this Court allowed on 1 November 2017. *Morrell v. Hardin Creek, Inc.*, ___ N.C. ___, 805 S.E.2d 695 (2017).

Standard of Review

Summary judgment is proper "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 a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2017). A ruling on a motion for summary judgment must consider the evidence in the light most favorable to the non-movant, drawing all inferences in the non-movant's favor. *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citations omitted). The standard of review of an appeal from summary judgment is de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted). Likewise, whether the language of a contract is ambiguous is a question of law to be reviewed de novo. *See Bicket v. McLean Secs., Inc.*, 124 N.C. App. 548, 553, 478 S.E.2d 518, 521 (1996) (citations omitted).

Analysis

A. Claims Against Hardin Creek

[1] "Interpreting a contract requires the court to examine the language of the contract itself for indications of the parties' intent at the moment of execution." *State v. Philip Morris USA Inc.*, 359 N.C. 763, 773, 618 S.E.2d 219, 225 (2005) (citing *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973)). "The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Gould Morris Elec. Co. v. Atl. Fire Ins. Co.*, 229 N.C. 518, 520, 50 S.E.2d 295, 297 (1948) (citation omitted). Although parties may generally contract "to bind themselves as they see fit," "contracts exempting persons from liability for negligence are not favored by the law, and are strictly construed against those relying thereon." *Hall v. Sinclair Ref. Co.*, 242 N.C. 707, 709, 89 S.E.2d 396, 397-98 (1955). For this reason, exculpatory clauses will not be "construed as to exempt the indemnitee from liability for his own negligence or the negligence of his employees in the absence of explicit language clearly indicating that such was the intent of the parties." *Hill v. Carolina Freight Carriers Corp.*, 235 N.C. 705, 710, 71 S.E.2d 133, 137 (1952). Thus, even when the issue before a court is whether an agreement exempts a party thereto from liability for its own negligence, the central question remains the same as in any contract interpretation case: what did the parties intend? "[W]hen the language of the contract and the intent of the parties are clearly exculpatory, the contract will be upheld." *Gibbs*, 265 N.C. at 467, 144 S.E.2d at 400.

As previously noted, the cases relied upon by the majority below are decisions of the Court of Appeals—*William F. Freeman, Inc. v. Alderman Photo Co.*, 89 N.C. App. 73, 365 S.E.2d 183 (1988), and *Lexington Insurance Co. v. Tires Into Recycled Energy & Supplies, Inc.*, 136 N.C. App. 223, 522 S.E.2d 798 (1999), *disc. rev. denied*, 351 N.C. 642, 543 S.E.2d 872 (2000)—that in turn were based upon this Court's decision in *Winkler*. We stated in *Winkler* that "[c]ontracts for exemption from liability for negligence are not favored by the law, and are strictly construed against the party asserting it. The contract will never be so interpreted *in the absence of clear and explicit words that such was the intent of the parties*." *Winkler*, 238 N.C. at 596, 79 S.E.2d at 190 (emphasis added) (citation omitted). A close examination of the facts in *Winkler* is useful in understanding why the Court of Appeals erred in finding that the lease in the instant case was ambiguous regarding the parties' intent to exempt each other for liability for negligence.

Winkler arose from an action brought by the plaintiff-landlord against his tenant for damages incurred when a theater building burned, allegedly as the result of the defendant-tenant's negligent operation of a popcorn machine. *Id.* at 589, 79 S.E.2d at 186. In the trial court, the defendant-tenant asserted, *inter alia*, "that the language of paragraphs 3 and 9 of the lease relieved the defendant from liability for damages by fire, no matter if caused by its own negligence" and the plaintiff-landlord was nonsuited. *Id.* at 594, 79 S.E.2d at 189. On appeal, just as in the instant case, this Court considered whether two lease provisions were ambiguous regarding the parties' intent as to the allocation of risk from the tenant's negligence:

> The first question involved is: Whether the words in the lease in paragraph 9 "the lessees agree that they will, at the expiration of this lease, deliver up and return possession of the premises to the lessors in as good order, repair and condition as at present, ordinary wear and tear excepted, and damage by fire . . . excepted," and the words in paragraph 3 "the lessees . . . shall, at their own cost and expense, *make any and all repairs* that may be necessary inside the portion of the building hereby demised, excepting in case of destruction or damage by fire," exempt the defendant from liability for damage by fire caused by its actionable negligence, if there was such actionable negligence on its part.

Id. at 596, 79 S.E.2d at 190-91 (ellipses in original) (emphasis added). This Court noted the "implied obligation on the part of the lessee to use reasonable diligence to treat the premises demised in such manner that no injury be done to the property, but that the estate may revert to the lessor undeteriorated by the willful or negligent act of the lessee," *Id.* at 594-95, 79 S.E.2d at 189, and then observed:

> Similar words [to those in the theatre lease] have been used in leases for many years to relieve the lessee from any liability caused by accidental fires, or fires caused by the wrongful act of another. Did these words mean that the lessee was to be exculpated from a fire which was the result of its own negligence? Such a concession would scarcely be looked for in a contract between business men. If the parties intended such a contract, we would expect them to so state in exact terms. It would be natural for the lessee, who had contracted to keep up repairs, to desire to escape liability for purely accidental fires and for

> the lessor to be willing to grant that relief, but it would not be natural that the lessor would be willing to release the lessee from damage caused by its own active negligence. In our opinion, the words in paragraphs 9 and 3 of the lease do not exempt the defendant from liability for fire damage, if caused by its actionable negligence.

Id. at 596, 79 S.E.2d at 191. This Court therefore determined that the requirements in paragraphs 3 and 9 that the theatre be returned to the landlord in "good order" and "undeteriorated" other than by ordinary wear and tear, and that the tenant bear the costs of all such needed repairs other than those caused by fire, did not reveal a clear intent to go beyond the typical or "natural" contractual bargain and waive a party's liability for damages caused by that party's own negligence. *Id.* at 598, 79 S.E.2d at 192.

The Court went on in *Winkler* to reject the defendant-tenant's contention that another paragraph of the lease providing "that the lessor shall keep the building insured to the extent of its full insurable value[ ] exculpate[d] the defendant from liability for fire damage caused proximately by its negligence." *Id.* at 597, 79 S.E.2d at 191. While acknowledging that "[u]pon paying a loss by fire, the insurer is entitled to subrogation to the rights of insured against the third person tort-feasor causing the loss, to the extent of the amount paid," the Court opined that the fact "that the insurer is entitled to recoup its loss out of what the defendant owes the plaintiff for having negligently destroyed the insured building is of no legal concern to the defendant." *Id.* at 597-98, 79 S.E.2d at 191-92. Accordingly, the Court concluded that "the language in the [theatre] lease does not expressly or impliedly exempt the defendant from liability for any damage by fire to the demised premises caused proximately by its negligence." *Id.* at 598, 79 S.E.2d at 192.

The language in Paragraph 5(b) in the case at bar cited as exculpatory by defendants and in the Court of Appeals dissent is readily distinguishable from the provisions in *Winkler* that were deemed to lack a clear demonstration of the parties' intent to indemnify each other for negligence. Rather than merely referring to the tenant's duty to return the premises in "good order" and to "make any and all repairs," the lease here explicitly exempted the parties "from *all claims and liabilities* arising from or caused by *any hazard* covered by insurance on the leased premises . . . *regardless of the cause of the damage or loss*." (Emphasis added). Indeed, plaintiffs acknowledge that "this language is broad and expansive enough to encompass a wide range of claims against Hardin Creek," while asserting that "it is that very breadth that

makes the clause unable to satisfy the exacting standard under North Carolina law for relieving Hardin Creek from liability for its own negligence." Plaintiffs' chameleonic construction of this contractual language is unworkable. Given the "broad and expansive" nature of the phrase "all claims and liabilities . . . regardless of the cause of the damage or loss," it is a challenging exercise to conjure up language in an exculpatory clause that would meet plaintiffs' implied standard for unambiguity regarding waiver of negligence-based claims other than to require such a waiver to explicitly mention the term "negligence." Neither *Winkler* nor any other precedent from this Court, however, requires that a contract expressly include the term "negligence" in order for an exculpatory clause to be enforced in the context of negligence claims. Instead, such provisions must simply contain "clear and explicit words that such was the intent of the parties." *Winkler*, 238 N.C. at 596, 79 S.E.2d at 190 (citation omitted). Here the phrase "from *all claims* and liabilities arising from or caused by any hazard covered by insurance on the leased premises . . . regardless of the cause of the damage or loss" is explicitly and effectively exculpatory as to "all claims," including those grounded in tort and caused by Hardin Creek's alleged negligence, which result from a "hazard covered by insurance . . . regardless of the cause of the damage or loss." (Emphasis added).

Plaintiffs argue that the language in Paragraph 5(b) cannot be read to obligate them to indemnify Hardin Creek from liability for claims for business losses—not covered by insurance—arising from Hardin Creek's negligence or other misconduct. Plaintiffs misapprehend the lease provision. A plain reading of Paragraph 5(b) reveals that the only limit on the scope of the exculpatory clause is not the type of *losses* suffered, but the type of *hazard* that caused those losses. If the hazard that caused plaintiffs' alleged damages was covered by insurance—and it is undisputed that the hazard of flooding that caused plaintiffs' alleged damages was covered by insurance—then plaintiffs are barred from bringing an action against Hardin Creek for "all claims and liabilities" caused thereby, including "business losses."

The dissent views the language at issue in Paragraph 5(b) of the lease in such a manner so as to gratuitously equate plaintiffs' interpretation of said language with defendants' construction of this provision. In examining this disputed language and evaluating the parties' respective positions concerning it, the dissent concludes that "each provides a plausible interpretation of the plain language." Based on the faulty premise that plaintiffs' version of the legal effect of the contested language in Paragraph 5(b) substantively establishes an ambiguity in the

provision's terminology, the dissent thereupon conveniently applies well-established rules of contract interpretation pertaining to ambiguities and resorts to consultation of other provisions of the lease in an effort to cultivate an ambiguity which was not planted in the contract. This approach is further exacerbated by the dissent's resolve to both stretch and invert this Court's reasoning in *Winkler* in an attempt to rationalize the applicability of such reasoning to the parties in the instant case, even though they occupy diametrically opposite positions from the parties in *Winkler*. Due to an initial erroneous supposition that plaintiffs' depiction of Paragraph 5(b)'s language at issue as ambiguous is meritorious, coupled with a misplaced reliance on the applicability of N.C.G.S. § 22B-1's public policy declarations which do not apply to a building outside of a contract "relative to the design, planning, construction, alteration, repair or maintenance," the dissent's resulting analyses are misoriented and the ultimate conclusions are unwarranted.

We likewise reject plaintiffs' contention that the above-quoted portion of Paragraph 5(b) is a waiver of subrogation clause that must be interpreted in context with the other provisions of the lease respecting insurance and not be enforced beyond the scope of the specific context in which it appears. In plaintiffs' view, this Court must look to the terms of Paragraph 8, which covers insurance requirements under the lease, to understand the parties' intent in Paragraph 5(b). Paragraph 8 required plaintiffs to maintain property insurance to "hold Landlord harmless for loss or damage by fire" and to maintain liability insurance to protect "the general public and Landlord . . . against claims for bodily injury or death." Plaintiffs suggest that those requirements delimit the reference to "any hazard covered by insurance on the leased premises" in Paragraph 5(b), and as a result, Paragraph 8 would not require plaintiffs to maintain property insurance for flood damage or for property damage greater than $100,000.00, and the exculpatory language in Paragraph 5(b) cannot apply to claims arising from those hazards. In effect, plaintiffs ask this Court to read into Paragraph 5(b) the equivalent of the following bracketed language:

> Landlord and Tenant and all parties claiming under them agree and discharge each other from all claims and liabilities [other than negligence and intentional torts] arising from or caused by any hazard covered by insurance [as specifically required under the terms of Paragraph 8 of this lease] on the leased premises, or covered by insurance [as specifically required under the terms of Paragraph 8 of this lease] in connection with the property owned or activities

> conducted on the leased premises, regardless of the cause of the damage or loss [excepting intentional or negligent acts of the Landlord], provided that such cause does not prevent payment of insurance proceeds to Landlord under the provisions of the applicable policy[; and with the proviso that the minimum policy limits of the insurance required in Paragraph 8 shall serve as the limits on the liability for claims brought pertinent to this provision].

The parties here could have entered into such an agreement that included the imagined terms bracketed above, which plaintiffs intimate should be inferred in construing Paragraph 5(b), but the parties did not do so. This Court cannot creatively interpret the parties' actual lease agreement in the manner urged by plaintiffs, and must instead enforce the parties' intent as evidenced by the clear and explicit language of the lease. *See Dawes v. Nash County*, 357 N.C. 442, 449, 584 S.E.2d 760, 764 (2003) (stating that "courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein" (quoting *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978))). The lease executed by plaintiffs and Hardin Creek unequivocally demonstrates the parties' intent to hold each other harmless regarding *all* liability for damage and loss arising from hazards covered by the insurance obtained for the premises. The parties do not dispute that the flooding of plaintiffs' leased premises was a hazard covered by insurance on the premises. Plaintiffs' complaint does not allege that the acts or omissions of any defendant prevented payment of insurance proceeds that became due as the result of covered hazards, although the complaint alleges that plaintiffs' damages exceeded their insurance policy limits. The trial court was correct in finding that Paragraph 5(b) is unambiguous and functions as a complete defense to plaintiffs' claims lodged against Hardin Creek, the only defendant that was undisputedly a party to the contract. Accordingly, we reverse the decision of the Court of Appeals with regard to all of plaintiffs' claims with regard to Hardin Creek and find that the trial court properly granted summary judgment in favor of Hardin Creek.

B. Claims Against S. Greene, Timberframe, and E. Greene

[2] The trial court granted summary judgment in favor of defendants S. Greene and Timberframe and also dismissed plaintiffs' third-party complaint against E. Greene with prejudice. The dissent below did not address these issues, but the Court of Appeals majority determined that the case should be remanded to the trial court to reconsider both

matters. We agree with the lower appellate court's approach regarding these claims, in light of the insufficiency of the record to allow this Court to fully assess the correctness of the trial court's allowance of the dispositive motions of defendants S. Greene, Timberframe, and E. Greene.

Although we reverse the Court of Appeals in its erroneous analysis of the lease, we agree that the record is not sufficiently developed for our consideration of the involvement of Timberframe and the individual defendants regarding modifications to the premises. Therefore, we remand these matters to the trial court for reconsideration of the remaining claims.

C. Hardin Creek's Counterclaims

[3] As previously noted, Hardin Creek's counterclaims for negligence and breach of contract were dismissed *sua sponte* by the trial court pursuant to N.C.G.S. § 1A-1, Rule 56(c). At the time that the trial court dismissed these counterclaims, no discovery had been conducted with respect to them, and they were not argued by the parties at the hearing on defendants' summary judgment motion. Under these circumstances, Hardin Creek contends that the basis for the trial court's dismissal of said counterclaims could only have been that the exculpatory clause, applying equally to Hardin Creek and to plaintiffs, concomitantly provided a complete defense to plaintiffs' claims and Hardin Creek's counterclaims. We agree that this is the only reasonable interpretation of the trial court's order, and therefore proceed on this premise.

In the Court of Appeals, Hardin Creek's brief addressed the dismissal of its counterclaims as follows:

> Without diminishing the strength of [d]efendants' argument that the Exculpatory Clause is valid and enforceable and bars [p]laintiffs' claims, [d]efendants, in the alternative, ask the [Court of Appeals] to apply the Exculpatory Clause equally to both parties; and if the summary judgment in favor of [d]efendants is reversed, the [c]ourt should reverse the dismissal of the counterclaims.

Plaintiffs characterized this language as only summarily addressing the dismissal of the counterclaims, and the Court of Appeals agreed, opining:

> [d]efendants fail to argue this issue and do not present this [c]ourt with a reason to disturb the trial court's order granting summary judgment in favor of [p]laintiffs as to [d]efendants' counterclaims. Defendants have abandoned this issue on appeal, and we consequently affirm the trial court's ruling as to [d]efendants' counterclaims.

Id. at ___, 803 S.E.2d at 676. We believe the Court of Appeals erred in determining that Hardin Creek abandoned this issue on appeal.

Whether the trial court erred in its resolution of Hardin Creek's counterclaims against plaintiffs depended on the same essential issue as did consideration of the trial court's resolution of plaintiffs' claims against Hardin Creek, namely, a determination of the meaning and effect of the exculpatory clause. Accordingly, the same facts, arguments, and authorities were pertinent to this element of the case. A repetition of these facts, arguments, and authorities would have served no useful purpose. Under the specific circumstances presented here, we therefore conclude that Hardin Creek did not abandon its counterclaims issue on appeal and instead sufficiently presented the matter for review.

In light of our determination that the exculpatory clause bars plaintiffs' claims against Hardin Creek, this provision also bars Hardin Creek's counterclaims against plaintiffs. Therefore, although we disavow the reasoning and holding of the Court of Appeals with regard to preservation of the counterclaims issue on appeal, the ultimate result as to the resolution of Hardin Creek's counterclaims remains the same. The trial court's grant of summary judgment in favor of plaintiffs on defendant Hardin Creek's counterclaims is upheld.

Conclusion

We affirm in part, affirm in part as modified, and reverse in part the decision of the Court of Appeals, and we remand this matter to that court for further remand to the trial court. While the summary judgment order is left undisturbed with regard to the claims of plaintiffs against Hardin Creek and Hardin Creek's counterclaims against plaintiffs, on remand the trial court should consider plaintiffs' claims against the other original defendants, plaintiffs' motion to add E. Greene as a defendant, and any discovery motions implicated thereby.

AFFIRMED IN PART; MODIFIED AND AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Justice BEASLEY, concurring in part and dissenting in part.

The majority today holds that an exculpatory clause in a commercial lease absolves the landlord from liability for his improper construction or oversight of construction of improvements pursuant to a lease modification agreement. In doing so, the majority construes the written contract in favor of the drafter, construes an exculpatory clause in favor

of the party benefiting thereunder, and approves of the grant of summary judgment in a case in which multiple genuine issues of material fact have yet to be determined. For these reasons, I must respectfully dissent in part from the majority's opinion.

Plaintiffs' claims against defendants included: (1) negligence against John Sidney Greene (S. Greene), Hardin Creek, Inc. (Hardin Creek), and Hardin Creek Timberframe and Millwork, Inc. (Timberframe); (2) breach of the implied warranty of workmanlike performance against the same defendants; (3) constructive eviction against Hardin Creek; (4) breach of the lease agreement's covenant of quiet enjoyment against Hardin Creek; and (5) unfair and deceptive trade practices against S. Greene and Hardin Creek.

In their motion for summary judgment, defendants alleged that Hardin Creek "was the entity responsible for getting the modifications done" and, therefore, no claim of negligence against S. Greene or Timberframe could lie. Defendants further alleged that there was no privity of contract between plaintiffs and S. Greene, or between plaintiffs and Timberframe and, therefore, no claims for breach of the implied warranty of workmanlike performance could lie against these defendants. Defendants alleged that Hardin Creek "was ready, willing, and able to restore the premises" after the flooding event, but plaintiffs quit the lease before repairs could be made. Therefore, defendant Hardin Creek could not be liable for constructive eviction or breach of the covenant of quiet enjoyment. Finally, defendants argued that paragraph 5(b) of the lease discharged any liability of Hardin Creek to plaintiffs as to all five of the claims brought against it.

The trial court found that paragraph 5(b) was "a complete defense to the claims raised in the Complaint" and that there were no genuine issues of material fact with respect to any of the claims raised in plaintiffs' complaint or the counterclaims raised in defendants' amended answer. The Court further found that plaintiffs' third-party complaint raised the same claims as the original complaint and was "substantively and substantially identical to the proposed Amended Complaint." Based upon those findings, the trial court summarily dismissed all claims against all parties.[1]

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1. Although the Court of Appeals did not reach this issue, I am compelled to briefly note the troubling litigation tactics employed by defendants in this case, which plaintiffs did raise on appeal to the Court of Appeals.

Defendants did not fully respond to discovery until being compelled by court order to do so on 26 February 2016, more than one year after discovery requests were first filed.

Analysis

I. Standard of Review

When the trial court allows or denies a motion for summary judgment, we review that ruling de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citing *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). Summary judgment is appropriate "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 a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2017).

"[T]he real purpose of summary judgment is to . . . pierce the pleadings and determine whether there is a genuine issue of material fact," *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972), in order to "eliminate formal trials where only questions of law are involved." *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). "The party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of fact."

Over the next six weeks, plaintiffs learned that legal title to the leased premises was actually vested in S. Greene's son and that a previously undisclosed agency relationship existed, and their counsel was flooded with an amended answer containing counterclaims, 1,200 pages of new discovery, six scheduled depositions (two of which were expert witnesses that defendants cancelled just days prior), a mediation conference, a motion to strike, and a motion for summary judgment, which defendants noticed for 10:00 a.m. on 25 April 2016 with a request that it not *actually* be heard until after 4:00 p.m., or the next day, or later in the week, because the parties' previously scheduled mediation was *also* being held at 10:00 a.m. that same day. Plaintiffs moved to continue the hearing and were being heard on that motion when the trial court abruptly ordered summary judgment, in part *sua sponte*, for all defendants. Plaintiffs have, by all accounts, prosecuted their claims diligently and in good faith, while defendants have benefited from dilatory and prejudicial tactics.

Rule 6(b) of the North Carolina Rules of Civil Procedure provides that the trial court may, in its discretion and upon a showing of cause, enlarge the time within which any act is required to be done. N.C.G.S. § 1A-1, Rule 6(b) (2017). In deciding whether, in its discretion, to grant a motion for continuance, the chief consideration is whether the grant or denial will be in furtherance of substantial justice. *Shankle v. Shankle*, 289 N.C. 473, 483, 223 S.E.2d 380, 386 (1976). Additionally, we have stated that "it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so." *Conover v. Newton*, 297 N.C. 506, 512, 256 S.E.2d 216, 220 (1979). It is clear from the record before us that multiple issues of fact remained to be determined, that plaintiffs had diligently pursued discovery for the preceding nine months, and that plaintiffs reasonably expected to be given an opportunity to flesh out those remaining issues of fact by completing discovery. This Court would certainly have benefited from a more fully developed record. Under these circumstances, I would hold that the trial court abused its discretion in denying plaintiffs' motion to continue.

Singleton, 280 N.C. at 464, 186 S.E.2d at 403 (citation omitted). "An issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or establish any material element of a claim or defense." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citing *Bone International, Inc. v. Brooks*, 304 N.C. 371, 375, 283 S.E.2d 518, 520 (1981)).

II. Scope of Exculpatory Clause

Because the trial court allowed summary judgment solely based on paragraph 5(b) of the lease agreement, this is principally a matter of contract interpretation. "The heart of a contract," i.e., the genuine issue, "is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Gould Morris Elec. Co. v. Atl. Fire Ins. Co.*, 229 N.C. 518, 520, 50 S.E.2d 295, 297 (1948). When the intent of the parties is clearly expressed in a written contract that contains no ambiguities requiring resort to extrinsic evidence or consideration of disputed facts, the contract may be interpreted as a matter of law. *Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E.2d 622, 624 (1973). However, when an ambiguity exists, the intention of the parties is a genuine issue of material fact to be determined by the jury, and summary judgment is inappropriate. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 525, 723 S.E.2d 744, 748 (2012) (finding summary judgment improper when parties disputed the meaning of a provision in their contract and construction of the document was required to ascertain their intent).

"An ambiguity exists in a contract when either the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations." *Id.* at 525, 723 S.E.2d at 748 (quoting *Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs.*, 362 N.C. 269, 273, 658 S.E.2d 918, 921 (2008)); *see also St. Paul Fire & Marine Ins. Co. v. Freeman-White Assocs.*, 322 N.C. 77, 366 S.E.2d 480 (1988) (finding dismissal improper when parties' disagreement about extent of insurance waiver provisions and assignment of risk of loss indicated ambiguity). The majority declares that the lease uses "clear and explicit language" which "unequivocally demonstrates the parties' intent to hold each other harmless regarding *all* liability for damage and loss arising from hazards covered by the insurance obtained for the premises."

But the parties contest the applicability and scope of the subparagraph at issue, and each provides a plausible interpretation of the plain language thereof. The entire provision disputed by the parties reads as follows:

> (b) Tenant's Neglect. Subject to the provisions set forth in the following sentence, Tenant shall pay for the cost of any repairs or damage resulting from the negligence or the wrongful acts of his employees, representatives or visitors. However, and notwith-standing any other provision of this lease to the contrary, Landlord and Tenant and all parties claiming under them agree and discharge each other from all claims and liabilities arising from or caused by any hazard covered by insurance on the leased premises, or covered by insurance in connection with the property owned or activities conducted on the leased premises, regardless of the cause of the damage or loss, provided that such cause does not prevent payment of insurance proceeds to landlord under the provisions of the applicable policy.

Defendants argue that, under this provision of the lease, if the hazard is covered by insurance, then all claims and liabilities arising out of that hazard are discharged, regardless of the amount of insurance and regardless of the nature of the claim. Plaintiffs contend that the same language releases each party from liability for "any claim" that is (1) caused by hazard and (2) covered by insurance. The majority opinion adopts defendants' interpretation by zeroing in on the words "all claims . . . arising from . . . any hazard covered by insurance." In doing so, the majority asserts that the plain reading is that "covered by insurance" modifies "hazard," not "claims," and therefore, if the hazard that caused the damage was covered by insurance, plaintiffs are barred from bringing *any* claim against defendant landlord related to that hazard. While this is certainly a reasonable interpretation of that language, so too is the interpretation offered by plaintiffs. Because both interpretations of the exculpatory clause are reasonable, a genuine issue of material fact remains, and the task of ascertaining the true intent of the parties at the time of contract formation is one for the jury, not the Court.

Despite asserting that the language is "clear and explicit," the majority goes on to construe that language, and does so in contravention of well-established rules of interpretation by resolving the ambiguity in favor of the drafter, *Root v. Allstate Ins. Co.*, 272 N.C. 580, 585, 158 S.E.2d 829, 834 (1968) (noting the rule that any "ambiguity in a written contract is to be construed against the party who prepared the instrument" (citing *Wilkie v. New York Mut. Life Ins. Co.*, 146 N.C. 513, 521, 60 S.E. 427, 430 (1908)); expressly declining to consider the contract provision in the context of the whole agreement, *Jones v. Casstevens*, 222 N.C. 411, 413-14, 23 S.E.2d 303, 305 (1942) (stating the rule that

"[s]ince the object of construction is to ascertain the intent of the parties, the contract must be considered as an entirety" (quotation and citation omitted)); and, rather than strictly construing the exculpatory clause, giving it the broadest possible interpretation, *Hall v. Sinclair Ref. Co.*, 242 N.C. 707, 709, 89 S.E.2d 396, 397-98 (1955) (noting that "contracts exempting persons from liability for negligence are not favored by the law, and are strictly construed against those relying thereon"); *Hill v. Carolina Freight Carriers Corp.*, 235 N.C. 705, 710, 71 S.E.2d 133, 137 (1952) (stating that strict construction requires "explicit language clearly indicating that such was the intent of the parties"). The majority also fails to adhere to the principle that, in this procedural posture, we are required to view the evidence in the light most favorable to the nonmovant, the plaintiff lessees. These rules combine to mean that, in this case, any time we are asked to choose between the meaning assigned by or most favorable to defendant landlord (the drafter and party seeking benefit of the exculpatory clause) and the meaning assigned by or most favorable to plaintiff lessees, the latter must prevail for purposes of determining whether summary judgment was appropriate. Not only that, but to give the language the meaning urged by defendants, we must find that it clearly and expressly states the parties intention to exculpate defendant from liability for his own negligence, and is clearly not susceptible to the meaning offered by plaintiffs.

The majority distinguishes the contract provision at issue here from the provision considered by this Court in *Winkler v. Appalachian Amusement Co.*, 238 N.C. 589, 79 S.E.2d 185 (1953). The majority finds the distinction between the exculpatory language at issue in *Winkler* and this lease's exculpatory language so significant as to warrant a completely contrary holding. But the underlying reasoning of the holding in *Winkler* is entirely applicable to the case at bar. There we noted that:

> It would be natural for the lessee, who had contracted to keep up repairs, to desire to escape liability for purely accidental fires and for the lessor to be willing to grant that relief, but it would not be natural that the lessor would be willing to release the lessee from damage caused by its own active negligence.

Id. at 596, 79 S.E.2d at 190-91. The same reasoning is applicable here where the liabilities are reversed. It would be natural for the lessor, who had contracted to make a repair, to desire to escape liability for purely accidental hazards and for the lessee to be willing to grant that relief, but it would not be natural that the lessee would be willing to release the lessor from damage caused by the lessor's own active negligence. In *Winkler* we concluded that the language at issue did not evince a clear

intent to go beyond the "natural" contractual bargain by waiving one party's liability to the other for its own active negligence. *Id.* at 596, 79 S.E.2d at 191. Evidence of that clear intent is necessary because, as the majority correctly notes, we must strictly construe contracts that purport to exempt a party from its own negligence. *Hall*, 242 N.C. at 709, 89 S.E.2d at 397-98.

I agree with plaintiffs that the broad and expansive language of paragraph 5(b) cannot be read by this Court to explicitly express an intention that the lessor be exculpated from its own active negligence. This argument is not "chameleonic." It is a correct interpretation of this Court's holdings spanning more than sixty years. *See*, *e.g.*, *Schenkel & Shultz*, 362 N.C. at 274-75, 658 S.E.2d at 922 (distinguishing indemnity clauses which may be broadly construed "to cover all losses, damages, and liabilities which reasonably appear to have been within the contemplation of the parties" from exculpatory clauses which "are not favored by the law" and must be "strictly construed against the party asserting it" (first quoting *Dixie Container Corp. v. Dale*, 273 N.C. 624, 627, 160 S.E.2d 708, 711 (1968), then quoting *Hill*, 235 N.C. at 710, 71 S.E.2d at 137)); *Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 467, 144 S.E.2d 393, 400 (1965) (noting that in "contracts whereby one seeks to wholly exempt himself from liability for the consequences of his negligent acts," both the language of the contract and intent of the parties must be "clearly exculpatory" and will be strictly construed (citing *Winkler*, 238 N.C. 589, 79 S.E.2d 185)); *Dixie Fire & Cas. Co. v. Esso Standard Oil Co.*, 265 N.C. 121, 126, 143 S.E.2d 279, 283 (1965) (strictly construing lease provision requiring lessor to make all repairs and declining to exempt lessee from its own negligence thereunder); *Hill*, 235 N.C. at 710, 71 S.E.2d at 137 (noting the "universal rule" that a clause exempting a person from liability for his own negligence is "strictly construed against the party asserting it"); *cf. Hall*, 242 N.C. at 709-11, 89 S.E.2d at 397-98 (strictly construing a contract provision which discharged a defendant "from any and all claims, demands and liability for any loss, damage, or injury, . . . by reason of any other casualty, whether due to the negligence of [the defendant] or otherwise" and finding the language sufficiently clear and explicit (first alteration in original)). If a party intends to be released from liability for its own active or passive negligence, it must so state in explicit terms. Hardin Creek did not. I can find no reason why the language at issue here differs so materially from that at issue in *Winkler* as to require a contrary holding.

The majority also rejects outright plaintiffs' reasonable contention that the exculpatory clause must be interpreted in the context of the whole agreement, particularly with respect to the other provisions of

the lease requiring coverage by insurance. The Court of Appeals correctly looked to the entire contract, noting that the phrases in paragraph 5(b)—"any hazard covered by insurance" and "payment of insurance proceeds"—required reference to another paragraph of the lease setting out the parties' intentions as to the required insurance coverages and the assignment of risk between them. *Morrell v. Hardin Creek, Inc.*, ___ N.C. App. ___, ___, 803 S.E.2d 668, 674 (2017). The majority today claims that it cannot look to other provisions of the lease without adding language to the disputed paragraph explicitly referencing the other provision. I can find no support in the law for this reasoning. In fact, the majority's rationale appears contrary to the fundamental law of contracts. *See, e.g.*, Restatement (Second) of Contracts § 202(2) (Am. Law Inst. 1979) ("A writing is interpreted as a whole . . . ."); 17A C.J.S. *Contracts* § 399, at 287 (collecting cases and stating the rule that "[a] contract must be interpreted or considered as a whole, or in its entirety"); R. Lord, 11 Williston on Contracts § 32:1, at 603 (4th ed. 2012) ("Primary rules of interpretation are always used by the courts to determine the meaning of particular words or clauses found in a contract, and the contract as a whole, regardless of whether the parties' writing is clear or ambiguous."). It is not necessary that paragraph 5(b) expressly reference paragraph 8. We need not be directed by the drafter to look at another paragraph. Our rules of construction require that we do so to ascertain the meaning which, as nearly as possible, approximates the parties' intentions at the time of contract formation. *Atl. & N.C. R. Co. v. Atl. & N.C. Co.*, 147 N.C. 368, 61 S.E 185, 189-90 (1908) (discussing the need to review contract language in light of the whole agreement). The majority acknowledges that its reading of the disputed paragraph requires reference to "the insurance obtained for the premises" and then refuses to consider the text of the lease setting out what that insurance might be. We are required to construe the language of paragraph 5(b) not as a singular clause, but as a clause contained within a larger paragraph which is part of the whole contract which in its totality expresses the intention of the parties. Determining the intention of the parties requires reference to the entire contract. Again, the task of ascertaining the parties' intention at the time of contract formation is one for the jury, not this Court.

Additionally, I agree with plaintiffs that, by statute, this promise to alter the building cannot include a waiver of liability for negligence[2] because such agreements are explicitly against public policy:

2. In addition to the statutory mandate that one who contracts to improve a building may not seek to exculpate himself for negligence relative thereto, the landlord who undertakes to make repairs is also under a duty, implied by law, to do so with care. *Bolkhir ex rel. Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988). Additionally,

> Any promise or agreement . . . relative to the . . . alteration, repair or maintenance of a building . . . purporting to indemnify or hold harmless the promisee, the promisee's independent contractors, agents, employees, or indemnities against liability for damages arising out of . . . damage to property proximately caused by or resulting from the negligence . . . of the promisee, its independent contractors, agents, employees, or indemnitees, is against public policy and is void and unenforceable.

N.C.G.S. § 22B-1 (2017).[3] Therefore, even if we assume, *arguendo*, that the parties originally intended to discharge the lessor from liability for his own negligence, to the extent that the agreement for the alteration of the building incorporated paragraph 5(b), the exculpatory clause cannot apply to the lessor's promise to alter the building. Our General Assembly has expressly declared such a promise to be void as against public policy, and this Court therefore has no jurisdiction to enforce it. *See Associated Mech. Contractors, Inc. v. HDR Eng'g Inc. of the Carolinas*, 178 F.3d 1282, 1999 WL 253539, at *5 (per curiam) (unpublished) (4th Cir. 1999) (noting that the statute allows the promisor to indemnify the promissee for damages caused solely by the promisor's negligence, but that defendant's indemnification provision could not be otherwise enforced); *accord Jackson v. Associated Scaffolders & Equip. Co.*, 152 N.C. App. 687, 690-91, 568 S.E.2d 666, 668 (2002) (applying the statute to hold indemnity clause in construction contract void as against public policy and therefore unenforceable).

Conclusion

I would hold that determination of the full scope of paragraph 5(b) relative to the alteration of the leased premises is a genuine issue of material fact that ought to be submitted to a jury and that the trial court

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enforcement of exculpatory clauses between parties whose legal relationship gives rise to special duties is against public policy. *See Hall*, 242 N.C. at 710, 89 S.E.2d at 398 (recognizing that public policy prohibits a public utility from contracting to discharge its own negligence and that "[t]he limitation is likewise uniformly applied to certain relationships such as that of master and servant" (quoting *Miller's Mut. Fire & Ins. Ass'n of Alton, Ill. v. Parker*, 234 N.C. 20, 22, 65 S.E.2d 341, 342 (1951))).

3. The majority contends that the statute is inapplicable because the contract between the parties is not "relative to the design, planning, construction, alteration, repair or maintenance" of a building. This assertion fails, however, to recognize that the damage involved was, at least arguably, caused by the negligent "alteration" of the building by S. Greene who very well may have been acting at the time in his capacity as a licensed general contractor, rather than in his capacity as agent for the landlord. Again, these are genuine issues of material fact more appropriately resolved by a jury.

must determine whether, to the extent the exculpatory clause purports to shield defendants from liability for their own negligence in altering the building, it is void as against public policy. I would also hold that paragraph 5(b) is ambiguous as demonstrated by the parties' differing, reasonable interpretations of its meaning; and that resolution of the ambiguity requires determination of issues of fact properly within the province of the jury. Consequently, I would affirm the decision of the Court of Appeals below which held that the trial court erred in allowing the motion for summary judgment in favor of defendant Hardin Creek and remand to that court with instructions to further remand for determination of these issues by the trial court.

I concur in that part of the majority's opinion which affirms the Court of Appeals' decision to remand this matter to the trial court for reconsideration of the liability of the remaining parties; however, I dissent as to that part of the opinion which concludes that the lease provision at issue is a complete bar to plaintiffs' claims against Hardin Creek, and for the same reasons, I also dissent as to that part of the majority's opinion which disavows the Court of Appeals' decision with regard to preservation of defendants' counterclaims.

NORTH CAROLINA ACUPUNCTURE LICENSING BOARD
v.
NORTH CAROLINA BOARD OF PHYSICAL THERAPY EXAMINERS

No. 380A17

Filed 7 December 2018

Physical Therapy—declaratory ruling issued by Board of Physical Therapy Examiners—dry needling as physical therapy—consistent with statutes and administrative rules

Where the N.C. Board of Physical Therapy Examiners (Physical Therapy Board) issued a declaratory ruling that dry needling constitutes physical therapy, the Supreme Court affirmed the decision of the Business Court upholding the declaratory ruling. Because the Physical Therapy Board's declaratory ruling and underlying policy statement were consistent with the statutes and administrative rules that the Board was charged with interpreting and administering, the Supreme Court deferred to the Board's interpretations of those same statutes and rules in concluding that dry needling is a

part of the practice of physical therapy. The Supreme Court rejected the N.C. Acupuncture Licensing Board's arguments that the Physical Therapy Board inappropriately used a policy statement to usurp the authority of the Rules Review Commission, that the Physical Therapy Board expanded the scope of the practice of physical therapy in contravention of the Administrative Procedure Act, and that dry needling could not be part of the practice of physical therapy because it is acupuncture.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order and opinion on petition for judicial review dated 2 August 2017 entered by Judge Louis A. Bledsoe, III, Special Superior Court Judge for Complex Business Cases, in Superior Court, Wake 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 18 April 2018.

Everett Gaskins Hancock LLP, by E.D. Gaskins, Jr., Katherine A. King, and James M. Hash; and Stevens Martin Vaughn & Tadych, PLLC, by Michael J. Tadych, for plaintiff-appellant.

Ellis & Winters LLP, by Stephen D. Feldman, James M. Weiss, and Troy D. Shelton, for defendant-appellee.

JACKSON, Justice.

In this case we must determine whether the Business Court erred by affirming a declaratory ruling issued by the North Carolina Board of Physical Therapy Examiners (Physical Therapy Board) pursuant to N.C.G.S. § 150B-4 determining that dry needling constitutes physical therapy. Because we conclude that the Physical Therapy Board's decision was consistent with its enabling statutes and administrative rules, we affirm the final judgment of the Business Court that upheld the Physical Therapy Board's declaratory ruling.

In May 2016, the North Carolina Acupuncture Licensing Board (Acupuncture Board) requested a declaratory ruling from the Physical Therapy Board "that 'dry needling' is not within the scope of the Physical Therapy Act," and further requesting that Board to withdraw its "[contradictory] position statement . . . because it is in conflict with the determination of the Rules Review Commission . . . ." Both the Acupuncture Board and the Physical Therapy Board are administrative agencies created by the state legislature, and both are authorized to adopt rules and regulations governing the licensing and performance of their respective

occupations. This case arises from a nearly decade-long debate over whether "dry needling" is confined to the practice of acupuncture, thus placing dry needling within the exclusive regulatory purview of the Acupuncture Board. As stated in the record on appeal, the Acupuncture Board defines dry needling as "the insertion of solid filament needles into specific trigger points in a patient's muscle tissue to relieve pain."

The history of the regulation of dry needling is instructive. In 2002 the Physical Therapy Board wrote in its newsletter that dry needling "is a form of acupuncture" and should not be performed by physical therapists who are not also licensed by the Acupuncture Board. Subsequently, in 2010 the Physical Therapy Board, referencing new scientific studies and practice developments, reconsidered this position and issued an informal position statement concluding that dry needling falls within the practice of physical therapy because it involves "intramuscular manual therapy." The Acupuncture Board disagreed with this conclusion and in 2011 requested an opinion from the Attorney General's office whether dry needling fell within the scope of physical therapy. In lieu of a formal opinion, the Attorney General issued an Advisory Letter taking the position that dry needling is "distinct from acupuncture" and that the Physical Therapy Board must therefore regulate the practice in the interest of public safety. Accordingly, the Physical Therapy Board proposed a formal rule, with an effective date of 1 February 2015, regulating the practice of dry needling by physical therapists. In compliance with N.C.G.S. § 150B-21.8, the Physical Therapy Board submitted the rule to the Rules Review Commission for its consideration. During the public hearing on the proposed rule, several acupuncturists opposed it, and the Commission decided to object to the rule based upon a lack of statutory authority to adopt it. The Physical Therapy Board did not appeal the Commission's decision but instead promptly posted a notice on its website indicating physical therapists could continue to practice dry needling in accordance with existing standards of competence consistent with its 2010 position statement. In 2015 the Acupuncture Board filed an action against the Physical Therapy Board in Superior Court, Wake County seeking to enjoin the practice of dry needling by physical therapists. That action was designated as a mandatory complex business case and assigned to the Business Court, which dismissed the 2015 complaint based upon the Acupuncture Board's failure to exhaust its administrative remedies before filing the action in superior court.

Thereafter, in order to exhaust its administrative remedies the Acupuncture Board requested the declaratory ruling from the Physical Therapy Board that is at issue in this case. In its 27 June 2016 declaratory ruling, the Physical Therapy Board "reaffirm[ed] the conclusion

that dry needling constitutes physical therapy" pursuant to the relevant statutes and Board rules. The Acupuncture Board appealed this ruling, and the Business Court affirmed the Physical Therapy Board's declaratory ruling. The Acupuncture Board then appealed to this Court.

In this appeal the Acupuncture Board argues that dry needling is part of the practice of acupuncture rather than physical therapy. Therefore, it argues, the Physical Therapy Board erred in determining dry needling is within the scope of physical therapy. We disagree.

A decision made in a declaratory ruling by an administrative agency is subject to judicial review. N.C.G.S. §§ 150B-4, -43 to -52 (2017). "On judicial review of an administrative agency's final decision, the substantive nature of each assignment of error dictates the standard of review." *Wetherington v. N.C. Dep't of Pub. Safety*, 368 N.C. 583, 590, 780 S.E.2d 543, 546 (2015) (quoting *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004)). In its petition for judicial review, the Acupuncture Board claimed that the Physical Therapy Board's decision was made in excess of statutory authority, rendered upon unlawful procedure, and affected by other errors of law. Pursuant to N.C.G.S. § 150B-51(c), all three of these types of asserted errors are reviewed de novo. "Under the *de novo* standard of review, the trial court 'consider[s] the matter anew[ ] and freely substitutes its own judgment for the agency's.' " *Wetherington*, 368 N.C. at 590, 780 S.E.2d at 547 (alterations in original) (quoting *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895).

While " '[t]he responsibility for determining the limits of statutory grants of authority to an administrative agency is a judicial function for the courts to perform,' " when "making this determination we apply the enabling legislation practically so that the agency's powers include all those the General Assembly intended the agency to exercise." *High Rock Lake Partners v. N.C. Dep't of Transp.*, 366 N.C. 315, 319, 735 S.E.2d 300, 303 (2012) (internal citations omitted) (quoting *In re Broad & Gales Creek Cmty. Ass'n*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980)). This Court gives "great weight to an agency's interpretation of a statute it is charged with administering; however, 'an agency's interpretation is not binding.' " *Id.* at 319, 735 S.E.2d at 303 (internal citations omitted) (quoting *Lee v. Gore*, 365 N.C. 227, 229-30, 717 S.E.2d 359, 358 (2011)). "The weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *N.C. Sav. & Loan League v. N.C. Credit Union Comm'n*, 302 N.C. 458, 466, 276 S.E.2d 404, 410 (1981) (alteration in original) (quoting

Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S. Ct. 161, 164 (1944)). We will not "follow an administrative interpretation in direct conflict with the clear intent and purpose of the act under consideration." *High Rock Lake Partners*, 366 N.C. at 319, 735 S.E.2d at 303 (quoting *Watson Indus. v. Shaw*, 235 N.C. 203, 211, 69 S.E.2d 505, 511 (1952)). This Court's "primary task in construing a statute is to effectuate the intent of the legislature." *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 207, 593 S.E.2d 764, 774 (2004) (first citing *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 399, 269 S.E.2d 547, 561 (1980); and then citing *In re Beatty*, 286 N.C. 226, 229, 210 S.E.2d 193, 195 (1974)). We previously have identified the " 'best indicia of . . . legislative purpose' to be 'the language of the statute, the spirit of the act, and what the act seeks to accomplish.' " *Id.* at 207, 593 S.E.2d at 774 (ellipsis in original) (quoting *State ex rel. Comm'r of Ins.*, 300 N.C. at 399, 269 S.E.2d at 561) (citation omitted).

With respect to the scope of physical therapy, the General Assembly has stated:

> "Physical therapy" means the evaluation or treatment of any person by the use of physical, chemical, or other properties of heat, light, water, electricity, sound, massage, or therapeutic exercise, or other rehabilitative procedures, with or without assistive devices, for the purposes of preventing, correcting, or alleviating a physical or mental disability. Physical therapy includes the performance of specialized tests of neuromuscular function, administration of specialized therapeutic procedures, interpretation and implementation of referrals from licensed medical doctors or dentists, and establishment and modification of physical therapy programs for patients. *Evaluation and treatment of patients may involve physical measures, methods, or procedures as are found commensurate with physical therapy education and training and generally or specifically authorized by regulations of the Board.* Physical therapy education and training shall include study of the skeletal manifestations of systemic disease. Physical therapy does not include the application of roentgen rays or radioactive materials, surgery, manipulation of the spine unless prescribed by a physician licensed to practice medicine in North Carolina, or medical diagnosis of disease.

N.C.G.S. § 90-270.90(4) (2017) (emphasis added).

Here, as shown by the plain language of the statute, the General Assembly defined the practice of physical therapy broadly and left open the opportunity for the Board to further define physical therapy "generally or specifically . . . by regulations." *Id.* It is clear the intent of the legislature was to allow for the evolution of treatments used in the practice of physical therapy. Specifically, the language in the definition encompasses what is taught in educational programs and training as appropriate for regulation by the Board. This language does not limit the Board's authority to adopt rules to accomplish this purpose.[1] The only prohibitions set forth by the General Assembly are explicit: "Physical therapy does not include the application of roentgen rays or radioactive materials, surgery,[2] manipulation of the spine unless prescribed by a physician licensed to practice medicine in North Carolina, or medical diagnosis of disease." *Id.* The General Assembly gave the Physical Therapy Board the power to "[a]dopt, amend, or repeal any rules or regulations necessary to carry out the purposes of this Article and the duties and responsibilities of the Board." N.C.G.S. § 90-270.92(9) (2017). The General Assembly specifically expressed that the "powers and duties enumerated [for the Board] are granted for the purpose of enabling the Board to safeguard the public health, safety and welfare against unqualified or incompetent practitioners of physical therapy, and are to be *liberally* construed to accomplish this objective." *Id.* § 90-270.92 (2017). (emphasis added). This language vests the Board with broad authority to regulate the practice of physical therapy and adopt administrative rules and regulations governing the profession. Although not dispositive, the Physical Therapy Board's construction of the statutory term "physical therapy" so as to encompass dry needling is persuasive authority for this Court.

Here the Physical Therapy Board determined that dry needling falls within the statutory definition of physical therapy. Specifically, the Physical Therapy Board concluded that "dry needling is a treatment that

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1. N.C.G.S. § 150B-2(8a) (2017) defines a "[r]ule" as "any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly . . . ."

2. The Acupuncture Board attempts to argue that dry needling qualifies as "surgery" based upon a definition promulgated by the North Carolina Medical Society; however, the Medical Society, a voluntary membership association, has no authority to define or regulate surgery. Rather, the Medical Board, which was established pursuant to N.C.G.S. § 90-2, is charged with the authority "to regulate the practice of medicine and surgery for the benefit and protection of the people of North Carolina." For purposes of our review in the instant case, neither the Medical Board nor the Medical Society have asserted that they play a role in governing the practice of physical therapy. Therefore, we are not persuaded by this argument.

uses physical or rehabilitative procedures, with assistive devices, for the purpose of correcting or alleviating myofascial pain, a physical disability." In determining the weight to give this interpretation, the Court considers: "[1] the thoroughness evident in its consideration, [2] the validity of its reasoning, [3] its consistency with earlier and later pronouncements, and [4] all those factors which give it power to persuade." *N.C. Sav. & Loan League*, 302 N.C. at 466, 276 S.E.2d at 410 (quoting *Skidmore*, 323 U.S. at 140, 65 S. Ct. at 164).

The Physical Therapy Board reached its conclusion in a detailed, forty-nine page declaratory ruling that included references to numerous scientific articles, reports, and books describing the history, efficacy, and safety of dry needling. In making this determination, the Physical Therapy Board looked not only to North Carolina law and experience but also to the conclusions reached by similar administrative agencies in other states. The Physical Therapy Board applied its experience and expertise in construing the enabling statute and rules adopted by the Board to determine that dry needling falls within the statutory definition of physical therapy. Given the Physical Therapy Board's extensive review of a variety of substantial studies and other evidence in conjunction with the involvement of technical and specialized terms specific to physical therapy, we conclude that the Board's reasoning is sound. The Physical Therapy Board's determination also is consistent with its earlier statements, specifically in 2010, that were confirmed in 2011 by the North Carolina Attorney General's staff, and again in 2015 via the Board's publication clarifying that physical therapists "can continue to perform dry needling so long as they possess the requisite education and training required by N.C.G.S. § 90-270.24(4) [2015]."[3]

The posture of this case is not one we typically see when reviewing a dispute concerning administrative law and an occupational licensing board's interpretation of the statutes governing its profession. Ordinarily, an administrative agency would either promulgate a rule that would undergo notice and comment rulemaking, or the agency could respond to a request for declaratory ruling. Chapter 150B clearly covers both of these scenarios and does not provide that either path is exclusive. Ultimately, both are subject to exhaustion of administrative remedies and to judicial review.

Here, we note that the Physical Therapy Board initially chose to exercise its authority to adopt a rule stating that: "Physical therapy is

3. Subsection 90-270.24(4), defining "physical therapy," was later recodified as N.C.G.S. § 90-270.90(4) (2017).

presumed to include any acts, tests, procedures, modalities, treatments, or interventions that are routinely taught in educational programs or in continuing education programs for physical therapists and are routinely performed in practice settings." 21 NCAC 48C .0101(a) (2018). Part of the Physical Therapy Board's rationale for its declaratory ruling was that relevant literature and other evidence showed that dry needling is being taught in educational and continuing education programs for physical therapists and is routinely performed in practice settings. Specifically, the Physical Therapy Board repeatedly pointed out that eighty-six percent of the knowledge requirements for competency in dry needling are taught in entry-level physical therapy programs, and the additional competencies are obtained through continuing education programs for licensed physical therapists. Because of these findings, the Physical Therapy Board applied its rule stating that "[a] physical therapist who employs . . . procedures . . . in which professional training has been received through education or experience is considered to be engaged in the practice of physical therapy" and concluded that dry needling falls within the practice of physical therapy. *Id.* § .0101(b) (2018). Because the Physical Therapy Board's interpretation of its own rule is consistent with both the statute and the language of the rule, the Board's interpretation "must be given 'controlling weight.' " *Morrell ex rel. Long v. Flaherty*, 338 N.C. 230, 238, 449 S.E.2d 175, 180 (1994) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S. Ct. 2381, 2386 (1994)), *cert. denied*, 515 U.S. 1122, 115 S. Ct. 2278 (1995)).

The Acupuncture Board also argues that the Physical Therapy Board has inappropriately used a policy statement to usurp the authority of the Rules Review Commission, which objected to a proposed rule by the Physical Therapy Board regarding training requirements for the practice of dry needling. However, the Rules Review Commission's authority over a proposed rule is generally limited to deciding whether to approve or object to the rule. *See* N.C.G.S. § 150B-21.10 (2017). In doing so, the Rules Review Commission does not consider questions relating to the quality or efficacy of the proposed rule but rather determines whether a rule meets four criteria:

> (1) It is within the authority delegated to the agency by the General Assembly.
>
> (2) It is clear and unambiguous.
>
> (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall

> consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
>
> (4) It was adopted in accordance with Part 2 of this Article.

Id. § 150B-21.9(a) (2017). As this Court previously has opined, "[t]he Commission is tasked only with the responsibility to review [a] Board's rules from a procedural perspective for clarity and to ensure that the rules are adopted in compliance with the APA. Such a review does not require special expertise . . . ." *N.C. State Bd. of Educ. v. State*, __ N.C. __, __, 814 S.E.2d 54, 65 (2018). "[I]f an agency such as [a] Board desires to challenge the Commission's exercise of its delineated duties, '[w]hen the Commission returns a permanent rule to an agency . . . the agency may file an action for declaratory judgment in Wake County Superior Court.' " *Id.* at __, 814 S.E.2d at 65 (third and fourth alterations in original) (quoting N.C.G.S. § 150B-21.8(d) (2017)). The Commission's rejection of the Physical Therapy Board's proposed rule on required training for the use of dry needling in no way conflicts with or affects the Physical Therapy Board's policy statements interpreting the definition of physical therapy. Both the 2002 and the 2010 policy statements by the Physical Therapy Board regarding dry needling are "[n]onbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule." N.C.G.S. § 150B-2(8a)(c) (2017). As such, they are necessarily not "statement[s] of general applicability" that would require formal rulemaking. *Id.* § 150B-2(8a), *see id.* § 150B-18 (2017). Therefore, this change in policy is not forbidden by the Rules Review Commission's subsequent rejection of a rule on a related subject.

Additionally, the Acupuncture Board contends that because of the Physical Therapy Board's 2002 policy statement excluding dry needling from the practice of physical therapy, the 2010 policy statement expanded the scope of the practice of physical therapy in contravention of the Administrative Procedure Act. *See id.* § 150B-19(2) (2017) ("An agency may not adopt a rule that . . . [e]nlarges the scope of a profession, occupation, or field of endeavor for which an occupational license is required.") This argument misapprehends that provision of the Administrative Procedure Act. *Id.* This subsection prevents an agency from expanding the activities that require a license beyond those identified by the legislature, but the provision does not relate to how an agency regulates those it licenses. The Physical Therapy Board's 2010 policy statement does not expand the class of persons required to be licensed, but simply indicates that when licensed physical therapists

engage in dry needling, they must comply with the relevant general rules promulgated by the Physical Therapy Board.

Finally, the Acupuncture Board also argues that dry needling cannot be part of the practice of physical therapy because it is acupuncture. We first note that although the Physical Therapy Board's observation that dry needling does not employ acupuncture methods of diagnosis and treatment is persuasive, the Physical Therapy Board lacks authority or expertise to determine whether a particular practice falls within the scope of acupuncture. This is because the law prohibiting the unauthorized practice of acupuncture, like many laws governing the practice of various occupations and professions, must be strictly construed. *See Elliott v. N.C. Psychology Bd.*, 348 N.C. 230, 235, 498 S.E.2d 616, 619 (1998) ("Thus, the Psychology Practice Act should be strictly construed because it is both in derogation of the common law and penal in nature."). "Strict construction of statutes requires only that their application be limited to their express terms . . . ." *Turlington v. McLeod*, 323 N.C. 591, 594, 374 S.E.2d 394, 397 (1988) (citing *Harrison v. Guilford County*, 218 N.C. 718, 12 S.E.2d 269 (1940)). As this Court has already affirmed, when there is ambiguity in the statutory language defining the role of an agency concurrent authority is assumed. *See Trayford v. N.C. Psychology Bd.*, 360 N.C. 396, 627 S.E.2d 462 (2006), *aff'g per curiam* 174 N.C. App 188, 619 S.E.2d 862 (2005) (holding that the Psychology Board could not regulate an individual's professional counselor license, regulated by the North Carolina Board of Licensed Professional Counselors, solely based on the fact he was also licensed as a psychological associate and that the Psychology Practice Act, N.C.G.S. § 90-270.4(g) provided for licensees to "comply with all conditions, requirements, and obligations imposed by [the Board or Act]").

The Acupuncture Board attempts to distinguish this case from *Trayford*. It argues that the Physical Therapy Act explicitly mandates that the Physical Therapy Board cannot limit the activities of other licensed professionals. *See* N.C.G.S. § 90-270.34(b)(1) (2015)[4] ("Nothing in this Article shall be construed to prohibit . . . [a]ny act in the lawful practice of a profession by a person duly licensed in this State . . . .") The Acupuncture Board argues that the Acupuncture Act contains no similar provision, *see id.* § 90-452 (2017); however, these provisions provide a limitation on enforcement actions by the covered boards, not a limitation on their areas of authority. This Court does not determine the

4. This provision was recodified as N.C.G.S. § 90-270.101(b)(1) (2017); the quoted language is the same in both statutes.

outcome of hypothetical enforcement actions, and "[i]t is no part of the function of the courts to issue advisory opinions." *Wise v. Harrington Grove Cmty Ass'n*, 357 N.C. 396, 408, 584 S.E.2d 731, 740 (2003) (citing *City of Greensboro v. Wall*, 247 N.C. 516, 519, 101 S.E.2d 413, 416 (1958)).

Both the Physical Therapy Board's declaratory ruling and underlying policy statement are consistent with the statutes and administrative rules that the Board is charged with interpreting and administering. Therefore, we defer to the Physical Therapy Board's interpretations of those same statutes and rules in reaching the conclusion that dry needling is a part of the practice of physical therapy. Accordingly, we affirm the decision of the Business Court affirming the Physical Therapy Board's declaratory ruling reaffirming that dry needling falls within the scope of physical therapy in North Carolina.

AFFIRMED.

PATRICIA PINE, EMPLOYEE
v.
WAL-MART ASSOCIATES, INC. #1552, EMPLOYER

NATIONAL UNION FIRE INSURANCE CO., CARRIER
(CLAIMS MANAGEMENT, INC., THIRD-PARTY ADMINISTRATOR)

No. 335A17

Filed 7 December 2018

Workers' Compensation—findings—insufficient—reliance on Parsons presumption not clear

A workers' compensation case was remanded for further findings clarifying the basis of the award where it was not clear whether the Industrial Commission made a finding of causation independent of any presumption.

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 769 (2017), affirming an opinion and award filed on 10 November 2015 by the North Carolina Industrial Commission. On 1 March 2018, the Supreme Court allowed plaintiff's petition for discretionary review of additional issues. Heard in the Supreme Court on 29 August 2018.

Shelby, Pethel and Hudson, P.A., by David A. Shelby, for plaintiff-appellant/appellee.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, Holly M. Stott, and Linda Stephens, for defendant-appellants/appellees.

Sumwalt Law Firm, by Vernon Sumwalt, for North Carolina Advocates for Justice, amicus curiae.

HUDSON, Justice.

Defendants, Wal-Mart Associates, Inc. (Wal-Mart) and National Union Fire Insurance Company, appealed the opinion and award of the North Carolina Industrial Commission (the Commission), which awarded plaintiff, Patricia Pine, ongoing disability compensation and medical compensation for her right shoulder, left knee, right carpal tunnel syndrome, right sagittal band rupture, right hand dystrophic condition, right carpal boss, and neck injuries. On appeal, a divided panel of the Court of Appeals affirmed, holding that while the Commission erred in ostensibly applying a presumption of compensability for plaintiff's medical conditions, the Commission concluded in the alternative that plaintiff had met her burden of proving causation absent any presumption. *Pine v. Wal-Mart Assocs.*, ___ N.C. App. ___, ___, 804 S.E.2d 769, 779 (2017). Because we cannot determine from this record the extent to which the Commission relied on a presumption of causation or whether it had an independent, alternate basis for its determination of causation, we conclude that we must reverse and remand this case for further findings and proceedings before the Commission.

Background

Plaintiff was employed by Wal-Mart in the electronics department, where she had worked for almost twenty-two years. On 29 December 2011, plaintiff tripped and fell forward over the bottom of a stairway ladder. When plaintiff attempted to break her fall with her right arm, her right wrist struck the cement floor, followed by her body falling on top of her right shoulder area. Her left knee also hit the floor before striking her in the chest near her collarbone. Plaintiff experienced pain in her right side up to her shoulder and collarbone. One of plaintiff's coworkers observed the fall and confirmed that plaintiff complained of pain in her left knee, right hand, right wrist, and right shoulder.

At the direction of Wal-Mart, plaintiff went to ProMed later that afternoon, where she was seen by Clifford Callaway, M.D. At that visit, plaintiff complained primarily of pain in her right shoulder area; Dr. Callaway diagnosed her with a shoulder sprain and ordered x-rays. Due to continued pain in her right wrist, right arm, right shoulder, left knee, and neck, plaintiff followed up several times with Dr. Callaway, who diagnosed her with a left knee sprain, right wrist sprain, and cervical strain.

Dr. Callaway referred plaintiff to James Comadoll, M.D., an orthopedic specialist with Pinnacle Orthopedic Associates. Plaintiff visited Dr. Comadoll on 6 February 2012 and complained of pain in her left knee and "decreased range of motion and pain with use of [her] right arm." Dr. Comadoll diagnosed plaintiff with a possible right rotator cuff tear and a left knee contusion, "ordered an MRI of her right shoulder, and released her to return to work with restrictions, including no use of her right arm and no standing or walking over one hour." In a follow-up visit on 21 February 2012, plaintiff "complained more about her neck with soreness and pain on range of motion," and in additional follow-up visits over successive months, plaintiff continued to complain of pain in her neck, right shoulder, and left knee. Due to concern about possible nerve entrapment, Dr. Comadoll ordered an EMG, which was performed on 31 May 2012. The EMG revealed that plaintiff had "median nerve compression in the wrist, i.e. carpal tunnel syndrome," which Dr. Comadoll testified could be caused by trauma. On 23 July 2012, Dr. Comadoll performed carpal tunnel release surgery on plaintiff's right hand, after which plaintiff continued to experience pain in her right hand. Dr. Comadoll ordered an MRI of plaintiff's left knee, which revealed a possible lateral meniscus anterior horn tear.

For plaintiff's complaints of pain in her neck and upper extremities, Dr. Comadoll referred her to Michael Getter, M.D., a board-certified orthopedic surgeon specializing in spinal surgery. On 17 December 2012, plaintiff saw Dr. Getter, who wrote a note taking her completely out of work and ordered a cervical MRI, which revealed "degenerative disc disease causing stenosis compressing the nerve at C4-5, C5-6, and C6-7." Based on the MRI results, Dr. Getter "recommended surgery to decompress the nerve and to prevent progressive neurological problems and muscle atrophy."

Defendants requested that plaintiff also have her right shoulder and right hand examined by Joseph Estwanik, M.D., whom she saw on 12 February 2013. After examining plaintiff, "Dr. Estwanik diagnosed a partial full thickness tear of the right rotator cuff for which he recommended arthroscopic surgery." Additionally, on 10 September 2014,

plaintiff saw Louis Koman, M.D., a board-certified orthopedic surgeon with a certificate of subspecialty in hand surgery. Dr. Koman "diagnosed Plaintiff with a carpal boss, a traumatic sagittal band rupture at the index of the metacarpophalangeal, and cervical spine pathology that was causing some residual symptoms in the right upper extremity despite the carpal tunnel release."[1]

Plaintiff timely filed a Form 18 Notice of Accident to Employer in which she described the injuries involved as "RUE, LLE, neck and any other injuries causally related." On 4 October 2012, defendants filed a Form 60 with the Commission accepting plaintiff's claim as compensable and describing the body parts involved in the injuries by accident as "Right shoul[d]er/arm." Defendants later filed a Form 61 on 5 August 2013 denying compensability for the "new injury outside of her employment to her cervical spine and further contend[ing] that Employee-Plaintiff's current disability, if any, is unrelated to the original compensable injury." Plaintiff filed a Form 33 on 28 August 2013 requesting that her claim be assigned for hearing.

Deputy Commissioner Kim Ledford heard this matter on 19 March 2014. On 14 November 2014, Deputy Commissioner Ledford entered an opinion and award concluding, *inter alia*, that "by the greater weight of competent medical opinion, . . . Plaintiff sustained injury to her right shoulder, which has been admitted, and to her right wrist, and her left knee, and also aggravated her pre-existing cervical disc disease." Accordingly, Deputy Commissioner Ledford awarded plaintiff disability compensation and medical compensation, "including any recommended surgery for Plaintiff's right shoulder, right wrist, neck and left knee." Both parties appealed to the Full Commission.

The Full Commission heard the case on 22 April 2015. The Commission issued an opinion and award on 10 November 2015, finding in pertinent part:

> 20. Based upon a preponderance of the evidence, the Full Commission places greater weight on the testimony of Dr. Callaway, Dr. Comadoll, Dr. Getter, and Dr. Koman, than that of Dr. Estwanik, and finds that Plaintiff's pre-existing cervical disc disease was aggravated by her fall

1. The Commission found that, "[c]arpal boss is osteoarthritis of the hand at the back, near the wrist" and "[t]he sagittal band is the extensor mechanism that pulls the fingers up over the metacarpophalangeal joint."

> at work on December 29, 2011. Additional medical treatment with Dr. Getter, including but not limited to surgery, is reasonable and necessary to effect a cure, give relief, or lessen the period of disability related to this injury.
>
> . . . .
>
> 22. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff's carpal tunnel syndrome and sagittal band rupture were caused by the December 29, 2011 injury by accident. The Full Commission further finds, by a preponderance of the evidence[,] that Plaintiff's carpal boss was materially aggravated by the December 29, 2011 injury by accident. Additional medical treatment, including but not limited to surgery with Dr. Koman, is reasonable and necessary to effect a cure, give relief, or lessen the period of disability related to these injuries.

In its conclusions of law, the Commission determined that defendants' filing of a Form 60 admitting compensability created a rebuttable presumption, commonly referred to as the *Parsons* presumption, *see Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), that plaintiff's other injuries were causally related to her 29 December 2011 accident and that defendants must rebut that presumption with evidence to the contrary. (First citing *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 620 S.E.2d 288 (2005), *disc. rev. improvidently allowed per curiam*, 360 N.C. 587, 634 S.E.2d 887 (2006); and then citing *Wilkes v. City of Greenville*, 243 N.C. App. 491, 777 S.E.2d 282 (2015), *aff'd in part, aff'd as modified in part, and remanded*, 369 N.C. 730, 799 S.E.2d 838 (2017).) The Commission concluded that here:

> 3. Defendants failed to present sufficient evidence to rebut the presumption that Plaintiff's carpal tunnel syndrome, carpal boss, sagittal band rupture, dystrophic right hand symptoms, neck, and left knee problems are causally related to the December 29, 2011 injury by accident. However, Defendants did rebut the presumption that Plaintiff's Dupuytren's condition is related to the December 29, 2011 injury by accident.

(Citing *Gonzalez v. Tidy Maids, Inc.*, 239 N.C. App. 469, 768 S.E.2d 886 (2015).) Accordingly, the Commission awarded disability compensation and medical compensation for plaintiff's right shoulder, right carpal tunnel syndrome, right sagittal band rupture, right hand dystrophic

condition, right carpal boss, left knee, and neck injuries. Defendants appealed from the Commission's opinion and award.

At the Court of Appeals, defendants challenged the Commission's conclusions of law, asserting that the Commission erred in applying the *Parsons* presumption to injuries not specifically listed by defendants in the Form 60. *Pine*, ___ N.C. App. at ___, 804 S.E.2d at 773. In a divided opinion filed on 5 September 2017, the Court of Appeals affirmed the Commission's award of benefits. *Id.* at ___, 804 S.E.2d at 779. The majority noted that following this Court's decision in *Wilkes v. City of Greenville*,[2] the legislature amended N.C.G.S. § 97-82(b) to provide that "[a]n award of the Commission arising out of G.S. 97-18(b) or G.S. 97-18(d) shall not create a presumption that medical treatment for an injury or condition not identified in the form prescribed by the Commission pursuant to G.S. 97-18(b) or G.S. 97-18(d) is causally related to the compensable injury." *Id.* at ___, 804 S.E.2d at 775 (emphasis omitted) (quoting Act of June 29, 2017, ch. 124, sec. 1.(a), 2017-4 N.C. Adv. Legis. Serv. 71, 71 (LexisNexis)). According to the majority, "[t]he statutory amendment binds our decision in this case because Section 1.(c) provides that the statute applies to all claims 'accrued or pending prior to, on, or after' the date on which the amendment became law." *Id.* at ___, 804 S.E.2d at 775 (quoting ch. 124, sec. 1.(c), 2017-4 N.C. Adv. Legis. Serv. at 72). Accordingly, the majority held that the Commission erred in applying the *Parsons* presumption to plaintiff's conditions that were not listed by defendants in the Form 60 and opined that "[g]enerally, such an error would require a remand to the Commission for the application of the correct legal standard." *Id.* at ___, 804 S.E.2d at 775.

Nonetheless, the Court of Appeals majority determined that "the error does not require reversal because the Commission made adequate findings that Plaintiff met her burden of proving causation without the presumption" and therefore had "an alternative factual basis for its award." *Id.* at ___, ___, 804 S.E.2d at 773, 775. According to the majority:

> [T]he Commission also found that Plaintiff had proved by a preponderance of the evidence—the applicable standard of proof absent the *Parsons* presumption—that her additional injuries were causally related to her workplace accident and are therefore compensable. The Commission's Finding of Fact Number 20, . . . expressly states that

2. 369 N.C. at 740, 799 S.E.2d at 846 ("Accordingly, we conclude that an admission of compensability approved under N.C.G.S. § 97-82(b) entitles an employee to a presumption that additional medical treatment is causally related to his compensable injury.").

> "[b]ased upon *a preponderance of the evidence*, the Full Commission . . . *finds* that Plaintiff's pre-existing [condition] *was aggravated* by her fall at work . . . ." (emphasis added). The Commission's Finding of Fact Number 22, . . . expressly states that "[b]ased upon *a preponderance of the evidence*, the Full Commission *finds* that Plaintiff's [medical conditions not admitted by Wal-Mart] *were caused* by . . . [her] accident." (emphasis added).
>
> The Commission's use of affirmative language in these findings of fact indicates it placed the burden of proof on Plaintiff to demonstrate causation of her disputed additional medical conditions. By contrast, had the Commission placed the burden of proof on Defendants for these findings, the Opinion and Award would have stated that "the Full Commission *does not find* that Plaintiff's injuries were *not caused* by her accident."

Id. at ___, 804 S.E.2d at 776 (all alterations except first and fourth ellipses in original). Thus, the majority held "that regardless of the Commission's discussion of the *Parsons* presumption in its Conclusions of Law, its Opinion and Award should be affirmed because the Commission found that Plaintiff proved by a preponderance of the evidence a causal relationship between her compensable injury by accident and the medical conditions for which she now seeks compensation." *Id.* at ___, 804 S.E.2d at 776.

The majority also addressed defendants' challenges to the Commission's Finding of Fact 14, pertaining to Dr. Getter's causation opinion, and Finding of Fact 19, pertaining to Dr. Koman's causation opinion. *Id.* at ___, 804 S.E.2d at 777. Defendants argued that "the[se] expert opinions . . . were unsupported by the record evidence, based on speculation and conjecture, and therefore are not competent evidence." *Id.* at ___, 804 S.E.2d at 777. According to defendants, "without this evidence, Plaintiff failed to prove that her neck, hand, and wrist injuries were causally related to her workplace accident." *Id.* at ___, 804 S.E.2d at 777. The majority disagreed, stating that "a full review of Dr. Koman's testimony demonstrates that his opinion was based on more than merely *post hoc, ergo propter hoc*," *id.* at ___, 804 S.E.2d at 778, "which 'denotes "the fallacy of . . . confusing sequence with consequence," ' " *id.* at ___, 804 S.E.2d at 777 (quoting *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 232, 538 S.E.2d 912, 916 (2000) (alteration in original)). The majority concluded that the causation opinions of Dr. Koman and Dr. Getter were not "so speculative as to render them incompetent" and that

"[t]heir testimony along with the others cited by the Commission and the evidence contained in the record support the Commission's conclusion that the additional medical conditions complained of by Plaintiff were causally related to Plaintiff's fall." *Id.* at ___, 804 S.E.2d at 778.

In a separate opinion, one member of the panel concurred with the majority's determination that the Commission erroneously applied the *Parsons* presumption but dissented from the conclusion that the Commission made an alternative determination that plaintiff had met her burden of proving causation independent of any presumption. *Id.* at ___, 804 S.E.2d at 779 (Tyson, J., concurring in part, dissenting in part). According to the dissenting opinion, the Commission's "Conclusions of Law 1 and 3 clearly indicate the Commission solely predicated its Opinion and Award for Plaintiff on the *Parsons* presumption and *Wilkes* being applicable to these facts." *Id.* at ___, 804 S.E.2d at 781-82. The dissenter further opined that while Findings of Fact 20 and 22 "state[ ] the required standard of proof," nowhere did the Commission "state[ ] that Plaintiff had carried her burden of proof." *Id.* at ___, 804 S.E.2d at 782. The dissenting opinion then concluded that "[t]he Opinion and Award is wholly unclear upon which party the Commission placed, or considered as having, the burden of proof to show or rebut causation. As such, the Award must be set aside and remanded." *Id.* at ___, 804 S.E.2d at 783.

The dissenting opinion also disagreed with the majority's determination that Dr. Koman's testimony constituted competent evidence. *Id.* at ___, 804 S.E.2d at 784. The dissenting judge would have concluded that Dr. Koman's testimony is not competent because "he solely relied on the '*post hoc*, *ergo propter hoc*' fallacy in concluding Plaintiff's carpal boss aggravation and sagittal band rupture were causally related to her fall on 29 December 2011." *Id.* at ___, 804 S.E.2d at 785.

Pursuant to N.C.G.S. § 7A-30(2), defendants appealed to this Court on the basis of the dissenting opinion in the Court of Appeals. Plaintiff filed a petition for discretionary review of additional issues, namely, whether retroactive application of N.C.G.S. § 97-82(b) violates her substantive due process rights protected by the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution. We allowed plaintiff's petition for discretionary review on 1 March 2018.

Analysis

Defendants argue that the Court of Appeals erred by failing to remand this case to the Commission for additional findings and conclusions. We agree that remand is necessary and therefore reverse the Court of Appeals.

We review a decision of the Commission to determine "whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000); *see also* N.C.G.S. § 97-86 (2017). "Under our Workers' Compensation Act, 'the Commission is the fact finding body.' 'The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (first quoting *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962); then quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). But, "[w]hen the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard." *Ballenger v. ITT Grinnell Indus. Piping, Inc.*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987) (citing, *inter alia*, *Conrad v. Cook-Lewis Foundry Co.*, 198 N.C. 723, 153 S.E. 266 (1930)). We review decisions of the Court of Appeals for errors of law. *Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611, 781 S.E.2d 282, 284 (2016) (citing N.C. R. App. P. 16(a)).

After the Commission issued its opinion and award, and after briefs were filed and oral arguments heard at the Court of Appeals, the legislature amended N.C.G.S. § 97-82(b) to provide that "[a]n award of the Commission arising out of G.S. 97-18(b) or G.S. 97-18(d) shall not create a presumption that medical treatment for an injury or condition not identified in the form prescribed by the Commission pursuant to G.S. 97-18(b) or G.S. 97-18(d) is causally related to the compensable injury." Ch. 124, sec. 1.(a), 2017-4 N.C. Adv. Legis. Serv. at 71. Because the legislation stated that "[t]his section is effective when it becomes law and applies to claims accrued or pending prior to, on, or after that date," *id.*, sec. 1.(c), 2017-4 N.C. Adv. Legis. Serv. at 72, the amended section could apply to plaintiff's claim.

Here defendants listed only "Right shoul[d]er/arm" in the Form 60 they filed with the Commission, and they therefore argue that under the amended N.C.G.S. § 97-82(b), plaintiff was not entitled to any presumption that her other injuries or conditions were causally related to her 29 December 2011 injury by accident. Thus, defendants argue the Commission erred in applying a presumption to those other injuries.

The Commission's Findings of Fact 20 and 22 read in part[3] as follows:

3. These findings are quoted more fully above.

> 20. Based upon a preponderance of the evidence, the Full Commission places greater weight on the testimony of Dr. Callaway, Dr. Comadoll, Dr. Getter, and Dr. Koman, than that of Dr. Estwanik, and finds that Plaintiff's pre-existing cervical disc disease was aggravated by her fall at work on December 29, 2011. . . .
>
> . . . .
>
> 22. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff's carpal tunnel syndrome and sagittal band rupture were caused by the December 29, 2011 injury by accident. The Full Commission further finds, by a preponderance of the evidence[,] that Plaintiff's carpal boss was materially aggravated by the December 29, 2011 injury by accident.

While these findings can be read to suggest that the Commission independently found, absent any presumption, that plaintiff's further injuries were causally related to her 29 December 2011 injury by accident, this reading is seemingly at odds with the Commission's Conclusions of Law 1 and 3, which state:

> 1. . . . In order to rebut the presumption, Defendants must present expert testimony or affirmative medical evidence tending to show that the treatment Plaintiff seeks is not directly related to the compensable injury. . . .
>
> . . . .
>
> 3. Defendants failed to present sufficient evidence to rebut the presumption that Plaintiff's carpal tunnel syndrome, carpal boss, sagittal band rupture, dystrophic right hand symptoms, neck, and left knee problems are causally related to the December 29, 2011 injury by accident. However, Defendants did rebut the presumption that Plaintiff's Dupuytren's condition is related to the December 29, 2011 injury by accident.

(Citations omitted.) We cannot determine from the record if the Commission, as the Court of Appeals majority concluded, made findings of causation independent of the application of any presumption. As the dissenting judge below noted, "The Opinion and Award is wholly unclear upon which party the Commission placed, or considered as having, the burden of proof to show or rebut causation. As such, the Award must be

set aside and remanded." *Pine*, ___ N.C. App. at ___, 804 S.E.2d at 783. Because of this apparent confusion within the opinion, we reverse the Court of Appeals and remand this case to that court for further remand to the Commission to make additional findings clarifying the basis for its award and for additional proceedings as necessary.[4]

We dismiss as improvidently allowed plaintiff's petition for discretionary review, while expressing no opinion on the constitutionality of the application of N.C.G.S. § 97-82(b) to plaintiff's case. *See Powe v. Odell*, 312 N.C. 410, 416, 322 S.E.2d 762, 765 (1984) ("It is a well settled rule of this Court that we will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below." (citing, *inter alia*, *State v. Woods*, 307 N.C. 213, 297 S.E.2d 574 (1982)); *see also Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (per curiam) ("[T]he courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds." (first citing *State v. Crabtree*, 286 N.C. 541, 543, 212 S.E.2d 103, 105 (1975); then citing *Rice v. Rigsby*, 259 N.C. 506, 512, 131 S.E.2d 469, 473 (1963))). This dismissal is without prejudice to plaintiff's ability to raise this issue in the future.[5]

REVERSED AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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4. Given that we are remanding this case to the Commission for further proceedings, we decline to address defendants' second contention that the Court of Appeals erred by failing to reverse the Commission's findings concerning the causation of plaintiff's sagittal band rupture, carpal boss, and dystrophic hand symptoms.

5. Because the amendment to N.C.G.S. § 97-82(b) occurred after the Court of Appeals heard arguments in this case on 9 August 2016, plaintiff's first opportunity to raise this issue was in her petition for discretionary review before this Court.

STATE v. FOWLER

[371 N.C. 718 (2018)]

STATE OF NORTH CAROLINA
v.
MELVIN LEROY FOWLER

No. 173PA17

Filed 7 December 2018

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 800 S.E.2d 724 (2017), finding reversible error in a judgment entered on 2 March 2016 by Judge A. Graham Shirley in Superior Court, Wake County, vacating defendant's conviction, and granting him a new trial. Heard in the Supreme Court on 30 August 2018.

Joshua H. Stein, Attorney General, by Christopher W. Brooks, Special Deputy Attorney General, for the State-appellant.

Jason Christopher Yoder for defendant-appellee.

PER CURIAM.

The decision of the Court of Appeals is vacated and this case is remanded to the Court of Appeals for reconsideration in light of our decision in *State v. Malachi*, ___ N.C. ___, ___ S.E.2d ___ (2018) (142PA17).

VACATED AND REMANDED.

STATE OF NORTH CAROLINA
v.
TERANCE GERMAINE MALACHI

No. 142PA17

Filed 7 December 2018

1. Criminal Law—jury instructions—actual and constructive possession—one theory of possession not supported by evidence

Where defendant was on trial for possession of a firearm by a felon and the trial court instructed the jury, over defendant's objection, on both actual and constructive possession even though the evidence only supported the theory of *actual* possession, the Court of Appeals correctly determined that the trial court erred by allowing the jury to potentially convict defendant of possession of a firearm by a felon on the basis of a constructive possession theory.

2. Criminal Law—jury instructions—unsupported instruction—subject to harmless error analysis

Where defendant was on trial for possession of a firearm by a felon and the trial court instructed the jury, over defendant's objection, on a theory of possession unsupported by the evidence, the Supreme Court held that defendant's challenge to the delivery of the trial court's unsupported instruction was subject to traditional harmless error analysis. The Court declined defendant's request to adopt a rule that such error is requires automatic reversal.

3. Criminal Law—jury instructions—unsupported instruction—no prejudice

Where defendant was on trial for possession of a firearm by a felon and the trial court instructed the jury, over defendant's objection, on both actual and constructive possession even though the evidence only supported the theory of *actual* possession, defendant failed to satisfy the Supreme Court that there was a reasonable possibility that, in the absence of the erroneous constructive possession instruction, the jury would have acquitted defendant.

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. ___, 799 S.E.2d 645 (2017), finding prejudicial error in a judgment entered on 28 January

2016 by Judge Yvonne Mims Evans in Superior Court, Mecklenburg County, vacating defendant's convictions, and granting defendant a new trial. Heard in the Supreme Court on 29 August 2018.

Joshua H. Stein, Attorney General, by John R. Green, Jr., Special Deputy Attorney General, for the State-appellant.

Glenn Gerding, Appellate Defender, by Aaron Thomas Johnson, Assistant Appellate Defender, for defendant-appellee.

ERVIN, Justice.

The issue before the Court in this case is whether the Court of Appeals erred by vacating the judgment entered by the trial court based upon defendant's convictions for possession of a firearm by a felon and having attained habitual felon status on the grounds that the trial court had erroneously instructed the jury that it could convict defendant based upon a constructive possession theory that lacked sufficient evidentiary support. After careful consideration of the record in light of the applicable law, we reverse the decision of the Court of Appeals and remand this case to that court for consideration of defendant's remaining challenges to the trial court's judgment.

Shortly after midnight on 14 August 2014, the Charlotte-Mecklenburg Police Department received an anonymous call from a person who stated that he had just seen an African-American male wearing a red shirt and black pants insert a handgun into his pants while in the parking lot of Walker's Express, a convenience store that was located at 3416 Freedom Drive. Upon arriving at Walker's Express approximately three minutes later, Officers Ethan Clark and Jason Van Aken of the Charlotte-Mecklenburg Police Department saw approximately six to eight people standing in the parking lot, including a man later identified as defendant, who was the only person present who matched the description provided by the caller.

As Officer Clark pulled his patrol vehicle into the parking lot, defendant looked directly at the officer, "squared to [Officer Clark], and then immediately looked away towards the ground, blading his body."[1] Upon

1. According to Officer Clark, the occurrence of "blading" suggests that the person in question is attempting to conceal the fact that he or she has a weapon on his or her person by adopting a stance that is perpendicular to the person or persons making the observation.

making this observation, Officer Clark and Officer Van Aken grabbed defendant's arms and walked him out of the group with which he had been standing. During that process, defendant "kept moving and tugging" and "was very squirmy." As the officers frisked and handcuffed defendant, Officer Van Aken removed a revolver from the waistband on the right side of defendant's pants. Officer Kevin Hawkins arrived as Officer Van Aken was in the process of taking the firearm into his custody. After Officer Van Aken seized the firearm, defendant pointed to another individual in the parking lot and stated that this individual had given him the firearm "and told him to hold on to it."

On 16 November 2015, the Mecklenburg County Grand Jury returned bills of indictment charging defendant with possession of a firearm by a felon and carrying a concealed weapon. Previously, on 2 February 2015, defendant was indicted for having attained habitual felon status. The charges against defendant came on for trial before the trial court and a jury at the 19 January 2016 criminal session of the Superior Court, Mecklenburg County. During the trial, defendant stipulated that he had been convicted of a felony prior to 14 August 2014. At the jury instruction conference, the State requested the trial court to instruct the jury in accordance with N.C. Pattern Jury Instruction Crim. No. "104.41, actual possession." Defendant objected to the State's request on the grounds that,

> when it gives the definition of possession it refers to actual or constructive. The [S]tate's evidence was that it was actual possession; there was no constructive possession. . . . It's not in terms of if it was near him or on him; there are witnesses stating it was on him, so therefore I would contend you should deny that instruction.

In overruling defendant's objection, the trial court told the prosecutor that "I think [the State] may have a good argument for actual, but nothing for constructive. And if the jury believes the witnesses, they're going to believe actual possession, right?" As a result, the trial court instructed the jury that:

> Possession of an article may be either actual or constructive. A person has actual possession of an article if he has it on his person and is aware of its presence, or has both the power and intent to control its disposition or use. A person has constructive possession of an article if the person does not have it on his person but is aware of its presence and both the power and intent to control

> its disposition or use. A person's awareness of an article and a person's power and intent to control its disposition or use may be shown by direct evidence, or it may be inferred by the circumstances.
>
> . . . .
>
> The [d]efendant has been charged with possessing a firearm after having been convicted of a felony. For you to find the [d]efendant guilty of this offense, the State must prove two things beyond a reasonable doubt.
>
> First, that prior to August 14th, 2014, the [d]efendant was convicted of a felony that was committed in violation of the law of the State of North Carolina; and second, that thereafter the [d]efendant possessed a firearm. If you find from the evidence beyond a reasonable doubt that the [d]efendant was convicted of a felony i[n] Superior Court and that the [d]efendant thereafter possessed a firearm, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

As it deliberated, the jury requested "a legal definition of possession of a firearm [and] a definition of a concealed weapon." Before responding to the jury's inquiry, the trial court addressed the parties, stating that "I will re-read the definition of possession of firearm by a felon, and in that definition I'll include actual and constructive possession; and I will re-read the concealed weapon instruction." Defendant unsuccessfully renewed his objection to the trial court's proposed possession instruction "based on due process grounds, on the possession instruction."

On 21 January 2016, the jury returned a verdict convicting defendant of possession of a firearm by a felon and acquitting him of carrying a concealed weapon. Seven days later, defendant entered a plea of guilty to attaining habitual felon status. Based upon the jury's verdict and defendant's guilty plea, the trial court entered a judgment sentencing defendant to a term of 100 to 132 months imprisonment. Defendant noted an appeal to the Court of Appeals from the trial court's judgment.

In seeking relief from the trial court's judgment before the Court of Appeals, defendant argued, among other things, that the trial court had erred by instructing the jury that it could find him guilty of possession of a firearm by a felon on the basis of a constructive possession theory.

State v. Malachi, ___ N.C. App. ___, ___, 799 S.E.2d 645, 647 (2017).[2] In awarding defendant a new trial on the basis of this contention, the Court of Appeals began by determining that "the State's evidence supported an instruction only for actual possession and that the trial court erroneously instructed the jury on constructive possession."[3] *Id.* at ___, 799 S.E.2d at 649. After noting that "a trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial," *id.* at ___, 799 S.E.2d at 648 (quoting *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 94 S. Ct. 3195, 41 L. Ed. 2d 1153 (1974)), and that "[o]ur courts [ ] have consistently held that a trial court's inclusion of a jury instruction unsupported by the evidence presented at trial is an error requiring a new trial,"*id.* at ___, 799 S.E.2d at 648, first citing *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990); and then citing in the following order *State v. Pakulski*, 319 N.C. App. 562, 574, 356 S.E.2d 319, 326 (1987); *State v. Johnson*, 183 N.C. App. 576, 584-85, 646 S.E.2d 123, 128 (2007); *State v. Hughes*, 114 N.C. App. 742, 746, 443 S.E.2d 76, 79, *disc. rev. denied*, 337 N.C. 697, 448 S.E.2d 546 (1994); and *State v. O'Rourke*, 114 N.C. App. 435, 442, 442 S.E.2d 137, 140 (1994)), the Court of Appeals acknowledged that, in *State v. Boyd*, 366 N.C. 548, 742 S.E.2d 798 (2013), this Court had reversed a Court of Appeals decision on the basis of a dissenting opinion stating that "errors [arising from trial court instructions allowing the jury to potentially convict a criminal defendant on the basis of a legal theory lacking sufficient evidentiary support that were] not objected to at trial are not plain error *per se*," with "the burden [being instead] on the defendant to show that [such] an erroneous . . . jury instruction had a probable impact on the jury's verdict," *id.* at ___, 799 S.E.2d at 649 (citing *Boyd*, 222 N.C. App. 160, 173, 730 S.E.2d 193, 201) (2012) (Stroud, J., dissenting)). The Court of Appeals interpreted our decision in *Boyd* to be limited to "plain error review" rather than eliminating "the long established presumption that

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2. Defendant also argued that the trial court had erred by denying his motion to suppress the firearm seized from his person. As a result of its decision to grant defendant a new trial on the basis of the trial court's decision to allow the jury to convict defendant on the basis of the doctrine of constructive possession, the Court of Appeals did not reach defendant's search-related claim.

3. Although the State argued "that the evidence was sufficient to support constructive possession because during the time after officers removed the revolver from [d]efendant, he theoretically could have broken free from the officers and taken hold of the revolver," *id.* at ___, 799 S.E.2d at 649, the Court of Appeals determined that, even though "[d]efendant certainly was aware of the presence of the revolver taken from him by police, no evidence was presented that he had the power to control its disposition or use by the officers who had secured it," *id.* at ___, 799 S.E.2d at 650. The State has not attempted to bring this argument forward for our consideration.

the jury relied on an erroneous disjunctive instruction not supported by the evidence when given over an objection by the defendant's trial counsel." *Id.* at ___, 799 S.E.2d at 649. As a result, since *Boyd* "does not address erroneous disjunctive jury instructions given over the objection of a defendant's trial counsel" and since the jury's verdict in this case did not specify the theory upon which that body based its decision to convict defendant, the Court of Appeals determined that defendant was entitled to a new trial based upon the trial court's erroneous decision to allow the jury to convict defendant on the basis of constructive possession. *Id.* at ___, 799 S.E.2d at 649. In addition, the Court of Appeals determined that defendant should receive a new trial "[e]ven if *Boyd* were interpreted to eliminate the presumption of prejudice by jury instructions unsupported by the evidence and objected to at trial" given that "there is a reasonable possibility that the jury would have reached a different result had the trial court not provided instruction about the theory of constructive possession." *Id.* at ___, 799 S.E.2d at 650.

On 23 May 2017, the State filed a petition seeking discretionary review of the Court of Appeals' decision in this case. In seeking further review by this Court, the State asserted that the trial court did not err by instructing the jury concerning the doctrine of constructive possession because " 'actual possession' is simply a subset of the broader concept" of constructive possession. In addition, the State argued that the Court of Appeals had misapplied *Boyd* and failed to conduct an appropriate prejudice analysis. According to the State, *Boyd* established that, regardless of whether a contemporaneous objection had been lodged at trial, "where an instruction is given on alternative theories of an offense despite one of the theories being unsupported, the erroneous instruction is to be analyzed for prejudice." The State contends that, although "plain error" analysis was appropriate in *Boyd* given the defendant's failure to object to the challenged instruction at trial, "[i]n this case, where there <u>was</u> an objection, the prejudice analysis would properly take the form of regular prejudicial error review." As a result, the State requested this Court to grant further review of the Court of Appeals' decision and to determine that there was no reasonable possibility that the jury convicted defendant on constructive possession grounds in light of the state of the evidence.

Defendant sought to dissuade the Court from granting discretionary review to consider "three separate legal questions, each of which has been settled for decades." As an initial matter, defendant argued that this Court had long distinguished between actual and constructive possession. Secondly, defendant argued that "it is erroneous to instruct the

jury on a theory unsupported by evidence." Thirdly, defendant urged this Court to reject the State's assertion that errors resulting from jury instructions allowing the jury to consider defendant's guilt on the basis of a legal theory that lacks sufficient evidentiary support should be subjected to a prejudice analysis in lieu of "the *per se* error rule followed by this Court for at least three decades." Finally, defendant asserted that the Court of Appeals had, in fact, conducted a prejudice analysis and determined that there was "a reasonable possibility that the jury would have reached a different result had the trial court not provided instruction about the theory of constructive possession." (Quoting *Malachi*, ___ N.C. App. at ___, 799 S.E.2d at 647). As a result, defendant urged this Court to refrain from granting further review in this case. We allowed the State's discretionary review petition on 1 November 2017.

In seeking to persuade us to overturn the Court of Appeals' decision, the State begins by asserting that the Court of Appeals erred by finding that the trial court had erroneously instructed the jury concerning the doctrine of constructive possession. According to the State, actual and constructive possession, instead of being mutually exclusive, "are definitions that partake of each other," with "what we think of as 'actual possession' [being] simply a subset of the broader concept [of constructive possession.]" The State asserts that, "[o]riginally, possession meant physical custody," with "constructive possession" constituting a "legal fiction" "employed to cover those scenarios where possession 'in the real sense of the word' was not present." (Quoting 3 Wayne R. LaFave, *Substantive Criminal Law* § 19.1(a)(2) (2d ed. 2003).) Over time, however, the State contends that this Court has "used constructive possession to broaden the scope of possessory crimes in general." (First citing *State v. Myers*, 190 N.C. 239, 243, 129 S.E. 600, 601 (1925); then citing *State v. Baxter*, 285 N.C. 735, 738, 208 S.E.2d 696, 698 (1974).) "At some point, possession itself adopted the more general definition—the power and intent to control," (citing *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 713 (1972)), so that "actual possession" "became one form or subset of possession," (citing *State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986)), with constructive possession becoming "possession's paradigm."

According to the State, the approach adopted by the Court of Appeals' decision in this case conflicts with its recognition in *State v. Barkley*, 233 N.C. App. 787, 759 S.E.2d 713, 2014 WL 1792716 (2014) (unpublished), that, "[r]ather than presenting an alternative theory of the offense, as defendant claims, the instructions as given simply provided the jury with an accurate legal definition of possession, which includes both actual and constructive possession." (Citing *Barkley*, 2014 WL 1792716, at *4.)

Similarly, the State contends that this Court has "recognized the overlap" between the two concepts by acknowledging that "actual and constructive possession 'often so shade into one another that it is difficult to say where one ends and the other begins.' " (Quoting *State v. McNeil*, 359 N.C. 800, 808, 617 S.E.2d 271, 276 (2005).) As a result, the State concludes, "given this Court's recognition that the boundary between actual and constructive possession is indefinite and that evidence of the one can constitute evidence of the other, the instructions given in this case were not erroneous at all."

Secondly, the State argues that, even if actual and constructive possession constitute "distinct theories" rather than "definitional components," the Court of Appeals misapplied *Boyd* by concluding that any error that the trial court might have committed was prejudicial. (Citing *Boyd*, 366 N.C. at 210, 739 S.E.2d at 838.) According to the State, this Court's decision in *Boyd* established that an error arising from the delivery of an instruction concerning a theory of guilt devoid of sufficient evidentiary support does not require an award of appellate relief unless the error in question was prejudicial regardless of whether a contemporaneous objection was lodged against the challenged instruction at trial. After acknowledging that *Boyd* arose in a plain error, rather than a preserved error, context, the State asserts that the only difference between these two situations stemmed from the nature of the required prejudice analysis, with the relevant inquiry, in a case in which a contemporaneous objection had been lodged at trial, being "whether, but for the instruction on the unsupported theory, there was a reasonable possibility of a different verdict." (Citing N.C.G.S. § 15A-1443(a) (2015).)

According to the State, this Court had held, prior to *Pakulski*, that the erroneous submission of an alternative theory of guilt that was not supported by evidence was not *always* prejudicial. (Citing *State v. Moore*, 315 N.C. 738, 749, 340 S.E.2d 401, 408 (1986) (stating that "[i]t is generally prejudicial error for the trial judge to permit a jury to convict upon a theory not supported by the evidence").) Although our decision in *Pakulski* relied upon *State v. Belton*, 318 N.C. 141, 165, 347 S.E.2d 755, 770 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 677, 483 S.E.2d 483, 414 (1997), *cert. denied*, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997), the State asserts that the holding in *Pakulski* "that submission of an alternative theory to the jury unsupported by evidence resulted in *per se* prejudice even if overwhelming evidence supported the other theory submitted to the jury" differed "significantly" "from *Belton*'s holding that submission of an alternative theory to the jury supported by evidence but legally invalid resulted in *per se* prejudice."

In addition, the State contends that the United States Supreme Court has clarified that the decisions upon which this Court relied in *Belton* "do not apply to instructions on an alternative theory of guilt unsupported by evidence" and only apply "to instructions on an alternative theory of guilt supported by evidence but otherwise legally unavailable." In spite of its acknowledgment that the United States Supreme Court's decision in *Griffin v. United States* does not control the resolution of the state law issue before us in this case, the State cites *Griffin* for the proposition that "a defendant is not entitled to a new trial when a jury returns a general verdict of guilty that could have been premised on a theory for which insufficient evidence was presented so long as another theory of guilt was supported by sufficient evidence." (Citing *Griffin v. United States*, 502 U.S. 46, 59, 112 S. Ct. 466, 474, 116 L. Ed. 2d 371, 383-84 (1991).) As a result, the State urges us to hold, in reliance upon the logic of *Griffin*, that when a trial court instructs on an alternative theory of guilt that lacks sufficient evidentiary support, defendant is not entitled to an award of appellate relief in the absence of a showing of prejudice.

Finally, the State argues that the Court of Appeals erred by holding, in the alternative, that the trial court's decision to allow the jury to convict defendant of possession of a firearm by a felon on the basis of a constructive possession theory that lacked sufficient evidentiary support prejudiced defendant. According to the State, the record contains "overwhelming and uncontroverted evidence that defendant was a felon and that he possessed a firearm—it was removed from his person and he acknowledged to police that he had been holding it," making it exceedingly doubtful that the jury relied upon a theory of constructive possession, rather than actual possession, in deciding to convict defendant.

Defendant, on the other hand, asserts that this Court should affirm the Court of Appeals' decision. In defendant's view, the State's contention that this Court has "erased" the distinction between actual and constructive possession is meritless. As an initial matter, defendant notes that the State had failed to assert that "this Court, over time, has effectively dissolved this distinction" between actual and constructive possession before either the trial court or the Court of Appeals. (Citing N.C. R. App. P. 10(a), (c); *id* at R. 28(a).) Instead, defendant states that the State argued before both the trial court and the Court of Appeals that "both theories of possession were supported by sufficient evidence to submit them to the jury," requested the trial court to instruct the jury concerning both of these possible theories of guilt, and drew a distinction between actual and constructive possession throughout its brief

before the Court of Appeals. In addition, defendant argues that, to the extent that the "trial court erred by failing to instruct the jury in accordance with the [S]tate's new understanding of possession, that error was invited by the [S]tate," given that the State requested, "*over repeated objection*, that the trial court instruct the jury on both actual and constructive possession." (First citing *Bell v. Harrison*, 179 N.C. 190, 198, 102 S.E. 200, 204 (1920); then citing *Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994); and then citing *State v. McPhail*, 329 N.C. 636, 643, 406 S.E.2d 591, 596 (1991)). As a result, for all of these reasons, defendant contends that the State has waived the right to argue before this Court that actual and constructive possession do not represent different theories of guilt.

Secondly, defendant argues that the State's attempt to describe actual possession as a subset of constructive possession "runs counter to a century of precedent from this Court," ranging from our decision last year in *State v. Jones*, 369 N.C. 631, 634, 800 S.E.2d 54, 57 (2017) (holding that "this Court has stated that '[a] person is in constructive possession of a thing when, while not having actual possession, he has the intent and capability to maintain control and dominion over that thing' ") (quoting *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986)), to our 1913 decision in *State v. Lee*, 164 N.C. 533, 535-36, 80 S.E. 405, 405-06 (1913) (interpreting a statute prohibiting the possession of intoxicating liquors for sale as encompassing both "actual and constructive possession"). As a result, defendant contends that the State's argument that the trial court did not err by instructing the jury concerning the doctrine of constructive possession ignores "[a] century of precedent [which] confirms that actual and constructive possession are mutually exclusive because constructive possession, *by definition*, can only occur where actual possession does not."

In addition, defendant contends that, even if the State's defense of the trial court's constructive possession instruction is correct, the trial court's decision to deliver a constructive possession instruction to the jury was still erroneous. According to defendant, it is "well established that 'a trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial.' " (Quoting *Cameron*, 284 N.C. at 171, 200 S.E.2d at 191.) Defendant argues that the evidence, when taken in the light most favorable to the State, merely suggested that defendant had actual possession of the firearm that was discovered on his person. As a result, defendant claims that the trial court erred by instructing the jury that it could convict defendant on the basis of a constructive possession theory.

Similarly, defendant contends that the Court of Appeals correctly held that the trial court's decision to deliver the erroneous constructive possession instruction was "presumptively reversible." According to defendant, a series of decisions by this Court clearly demonstrates "the command of *stare decisis*" that a trial court's decision to instruct the jury on a theory of guilt unsupported by the evidence requires appellate relief unless the reviewing court can conclusively determine from the record that the jury did not rely upon the unsupported decision in deciding to convict the defendant. (First citing *State v. Petersilie*, 334 N.C. 169, 193, 432 S.E.2d 832, 846 (1993); then citing, in the following order, *Lynch*, 327 N.C. at 219, 393 S.E.2d at 816; *Pakulski*, 319 N.C. at 574, 356 S.E.2d at 326; *Moore*, 315 N.C. at 749, 340 S.E.2d at 408; *State v. Dammons*, 293 N.C. 263, 272, 237 S.E.2d 834, 840 (1977); *State v. Lee*, 287 N.C. 536, 541, 215 S.E.2d 146, 149 (1975); *State v. Duncan*, 264 N.C. 123, 127, 141 S.E.2d 23, 26-27 (1965); *State v. Knight*, 248 N.C. 384, 389-90, 103 S.E.2d 452, 455-56 (1958).). In defendant's view, neither this Court's decision in *Boyd*, nor *Pakulski*'s citation to *Belton* justify a departure from the rule "that it is reversible error for the trial court to instruct the jury on a theory unsupported by the evidence." Defendant asserts that *Pakulski* was "neither the genesis nor the last statement of the [per se reversible error] rule, but one of a decades-long series of cases from this Court applying it." For that reason, defendant argues that any attempt to distinguish between the "legally-unsupported" jury instruction in *Belton* and the "factually-unsupported" jury instruction in *Pakulski* represents a misreading of this Court's precedent.

In a similar vein, defendant rejects the State's assertion that our recent decision in *Boyd* applies to more than "unpreserved instructional and evidentiary error" subject to a plain error standard of review. (Citing *Boyd*, 366 N.C. at 210, 739 S.E.2d at 838.) In view of the fact that defendant repeatedly objected to the delivery of a constructive possession instruction at trial, defendant asserts that his challenge to the trial court's constructive possession instruction is simply not subject to plain error review, rendering *Boyd* irrelevant to the proper resolution of this case. As a result, defendant argues that the delivery of an erroneous instruction concerning a theory of guilt that lacks sufficient evidentiary support is not subject to prejudicial error analysis and necessarily requires an award of appellate relief.

Defendant contends the "traditional rule," which he describes as presuming prejudice in instances in which a trial court instructs the jury concerning a theory of guilt lacking sufficient evidentiary support, "accords with the purposes and incentives governing preservation"

by "urg[ing] both parties to speak up at trial where errors can be corrected." In the aftermath of *Boyd*, defendant claims that "[t]he presumption that the jury convicted based on the unsupported legal theory" only applies when the defendant objected to the delivery of the unsupported instruction and "there is a general verdict, rather than a special verdict specifying the theory underlying the conviction." As a result, defendant argues that the "traditional rule" properly gives the State the incentive to request that the trial court instruct the jury to render a special, rather than a general, verdict, thereby assuring that the jury reached its decision on the basis of a correct understanding of the applicable law.

Finally, even if this Court decides that the erroneous delivery of an instruction allowing the jury to convict a defendant on the basis of a theory that lacks sufficient record support is subject to prejudicial error analysis, defendant argues that the Court of Appeals correctly determined that "there is a reasonable possibility that there would have been a different outcome had the trial court instructed the jury correctly." According to defendant, the Court of Appeals correctly held that the trial court's decision to deliver a constructive possession instruction created a risk that the jury would be confused about the meaning of "possession," with the existence of such confusion being evidenced by the jury's request for a further instruction concerning possession during the deliberation process. In addition, defendant suggests that the jury could have had doubts about the credibility of the State's evidence given its decision to acquit defendant of carrying a concealed weapon and the existence of evidence tending to show that Officer Van Aken had an altercation with defendant that resulted in defendant's hospitalization and the termination of Officer Van Aken's employment, that Officers Clark and Hawkins did not prepare their written statements on the day of the incident underlying the charges that were lodged against defendant or mention the altercation between Officer Van Aken and defendant in their statements, that Officer Hawkins remained in contact with Officer Van Aken after the latter's employment was terminated, and that no audio or video recordings of the discovery of the firearm on defendant's person had been made. As a result, defendant urges us to uphold the Court of Appeals' decision to award him a new trial.

[1] "It is well established that possession may be actual or constructive." *State v. Bradshaw*, 366 N.C. 90, 93, 728 S.E.2d 345, 348 (2012) (citing *State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986)). "Actual possession requires that a party have physical or personal custody of the item." *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998) (citation omitted). "[A] person is in constructive possession of a thing

when, while not having actual possession, he has the intent and capability to maintain control and dominion over that thing." *Jones*, 369 N.C. at 634, 800 S.E.2d at 57 (quoting *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986)). According to well-established North Carolina law, "it is error for the trial judge to charge on matters which materially affect the issues when they are not supported by the evidence." *State v. Jennings*, 276 N.C. 157, 161, 171 S.E.2d 447, 449 (1970) (First citing *State v. Knight*, 248 N.C. 384, 389-90, 103 S.E.2d 452 455-56 (1958); then citing *State v. McCoy*, 236 N.C. 121, 124, 71 S.E.2d 921, 923 (1952)).

Assuming, without in any way deciding, that the State has neither waived the right to assert that actual possession is a subset of constructive possession nor invited any error that the trial court might have made by treating actual and constructive possession as separate concepts in its jury instructions, this Court has, as defendant notes, long recognized a distinction between actual and constructive possession. Simply put, the prior decisions of this Court treat constructive possession as an alternative means of showing the possession of an item necessary for guilt of certain offenses that becomes available in the event that the State is unable to establish that the defendant actually possessed an item. Although a person in actual possession of an object might well have "the intent and capability to maintain control and dominion over" that object, the essence of the two types of possession revolves around the extent to which the person in question either did or did not physically have the object in his or her possession, with there being no need for a showing of "the intent and capability to maintain control and dominion over that object" in the event that the defendant physically possessed the relevant item. As a result, we hold that the Court of Appeals correctly determined that the trial court erred by allowing the jury to potentially convict defendant of possession of a firearm by a felon on the basis of a constructive possession theory.

[2] In awarding defendant a new trial, the Court of Appeals held, first, that the trial court's error was not subject to prejudicial error review and, then, that, even if prejudicial error review were appropriate, the trial court's erroneous constructive possession instruction prejudiced defendant. In urging us to uphold the validity of the first of these two decisions, defendant argues that an erroneous instruction concerning a legal theory that lacks sufficient evidentiary support is "presumptively erroneous"[4] and requires automatic reversal, with this assertion resting

4. In his brief, defendant appears to use the terms "presumptively erroneous" and "per se erroneous" as if they were synonymous. As this Court has previously noted,

upon defendant's interpretation of a series of decisions by this Court. In other words, defendant argues that the extent to which a prejudice inquiry should be conducted in cases involving errors such as the one at issue here has already been resolved, so that the Court of Appeals' decision must be upheld on stare decisis grounds.

Admittedly, the decisions upon which defendant relies in attempting to establish that this Court has adopted an automatic reversal rule consistently grant appellate relief in the event that a trial judge allows the jury to convict a defendant on the basis of a legal theory that lacks sufficient evidentiary support without explicitly engaging in any sort of prejudice inquiry. On the other hand, none of the decisions upon which defendant relies explicitly holds that a prejudice inquiry would be inappropriate in such instances,[5] and a number of them contain language that suggest that such a prejudice analysis should be conducted. *Moore*, 315 N.C. at

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"[p]resumption is a term which is often loosely used." *Henderson County v. Osteen*, 297 N.C. 113, 117, 254 S.E.2d 160, 163 (1979). As a general proposition, evidentiary presumptions are either "permissive," "conclusive," or "mandatory," with a permissive presumption involving a situation in which, once "the basic fact underlying the presumption has been established," "the presumed fact may or may not be found," *Dobson v. Harris*, 352 N.C. 77, 82 n.3, 530 S.E.2d 829, 835 n.3 (2000); a mandatory presumption, which may or may not be rebuttable, involving a situation in which, "[once] the basic fact has been established, the presumed . . . fact *must* be found unless sufficient evidence of its nonexistence is forthcoming," *id.* at 82 n.3, 530 S.E.2d at 835 n.3 (alterations in original) (quoting Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 44, at 148 (5th ed. 1998)); and a conclusive presumption being another term for an irrebutable mandatory presumption, *State v. Reynolds*, 307 N.C. 184, 189, 297 S.E.2d 532, 535 (1982) (stating that "[a] conclusive presumption provides that upon proof of the basic fact, the presumed fact must be found and cannot be overcome by rebutting evidence" (quoting John M. Schmolesky, *County Court of Ulster County v. Allen and Sandstrom v. Montana: The Supreme Court Lends an Ear but Turns Its Face*, 33 Rutgers L. Rev. 261, 265 (1981))). As we understand defendant's argument, the presumption arising from the delivery of an instruction authorizing the jury to convict the defendant on the basis of a legal theory lacking sufficient evidentiary support to which the defendant made a contemporaneous objection is a conclusive one—if such an event occurs, a new trial must be awarded without any further inquiry.

5. This Court did discuss the harmless error issue in *Pakulski*, in which the State sought a finding of non-prejudice on the grounds that "the jury could have based its verdict solely on the robbery felony." *Pakulski*, 319 N.C. at 574, 356 S.E.2d at 326. After noting that "the verdict form does not reflect the theory upon which the jury based its finding of guilty of felony murder" and that "we cannot discern from the record upon which theory the jury relied," this Court declined to "assume that the jury based its verdict on the theory for which it received a proper instruction." *Id.* at 574, 356 S.E.2d at 326. However, given that the State's evidence tying defendant to the homicide for which he was convicted consisted of little, if anything, more than accomplice testimony and given that the defendant presented both alibi evidence and other testimony challenging the accomplice's credibility, *id.* at 566-67, 356 S.E.2d at 322-23, the evidence of defendant's guilt was clearly subject to serious dispute. Similarly, in *Lynch*, the record contained evidence which a juror might

749, 340 S.E.2d at 408 (stating that "[i]t is generally prejudicial error for the trial judge to permit a jury to convict upon a theory not supported by the evidence"); *Dammons*, 293 N.C. at 272, 237 S.E.2d at 840 (stating that "[i]t is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the evidence"); *Lee*, 287 N.C. at 541, 215 S.E.2d at 149 (stating that "where the trial court in a criminal case permits the jury to return a verdict of guilty upon a legal theory or a state of facts not supported by the evidence it is prejudicial error entitling the defendant to a new trial"); *Knight*, 248 N.C. at 389-90, 103 S.E.2d at 455-56 (stating that the trial court's instructions, which "permitted the jury to rest its verdict on a theory not supported by the evidence," "was calculated to prejudice, and may have prejudiced, the defendant").[6] As a result, given that our existing jurisprudence does not conclusively establish that existing North Carolina law encompasses an automatic reversal rule of the type contended for by defendant, we must determine whether we should adopt such a rule.[7]

As this Court has said on numerous occasions, litigants are not entitled to receive "perfect" trials; instead, they are entitled to receive "a fair trial, free of prejudicial error." *State v. Ligon*, 332 N.C. 224, 243, 420 S.E.2d 136, 147 (1992). "In order to obtain a new trial it is incumbent on a defendant to not only show error but also to show that the error was so prejudicial that without the error it is likely that a different result would have been reached." *State v. Loren*, 302 N.C. 607, 613, 276 S.E.2d 365, 369 (1981); *see also State v. Alston*, 307 N.C. 321, 339, 298 S.E.2d 631, 644 (1983) (stating that "[t]he defendant is not entitled to a new trial

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have mistakenly believed to support the lying in wait theory that the Court ultimately determined to lack adequate evidentiary support, while the State's evidence of defendant's guilt on the basis of malice, premeditation, and deliberation was essentially circumstantial in nature. *Lynch*, 327 N.C. at 214-15, 393 S.E.2d at 813-14. As a result, neither of these decisions explicitly rejects the use of harmless error analysis in similar circumstance, while the outcomes in both cases are consistent with what seems to us to be an appropriately conducted harmless error analysis.

6. Similar language, which could be construed as dicta, appears in *State v. Dick*, 370 N.C. 305, 308, 807 S.E.2d 545, 547 (2017), which cites *Lynch*, 327 N.C. at 219, 393 S.E.2d at 816, for the proposition that "insufficient evidence regarding one theory submitted to the jury, when prejudicial, was reversible error requiring [a] new trial."

7. The State has argued, in reliance upon *Griffin* and *Belton*, that an automatic reversal rule arising from an instruction allowing the jury to convict a criminal defendant on an invalid legal theory would only be appropriate in the event that the legal theory in question was unavailable to the State as a matter of law rather than because that theory lacked sufficient evidentiary support. We do not find this argument persuasive given this Court's repeated decisions to grant appellate relief in cases in which the trial court allowed the jury to convict the defendant based upon a legal theory that lacked sufficient record support.

based on trial errors unless such errors were material and prejudicial"); *State v. Galloway*, 304 N.C. 485, 496, 284 S.E.2d 509, 516 (1981) (stating that "[i]t has long been the rule in this jurisdiction that not every erroneous ruling on the admissibility of evidence will result in a new trial being ordered," with the burden being "on the appellant not only to show error but also to show that there is a reasonable possibility 'that, had the error in question not been committed, a different result would have been reached at the trial.' ") (quoting N.C.G.S. § 15A–1443 (1978)). "The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence" and "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 3105, 92 L. Ed. 2d 460, 470 (1986) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S. Ct. 1431, 1436, 89 L. Ed. 2d 674, 684-85 (1986) (first citing, *United States v. Nobles*, 422 U.S. 225, 230, 95 S. Ct. 2160, 2166, 45 L. Ed. 2d 141, 148 (1975); then citing R. Traynor, *The Riddle of Harmless Error* 50 (1970))).[8] As a result, a showing of prejudice is generally required before appellate relief is granted in this jurisdiction.

An automatic reversal rule has, however, been deemed appropriate in some circumstances. As the United States Supreme Court has stated in discussing the concept of structural error, " 'while there are some errors to which [harmless-error analysis] does not apply, they are the exception and not the rule,' " with "harmless-error analysis [being applicable] to instructional errors so long as the error at issue does not categorically ' "vitiat[e] *all* the jury's findings" ' " and with "[a]n instructional error arising in the context of multiple theories of guilt no more vitiat[ing] *all* the jury's findings than does omission or misstatement of an element of the offense when only one theory is submitted." *Hedgepeth v. Pulido*, 555 U.S. 57, 61, 129 S. Ct. 530, 532, 172 L. Ed. 2d 388, 391-92 (2008) (per curiam) (first alteration in original) (first quoting

8. Although we agree with defendant that our recent decision in *Boyd*, which was made in a plain error context, does not control the outcome of this case given that defendant properly preserved his challenge to the trial court's erroneous constructive possession instruction for purposes of appellate review, it does tend to call into question any contention that harmless error concepts are completely irrelevant to errors such as the one at issue in this case and to suggest that our usual approach to harmless error analysis, under which unpreserved errors are reviewed under a plain error standard of review while errors that were the subject of a contemporaneous objection at trial are reviewed for harmlessness under the standards enunciated in either N.C.G.S. § 15A-1443(a) or N.C.G.S. § 15A-1443(b), applies in cases like this one.

Clark, 478 U.S. at 578, 106 S. Ct. at 3106, 92 L. Ed. 2d at 471; and then quoting *Neder v. United States*, 527 U.S. 1, 11, 119 S. Ct. 1827, 1834, 144 L. Ed. 2d 35, 48 (1999) (third alternation in original) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S. Ct. 2078, 2082, 124 L. Ed. 2d 182, 190-91 (1993)).[9] Similarly, this Court has treated some errors as being sufficiently serious as to merit an award of appellate relief without the necessity for a showing of prejudice. *State v. Hucks*, 323 N.C. 574, 581, 374 S.E.2d 240, 245 (1988) (holding that a failure to appoint two counsel to represent a defendant in a capital trial constitutes prejudicial error per se); *State v. Mitchell*, 321 N.C. 650, 659, 365 S.E.2d 554, 559 (1988) (holding that a trial court's "refusal to permit both [of the defendant's trial] counsel to address the jury during the defendant's final arguments constitute[d] prejudicial error per se in both the guilt-innocence and sentencing phases" of the defendant's capital trial); *State v. Bindyke*, 288 N.C. 608, 627, 220 S.E.2d 521, 533 (1975) (holding that the presence of an alternate juror in the jury room during deliberations constitutes prejudicial error per se). However, this Court has generally refrained from finding prejudicial error per se even in the face of serious evidentiary and instructional errors. For example, this Court has deemed errors such as the admission of "other bad acts evidence" in violation of N.C.G.S. § 8C-1, Rule 404(b), *see State v. McKoy*, 317 N.C. 519, 529, 347 S.E.2d 374, 380 (1986) (holding that the admission of evidence tending to show other criminal conduct on the part of one of the defendants involved in a multi-defendant trial in violation of N.C.G.S. § 8C-1, Rule 404(b) constituted harmless error with respect to both that defendant and a codefendant), a violation of a defendant's constitutional right to be informed of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), *see State v. Hicks*, 333 N.C. 467, 481, 428 S.E.2d 167, 175 (1993) (holding that, in light of "the extremely incriminating evidence properly admitted at trial," "the admission of the defendant's first confession in violation of the *Miranda* exclusionary rule was harmless

9. We do not, of course, wish to be understood as treating the United States Supreme Court's structural error jurisprudence as controlling with respect to the issue of when, under North Carolina's law, harmless error analysis is and is not appropriate. Instead, as is discussed more fully in the text of this opinion, "North Carolina courts also apply a form of structural error known as error per se," under which "error per se is automatically deemed prejudicial and thus reversible without a showing of prejudice." *State v. Lawrence*, 365 N.C. 506, 514, 723 S.E.2d 326, 331-32 (2012) (first citing N.C.G.S. § 15A–1443(a) (2009); then citing *State v. Parker*, 350 N.C. 411, 421, 426, 516 S.E.2d 106, 114, 117 (1999), *cert. denied*, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000); and then citing *State v. Brown*, 325 N.C. 427, 428, 383 S.E.2d 910, 910 (1989) (per curiam)). As a result of the fact that "federal structural error and state error per se have developed independently," *Lawrence*, 365 N.C. at 514, 723 S.E.2d at 332, the same error might or might not be deemed structural by the federal courts and error per se by the North Carolina courts.

beyond a reasonable doubt"), *abrogated on other grounds by State v. Buchanan*, 353 N.C. 332, 340, 543 S.E.2d 823, 828 (2001)), a violation of the defendant's right to confront the witnesses for the prosecution, *see State v. Ortiz-Zape*, 367 N.C. 1, 13-14, 743 S.E.2d 156, 164-65 (2013) (holding, in the alternative, that any violation of the defendant's confrontation rights resulting from the admission of expert witness opinion testimony that analyzed data from lab tests performed by another chemist was harmless beyond a reasonable doubt), *cert. denied*, 572 U.S. 1134, 134 S. Ct. 2660, 189 L. Ed. 2d 208 (2014)), and the omission of an element of the crime charged from the trial court's substantive instructions to the jury, *see State v. Bunch*, 363 N.C. 841, 845, 689 S.E.2d 866, 869 (2010) (holding "that the trial court's omission of elements of a crime in its recitation of jury instructions is reviewed under the harmless error test"), to be subject to harmless error analysis. The instructional error under consideration in this case more closely resembles the types of errors in which a showing of prejudice is required before an award of appellate relief is deemed appropriate than the fundamental, difficult to evaluate, errors that this Court has deemed to constitute prejudicial error per se, and defendant has failed to demonstrate why the instructional error at issue in this case should be treated differently than similar instructional errors. As a result, like the United States Supreme Court, we are not persuaded that the error at issue in this case is so potentially serious as to justify adopting an automatic reversal rule, which essentially treats errors like the one at issue in this case as prejudicial error per se.

The only argument advanced in defendant's brief in support of the adoption of an automatic reversal rule other than the assertion that this Court's prior decisions require such a decision is a contention that such an automatic reversal rule, as modified in *Boyd*, "recognizes the nature of the error and the simple steps that can be taken to address any resulting harm." In essence, defendant argues that, under the automatic reversal rule as modified by *Boyd*, "[t]he presumption that the jury convicted on the unsupported legal theory [ ] applies only where there is a general verdict rather than a special verdict specifying the theory underlying the conviction." In defendant's view, "[i]f, despite an objection, the [S]tate insists on an unsupported theory," it "can request a special verdict specifying the theory on which the jury convicted," with this "minimal step" "cost[ing] the [S]tate virtually nothing." According to defendant, it is only fair to place the burden of requesting the use of a special verdict upon the State, since it "is the party requesting the unsupported jury instruction" "over objection" and should "bear the responsibility of curing the problems the unsupported instruction would cause" and since placing the burden on defendant to request a special instruction may

result in a decision that defendant "has abandoned her original objection" or "joined in requesting the instruction." As a result, defendant contends that "[a] rule presuming prejudice where the defendant has objected to the unsupported instruction [ ] puts the incentives in all of the right places," with defendant being given an incentive to object in order to either preclude the delivery of the unsupported instruction or permit "[t]he resulting error [to] be corrected on appellate review" and with the State being given "an incentive to request a special verdict form to cure the problem it created."

We are not persuaded by defendant's incentive-based argument. As an initial matter, defendant's argument rests upon the apparent assumption that the only way in which the delivery of an instruction allowing defendant's conviction on the basis of an unsupported legal theory could ever be deemed harmless is in the event that the reviewing court is provided with an ironclad guarantee that the jury did not rely upon the unsupported legal theory in deciding to convict defendant. Needless to say, insistence upon such a guarantee would not be consistent with this Court's usual approach to the resolution of harmless error-related issues, which the relevant statutory language indicates must rest upon an assessment of the likelihood that the outcome at trial would have been different had an error not occurred. In addition, defendant's argument overlooks the fact that errors like the one at issue here do not necessarily occur at the behest of the State. On the contrary, the trial court may elect to deliver an instruction like the one at issue here on its own motion or even over the State's objection. Moreover, the trial court might reject a request by the State for the submission of a special verdict form to the jury. Even so, defendant's approach suggests that an automatic reversal would be appropriate in each of those instances. Finally, defendant fails to take into account the fact that, as long as a defendant lodges a contemporaneous objection to the delivery of an instruction like the one at issue here, the defendant's claim will be reviewed utilizing the more easily satisfied "reasonable possibility" standard set out in N.C.G.S. § 15A-1443(a) instead of the more stringent "reasonable probability" standard enunciated for use in "plain error" situations in *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (stating that, in order to establish plain error, "a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty' " (first quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983); then citing *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986))). On the other hand, in the event that the State failed to seek to obtain the submission of a special verdict form or failed to persuade the trial court to submit one, it would have

passed up a chance to potentially eliminate any need for the reviewing court to undertake a "reasonable possibility" analysis. Defendant's implicit argument to the contrary notwithstanding, the approach to the harmless error issue that we deem to be appropriate in this case does, in fact, provide the State with an incentive to ask that the jury be required to return a special verdict. As a result, for all of these reasons, we hold that defendant's challenge to the delivery of the trial court's unsupported constructive possession instruction is subject to traditional harmless error analysis.

[3] As a general proposition, a defendant seeking to obtain appellate relief on the basis of an error to which he or she lodged an appropriate contemporaneous objection at trial must establish that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a) (2017).[10] However, the history of this Court's decisions in cases involving the submission of similar erroneous instructions and our consistent insistence that jury verdicts concerning a defendant's guilt or innocence have an adequate evidentiary foundation persuade us that instructional errors like the one at issue in this case are exceedingly serious and merit close scrutiny to ensure that there is no "reasonable possibility" that the jury convicted the defendant on the basis of such an unsupported legal theory. However, in the event that the State presents exceedingly strong evidence of defendant's guilt on the basis of a theory that has sufficient support and the State's evidence is neither in dispute nor subject to serious credibility-related questions, it is unlikely that a reasonable jury would elect to convict the defendant on the basis of an unsupported legal theory.[11]

According to the undisputed evidence elicited at trial, investigating officers went to a convenience store parking lot after receiving a report

10. Defendant suggests that the Court should treat the trial court's decision to allow the jury to convict defendant on the basis of a constructive possession theory as a constitutional violation subject to harmless review pursuant to N.C.G.S. § 15A-1443(b) (requiring the State to show that the alleged error was harmless beyond a reasonable doubt). In view of the fact that the Court of Appeals did not find that the trial court's error was constitutional in nature and the fact that defendant did not petition this Court to allow consideration of such a constitutional issue, we decline to adopt defendant's alternative argument concerning the manner in which the required harmless error analysis should be conducted.

11. According to defendant, the State waived the right to argue that the trial court's error was harmless on the grounds that the State had failed to advance such an argument in its discretionary review petition. Admittedly, the question to be presented stated in the State's petition refers to the Court of Appeals' "fail[ure] to conduct a prejudice analysis." However, the State's petition contained an argument heading asserting that the Court of

that an individual possessed a firearm and discovered such a weapon while searching an individual who matched the description of the person in question and who turned out to be defendant. In the event that the jury found this undisputed evidence to be credible beyond a reasonable doubt, it would have been required, under the trial court's instruction, to convict defendant of possession of a firearm by a felon on the basis of an actual possession theory. As a result, the ultimate issue before this Court is whether there is a reasonable possibility that the jury would have sufficiently questioned the credibility of the investigating officers' testimony to return a verdict of acquittal.

Defendant claims that the jury could have questioned the credibility of the investigating officers' testimony for a number of reasons, including the injuries that Officer Van Aken inflicted upon defendant during a post-arrest altercation, the fact that Officer Van Aken's employment was terminated and that he was charged with assaulting defendant based upon this post-arrest altercation, the fact that the statements provided by various officers were not written immediately after defendant's arrest, and the fact that the officers' interactions with defendant were not recorded and that the other officers remained in contact with Officer Van Aken after his termination. Almost all of the reasons that defendant has advanced in support of his contention that the testimony of the investigating officers is subject to serious question rest upon events that occurred after defendant was placed under arrest for possessing a firearm. For that reason, defendant's implicit suggestion that investigating officers attempted to "frame" defendant in order to protect Officer Van Aken seems to us to rest upon a logical inconsistency. Moreover, while defendant's arguments predicated upon the officers' failure to record their interaction with defendant and the delay in the drafting of their reports cannot be dismissed upon the basis of similar logic, they do not strike us as particularly compelling. Finally, the Court of Appeals' emphasis upon the fact that the jury asked for further instructions concerning the possession issue and the fact that the jury acquitted defendant of carrying a concealed weapon does not tend to show prejudice, at least in our opinion, given the absence of any explanation for why the jury might have sought clarification about the meaning of possession and

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Appeals had "fail[ed]to conduct a prejudice analysis in accord with" *Boyd* and *Griffin* and an argument that there was no "reasonable possibility" that the jury would have convicted defendant on the basis of a constructive possession theory "since the evidence was uncontroverted that defendant possessed the firearm" given that "it was removed from his person and he acknowledged to police that he was holding it." As a result, we conclude that the issue of whether the delivery of the constructive possession instruction constituted prejudicial error is properly before us.

the fact that guilt of carrying a concealed weapon, unlike the charge of possession of a firearm by a felon, requires proof of intentional concealment. *State v. Gilbert*, 87 N.C. 527, 528 (1882) (stating that "*[t]o conceal a weapon*[ ] means something more than the mere act of having it where it may not be seen" and "implies an assent of the mind, and a *purpose* to so carry it, that it may not be seen"). As a result, defendant has not satisfied us that there is a reasonable possibility that, in the absence of the erroneous constructive possession instruction, the jury would have acquitted defendant.

Thus, for all of these reasons, we hold that the Court of Appeals erred by holding that challenges to jury instructions allowing juries to convict criminal defendants on the basis of legal theories that lack evidentiary support are not subject to harmless error analysis and by holding that, even if such a harmlessness analysis were appropriate, there was a reasonable possibility that the outcome at defendant's trial would have been different had the trial court refrained from allowing the jury to convict defendant on the basis of a constructive possession theory. As a result, the Court of Appeals' decision in this case is reversed and this case is remanded to the Court of Appeals for consideration of defendant's remaining challenges to the trial court's judgment.

REVERSED AND REMANDED.

Justice MORGAN dissenting.

While I agree with my learned colleagues in the majority that the Court of Appeals correctly determined that the trial court erred by allowing the jury to potentially convict defendant of the offense of possession of a firearm by a felon on the basis of a constructive possession theory, I nonetheless disagree with their conclusion that the lower appellate court erred in its determination that there was a reasonable possibility that the outcome of defendant's trial would have been different if the trial court had refrained from allowing the jury to potentially convict defendant on the basis of a theory of constructive possession. Based on my position, I am inclined to affirm the Court of Appeals' decision to vacate the trial court's judgment and grant defendant a new trial.

My departure from the majority in this case stems from the liberties that I believe the majority improperly takes to discount the reasonable possibility that, had the error of the submission of the constructive possession of firearm by defendant not been submitted to the jury as a theory for his guilt, a different result would have been reached at the trial

out of which this appeal arises. The majority expressly utilizes "close scrutiny to ensure that there is no 'reasonable possibility' that the jury convicted the defendant on the basis of such an unsupported legal theory"—namely, constructive possession—while introducing a new evaluative standard that "in the event that the State presents exceedingly strong evidence of defendant's guilt on the basis of a theory that has sufficient support and the State's evidence is neither in dispute nor subject to *serious* credibility-related questions"—here, actual possession—"it is unlikely that a reasonable jury would elect to convict the defendant on the basis of an unsupported legal theory." (Emphasis added.) As I assess this newly minted doctrine by the majority cobbled together from selected principles enunciated in our decisions of *Bradshaw*, *Jones*, *Ligon*, *Loren*, *Alston*, and *Galloway*, coupled with the majority's willingness to couch the trial jury's ability to "potentially convict defendant of the offense of possession of a firearm by a felon on the basis of a constructive possession theory" as insufficient wrongful exposure to warrant a new trial for defendant, my recognition of the fundamental concepts of trial evidence, the application of the appropriate law to the evidence, and the respective roles of the judicial forum and the jury leads me in a different direction from my fellow jurists in this case.

"Every criminal conviction involves facts (i.e., what actually occurred) and the application of the law to the facts . . . . In a jury trial the judge instructs jurors on the law, and the jury finds the facts and applies the law." *State v. Arrington*, ___ N.C. ___, ___, 819 S.E.2d 329, 331 (2018). Courts must not "invade the province of the jury, which is to assess the credibility of the witnesses and determine the facts from the evidence adduced." *State v. Rhodes*, 290 N.C. 16, 24, 224 S.E.2d 631, 636 (1976) (first citing *State v. Canipe*, 240 N.C. 60, 81 S.E.2d 173 (1954); and then citing 7 Strong's North Carolina Index 2d Trial § 18 (1968)); *see also State v. Ward*, 364 N.C. 133, 153, 694 S.E.2d 738, 750 (2010) (Newby, J., dissenting) (observing that "it is the role of the jury to make any final determination regarding the weight to be afforded to the evidence" (quoting *Crocker v. Roethling*, 363 N.C. 140, 150, 675 S.E.2d 625, 632 (2009) (Martin, J., concurring)). By opining upon the reasonableness of the jury's two potential theories underlying a verdict of guilty, when there is no evidence to support one theory and sufficient evidence to support the other theory, the majority is engaging in an exercise that invades the established province of the jury. I do not consider it to be within a judicial forum's proper purview to sift through the evidence and to speculate as to which theory, between or among multiple ones, a jury considered to be persuasive to reach its verdict, yet the majority has effectively done so here.

In a similar vein, the majority states that "the ultimate issue before this Court is whether there is a reasonable possibility that the jury would have sufficiently questioned the credibility of the investigating officers' testimony to return a verdict of acquittal." "[A]ssess[ing] the credibility of the witnesses" is a matter for the jury. *Rhodes*, 290 N.C. at 24, 224 S.E.2d at 636. While the majority acknowledges that "defendant suggests that the jury could have had doubts about the credibility of the State's evidence" regarding the investigating law enforcement officers, nonetheless, the members of the majority assess the manner in which the trial jury could have determined issues of credibility with respect to the submitted theories of defendant's culpability and conclude that it "seems to us to rest upon a logical inconsistency." Just as this Court in the case at bar should refrain from conducting a review of the potential effect of erroneous jury instructions upon a jury's verdict of guilty by invading the province of the jury as to which submitted legal theory may have prompted its finding of guilty, this Court should also take care to refrain from conducting such a review by invading the province of the jury by conducting its own examination of witness credibility issues.

For the reasons stated, I would affirm the decision of the Court of Appeals in this case.

STATE OF NORTH CAROLINA
v.
PATTY MEADOWS

No. 400PA17

Filed 7 December 2018

1. Appeal and Error—nonconstitutional sentencing issues—failure to object—preserved for review

Defendant's nonconstitutional sentencing issues were preserved for appellate review even though she failed to object before the sentencing court. N.C. Rule of Appellate Procedure 10(a)(1) did not require a contemporaneous objection because the trial court knew or should have known that defendant sought the minimum possible sentence. The issues were also preserved for review by N.C.G.S. § 15A-1446(d)(18), which has been upheld because it does not conflict with the N.C. Rules of Appellate Procedure.

2. Sentencing—safekeeping order—not overruled

Defendant was not entitled to relief where she argued that the judge who sentenced her overruled the safekeeping order of the trial judge trial by sentencing her. A judge other than the trial judge may conduct a sentencing hearing, and there was no indication that the trial judge wished to retain jurisdiction over the matter or delay sentencing.

3. Sentencing—within statutory limit—presumed regular and valid

Defendant was not entitled to relief where she argued that the judge who sentenced her abused his discretion. The sentence was within the statutory limit and thus presumed regular and valid where the record showed no indication that the judge considered irrelevant or improper matters in determining the severity of the sentence.

4. Appeal and Error—constitutional sentencing issue—failure to object—not preserved for review

Where defendant failed to lodge a contemporaneous objection to a constitutional issue before the sentencing court, appellate review of the Eighth Amendment argument was barred by N.C. Rule of Appellate Procedure 14(b)(2) and the Supreme Court's previous holdings that constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 806 S.E.2d 682 (2017), finding no error after appeal from judgments entered on 7 and 8 April 2016 by Judge Gary M. Gavenus in Superior Court, Madison County upon a jury verdict finding defendant guilty following a trial before Judge R. Gregory Horne. Heard in the Supreme Court on 2 October 2018.

Joshua H. Stein, Attorney General, by Daniel Snipes Johnson, Special Deputy Attorney General, for the State.

Michael E. Casterline for defendant-appellant.

BEASLEY, Justice.

This case requires the Court to consider whether Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure precludes appellate review of sentencing arguments not raised before the sentencing court.

We conclude that defendant waived her Eighth Amendment arguments by failing to raise them before the sentencing court; defendant's non-constitutional sentencing issues were preserved for appellate review despite her failure to lodge a contemporaneous objection, but are nonetheless meritless. Accordingly, we modify and affirm the decision of the Court of Appeals. As to defendant's ineffective assistance claim, we hold that discretionary review was improvidently allowed.

Following a jury trial, defendant Patty Meadows was convicted of one count each of trafficking opium by sale, trafficking opium by delivery, and trafficking opium by possession. All three counts arose from the same transaction, in which defendant sold seventy-five oxycodone pills to a confidential informant. At trial, after the close of all evidence, defendant sought emergency medical treatment, which prevented her attendance at closing arguments and the jury charge. After deliberating for less than an hour, the jury returned its verdict of guilty on all counts in defendant's absence. Noting that a defendant's presence is required for sentencing, Judge R. Gregory Horne continued the matter to the following day. The next day, defense counsel produced a doctor's note indicating that defendant was medically unable to be present in court at that time. Judge Horne entered a written safekeeping order directing the Sheriff of Madison County to "place the defendant . . . in the custody of the Warden of Central Prison, Wake County, Raleigh, North Carolina for safekeeping pursuant to [N.C.G.S. §] 162-39 until such time as [s]he is needed to face the charges held against [her] in Court or Release Conditions have been satisfied." After Judge Horne entered the safekeeping order, Judge Gary M. Gavenus assumed the bench to conduct the administrative session scheduled for that day. Later that afternoon, defendant was brought to court and presented to Judge Gavenus for sentencing. Without objection from defendant, Judge Gavenus conducted defendant's sentencing hearing. After hearing the State's summary of the trial evidence and both parties' arguments, Judge Gavenus imposed a minimum sentence of seventy months' imprisonment on each count, with the sentences for two counts to be served concurrently and the third sentence to be served consecutively to the first two.

Defendant appealed, arguing that: (1) defendant received ineffective assistance of counsel; (2) by sentencing defendant, Judge Gavenus improperly overruled Judge Horne's safekeeping order; (3) Judge Gavenus abused his discretion in imposing consecutive sentences on an elderly first offender for a single drug transaction; and (4) defendant's sentences are grossly disproportionate to her offenses in violation of the Eighth Amendment to the United States Constitution. The Court

of Appeals found no error in defendant's convictions and sentences, concluding that defendant failed to preserve arguments related to her sentencing as required by Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure and that defendant was not denied effective assistance of counsel. *State v. Meadows*, ___ N.C. App. ___, ___, 806 S.E.2d 682, 686-96 (2017). Defendant petitioned for discretionary review of each issue, which this Court allowed on 9 May 2018. *Meadows*, ___ N.C. ___, 812 S.E.2d 847 (2018)

Defendant's arguments relate mostly to the sentence imposed by Judge Gavenus. As she argued before the Court of Appeals, defendant challenges her sentence as an abuse of discretion, an illegal overruling of one superior court judge by another, and a violation of the Eighth Amendment's prohibition against cruel and unusual punishments.

Despite her failure to voice any objection to her sentence or the sentencing proceedings in the trial court, defendant contends she is entitled to raise these arguments on appeal. Before the Court of Appeals, defendant relied on a line of cases decided by that court holding that the issue preservation requirements of Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure do not apply to errors occurring during a sentencing hearing. The Court of Appeals disagreed, concluding that Rule 10(a)(1) applies to sentencing hearings; accordingly, the Court of Appeals held that defendant had waived her sentencing arguments. *Meadows*, ___ N.C. App. at ___, 806 S.E.2d at 689-96. Before this Court, defendant now argues that sentencing issues are statutorily preserved by N.C.G.S. § 15A-1446(d)(18) (2017); thus, no contemporaneous objection is required.

[1] Under the Constitution of North Carolina, this Court possesses "exclusive authority to make rules of procedure and practice for the Appellate Division." N.C. Const. art. IV, § 13, cl. 2. Accordingly, this Court has promulgated Appellate Rule 10, which states:

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. . . . Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, including, but not limited to, whether the judgment is

> supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, may be made the basis of an issue presented on appeal.

N.C. R. App. P. 10(a)(1). Thus, the Appellate Rules generally require that parties take some action to preserve an issue for appeal. *Id.* Exceptions exist, however, allowing a party to raise an issue on appeal that was not first presented to the trial court.

This Court addressed one such scenario in *State v. Canady*, 330 N.C. 398, 410 S.E.2d 875 (1991). There, the defendant raised for the first time on appeal an alleged error in the trial court's finding of an aggravating factor to support an increased sentence. *Id.* at 400, 410 S.E.2d at 877. We held that Rule 10(b)(1), the text of which is now found in Rule 10(a)(1),[1] did not apply to the case because the rule is "directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal." *Id.* at 401, 410 S.E.2d at 878.

The *Canady* opinion has inspired a string of decisions in the Court of Appeals holding that Rule 10(a)(1) categorically does not apply to errors committed during a sentencing hearing. *See State v. Pettigrew*, 204 N.C. App. 248, 258, 693 S.E.2d 698, 704-05, *appeal dismissed*, 364 N.C. 439, 706 S.E.2d 467 (2010); *State v. Curmon*, 171 N.C. App. 697, 703-04, 615 S.E.2d 417, 422-23 (2005); *State v. Hargett*, 157 N.C. App. 90, 92-93, 577 S.E.2d 703, 705 (2003). To derive such a categorical rule from *Canady*, however, one must ignore the opinion's rationale. In that case, we considered the purpose of Rule 10(a)(1): "to require a party to call the court's attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal." *Canady*, 330 N.C. at 401, 410 S.E.2d at 878. Thus, we noted that the rule discourages gamesmanship; a party may not simply "allow evidence to be introduced or other things to happen during a trial as a matter of trial strategy and then assign error to them if the strategy does not work." *Id.* at 402, 410 S.E.2d at 878. Rather than create a categorical rule, we concluded that the danger of gamesmanship was not present in *Canady* and held

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1. Rule 10 was amended effective 1 October 2009, and certain provisions were changed and subsections moved. *Compare N.C. Rules of Appellate Procedure*, 363 N.C. 902, 935-38 (2009), *with N.C. Rules of Appellate Procedure*, 287 N.C. 672, 698-702 (1975). Prior to the 2009 amendment, the language currently contained in subdivision (a)(1) was located in subdivision (b)(1).

that no contemporaneous objection was required to preserve the issue for appellate review in that case. *Id.* at 402, 410 S.E.2d at 878 ("The defendant did not want the court to find the aggravating factor, and the court knew or should have known it. This is sufficient to [preserve the issue for appellate review]."),

Here, defendant requested that all three sentences be consolidated, which would have resulted in a sentence of seventy to ninety-three months' imprisonment. Defense counsel argued in support of the requested sentence, noting defendant's advanced age, poor health, and previously clean criminal record. After hearing arguments, Judge Gavenus consolidated only two of the three sentences, resulting in a 140-month minimum term of imprisonment. As in *Canady*, the sentencing court "knew or should have known" defendant sought the minimum possible sentence. Accordingly, defendant need not have voiced a contemporaneous objection to preserve her nonconstitutional sentencing issues for appellate review.

Defendant's sentencing issues are also preserved by statute. In N.C.G.S. § 15A-1446(d) (2017), the General Assembly enumerated a list of issues it deems appealable without preservation in the trial court. One such issue is an argument that "[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law." *Id.* § 15A-1446(d)(18). Although this Court has held several subdivisions of subsection 15A-1446(d) to be unconstitutional encroachments on the rulemaking authority of the Court,[2] subdivision (18) is not one of them. In *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010), the Court explained that a statutory provision governing the preservation of issues for purposes of appellate review is unconstitutional only if it

2. *See State v. Stocks*, 319 N.C. 437, 439, 355 S.E.2d 492, 493 (1987) (holding N.C.G.S. § 15A-1446(d)(5) unconstitutional because its provision that errors based on insufficiency of evidence are reviewable without objection at trial conflicted with Appellate Rule 10(b)(3), which prohibited a defendant from "assign[ing] as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial"); *State v. Bennett*, 308 N.C. 530, 535, 302 S.E.2d 786, 790 (1983) (holding unconstitutional N.C.G.S. § 15A 1446(d)(13), which allowed for appellate review of errors in the jury charge without an objection having been raised at trial, despite then-Appellate Rule 10(b)(2)'s provision to the contrary); *State v. Elam*, 302 N.C. 157, 159-61, 273 S.E.2d 661, 663-64 (1981) (holding unconstitutional N.C.G.S. § 15A-1446(d)(6), which provided that a defendant may appeal based on an argument made for the first time on appeal that the defendant "was convicted under a statute that is in violation of the Constitution of the United States or the Constitution of North Carolina," although Appellate Rule 14(b)(2) required that a constitutional challenge be "timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not)").

conflicts with a "specific provision[ ] of our appellate rules rather than the general rule stated in Rule of Appellate Procedure 10(a)." Because no such conflict existed, the Court upheld subdivision 15A-1446(d)(18). Accordingly, defendant's nonconstitutional sentencing arguments are preserved by statute.

[2] Nonetheless, although it was error for the Court of Appeals to decline to address defendant's sentencing arguments, defendant is not entitled to relief on appeal because those arguments are meritless.

Defendant's argument that Judge Gavenus "overruled" Judge Horne's safekeeping order by sentencing her is unavailing. First, a judge other than the trial judge may conduct a defendant's sentencing hearing. *State v. Sauls*, 291 N.C. 253, 263-64, 230 S.E.2d 390, 396 (1976), *cert. denied*, 431 U.S. 916, 53 L. Ed. 2d 226 (1977). Furthermore, neither the order nor Judge Horne's oral remarks indicated that he wished to retain jurisdiction over the matter or to delay sentencing. The order merely stated that defendant was to be held in custody "*until such time as [she] is needed* to face the charges held against [her] in Court or Release Conditions have been satisfied." From the bench, Judge Horne stated that the Department of Adult Correction should "evaluate [defendant's] situation *until such time as sentencing can be scheduled* and entered before *a court* of competent jurisdiction." (emphasis added). Judge Horne could have, but did not, say defendant should be held "until *I* can sentence her" or "until she can be brought before *me* for sentencing." Instead, Judge Horne's oral remarks and written order indicate an awareness that defendant might be sentenced by some other judge, so long as that judge presided over a court of competent jurisdiction.

[3] Defendant's argument that Judge Gavenus abused his discretion in sentencing her is similarly meritless. A sentence "within the statutory limit will be presumed regular and valid," unless "the record discloses that the court considered irrelevant and improper matter[s] in determining the severity of the sentence." *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987) (citing and quoting *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977)). Defendant here states that Judge Gavenus must have been influenced by defendant's decision to take her case to trial because there is no other explanation for the harshness of the imposed sentence. Defendant's conclusory accusation lacks any support in the record. Because there is no reason to believe Judge Gavenus was influenced by irrelevant or improper considerations, the within-limits sentence imposed here is presumed proper.

[4] Although defendant's nonconstitutional sentencing issues are preserved without contemporaneous objection consistent with *Canady* and N.C.G.S. § 15A-1446(d), constitutional issues are not. Rule 14(b)(2) of the North Carolina Rules of Appellate Procedure requires that a constitutional issue must have been "timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not)" as a prerequisite to appellate review in this Court. Further, this Court has consistently held that "[c]onstitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) (quoting *State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004), *cert. denied sub nom. Queen v. North Carolina*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005)). This is true even when a sentencing issue is intertwined with a constitutional issue. *See*, *e.g.*, *id.* at 301-02, 698 S.E.2d at 67 (holding that the defendant's constitutional double jeopardy argument was waived for failure to object at trial); *State v. Madric*, 328 N.C. 223, 231, 400 S.E.2d 31, 36 (1991) (same). Because defendant failed to argue to the sentencing court that the sentence imposed violates the Eighth Amendment, she may not raise that argument on appeal.

For the reasons stated, we hold that defendant waived her Eighth Amendment argument by failing to raise it before the sentencing court. Moreover, with regard to defendant's nonconstitutional sentencing arguments, we conclude that they were preserved for appellate review, but are meritless. Finally, we hold that discretionary review was improvidently allowed as to defendant's ineffective assistance claim.

MODIFIED AND AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

STATE OF NORTH CAROLINA
v.
DARRELL LEE MELTON

No. 253PA17

Filed 7 December 2018

Criminal Law—solicitation—distinguished from attempt

The trial court should have granted defendant's motion to dismiss charges of attempted murder where defendant arranged with a hired killer (actually an undercover officer) to kill his former wife, counseled the hired killer on how to complete that action, and paid the hired killer in full. North Carolina's definition of "attempt" has developed through the common law rather than through the model penal code, as it has some other states. Defendant's acts were all part of the solicitation, not the execution of the crime solicited. There was no evidence to establish that defendant committed an overt act that would have resulted in the killing in the ordinary and likely course or things.

Justice MORGAN dissenting.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 801 S.E.2d 392 (2017), finding no error after appeal from judgments entered on 21 April 2016 by Judge Mark E. Powell in Superior Court, Transylvania County. Heard in the Supreme Court on 15 May 2018 in session in the Henderson County Historic Courthouse in the City of Hendersonville, pursuant to section 18B.8 of Chapter 57 of the 2017 North Carolina Session Laws.

Joshua H. Stein, Attorney General, by Matthew Tulchin, Special Deputy Attorney General, for the State.

Glenn Gerding, Appellate Defender, by Kathryn L. VandenBerg, Assistant Appellate Defender, for defendant-appellant.

HUDSON, Justice.

This case comes to us by way of defendant's petition for discretionary review of the Court of Appeals' decision. Specifically, defendant has asked us to determine whether the Court of Appeals erred by (1) upholding defendant's conviction for attempted murder, and (2) holding that punishing defendant for both solicitation and attempted murder based on the same conduct did not violate double jeopardy. We hold that the Court of Appeals erred in upholding defendant's conviction for attempted murder, and accordingly, we reverse the decision of the Court of Appeals. Because of this holding, we need not reach the double jeopardy issue.

I. Factual and Procedural Background

The scene underlying this case began when defendant left telephone messages for an acquaintance, Lawrence Sorkin, in late fall of 2014 and January of 2015. At the time, defendant was involved in an ongoing child custody dispute with his former wife. In his first message, defendant asked if he could have a few minutes of Sorkin's time to discuss something that would be "beneficial" to defendant. In the message in January, defendant stated that he would be willing to give Sorkin $200 for his time. The two agreed to meet at a Waffle House in Brevard in late January.

When they met, Sorkin mentioned defendant's offer of $200 and told defendant that the payment was not necessary; defendant paid the restaurant bill, and they continued their conversation near defendant's car. While they were outside, defendant told Sorkin that he was feeling pressured by his child custody case, that he felt it was not getting any better, and that he was tired of going to court. According to Sorkin, defendant also recalled an earlier conversation between them in which Sorkin jokingly recalled that his father mentioned he had connections to some men in Jacksonville, Florida who could "break a few legs." By the end of the conversation, Sorkin feared that defendant meant to hurt his former wife.

Later that same day, Sorkin went to the Transylvania County Sheriff's Department to report his discussion with defendant. From that point on, Sorkin cooperated with the Sheriff's Office and helped arrange a meeting between defendant and an undercover officer in a Walmart parking lot. Sorkin's role in arranging the meeting involved multiple telephone conversations and in-person meetings with defendant, in which Sorkin acted as if he was contacting a "resource" on defendant's behalf who could "take care of the matter however [defendant] wanted."

The meeting between defendant and the undercover officer at the Walmart parking lot occurred on 3 February 2015. Sorkin was also present, and he directed defendant to the undercover officer's car. Sorkin left immediately after defendant made contact with the officer. When defendant entered the car, the officer, playing the role of a hired killer, scanned defendant and asked him if he had a wire or a recording device. Later, defendant mentioned the $2,500 that he was told to bring to the meeting. The officer instructed defendant to show him the money.

After seeing the money, the officer began to ask defendant questions about his former wife. Defendant provided her name, address, and cell phone number. At some point during the meeting, defendant also provided pictures of his former wife. The officer then asked defendant how he could "get" defendant's former wife "by herself." In response, defendant gave the undercover officer the name of his daughter's elementary school and the drop-off times at the school. In response to questions, defendant then gave a description of his former wife's car and informed the officer that she was always alone in the car after she dropped their daughter off at school.

Next, the undercover officer instructed defendant on how they would communicate and how defendant would pay the remaining $7,500. Specifically, the officer told defendant that he had just purchased a phone that he would have for six days only. He told defendant that in two days, defendant should buy a "Verizon burn phone," and text him from that number. The officer told defendant that, "[w]hen it's done," he would instruct defendant on where to send the remaining $7,500. The officer then told defendant that "when we're done," defendant should destroy the Verizon burn phone.

After giving defendant these last instructions, the undercover officer asked defendant where he wanted his former wife's dead body. Defendant responded that he was "having trouble understanding." After this response, the officer asked defendant, "Why am I here?" and defendant responded, "I need to be the sole parent making every decision with my daughter all the time, and no chance of any more court cases. Totally no chance." The officer then stated that he was not a lawyer, and defendant indicated that he understood that. While pushing defendant to clarify his intent, the officer told defendant that if he wanted sole custody, he could "give [defendant] sole custody." Defendant responded that he wanted sole custody. Then after again being asked where he wanted his former wife's dead body and how defendant "want[ed] [him] to do it," defendant told the officer that "as long as there's no chance that I will answer questions or be involved, I want – I want to make sure my

daughter is with me all the time, only me, no chance of any further court cases or anything." Defendant ultimately told the officer that he did not "want any bodies moved."

After stating that he did not want any bodies moved, defendant explained to the undercover officer how he could do the job without defendant's daughter being present. Defendant said, "I pick [my daughter] up Monday, and she's with me. Six days is – what's we're in. During school is fine. Thursday is a half day, they got off at noon." After the officer asked defendant again how he "want[ed] it done," defendant ultimately responded, "I don't care about any details."

Before defendant left the vehicle, the undercover officer asked whether defendant would have any trouble acquiring the rest of the $7,500. Defendant responded that he had the full $10,000 with him, and he gave it to the officer. After defendant handed over the money, the officer told him they would have no more communication and that defendant would know once his former wife was dead. Next, the officer asked defendant if the $10,000 was all from one bank. Defendant responded that the money was withdrawn at "[d]ifferent times" and that he "saved a while." The officer next said to defendant that his former wife could "disappear . . . Thursday or not." Defendant then responded "Yes, sir" to whether "Thursday it is okay?" At that point, defendant left the officer's car, and he was arrested as he returned to his own car. At the time of defendant's arrest, the undercover officer had left the Walmart parking lot.

Following his arrest, defendant was indicted on 9 February 2015 on charges of attempted first-degree murder and solicitation to commit first-degree murder. Defendant filed a motion to continue on 7 April 2016 requesting more time to obtain a neuropsychiatrist to examine the results of an MRI done on defendant's brain. The court denied defendant's motion to continue.[1] Defendant's trial began on 18 April 2016, and the facts summarized above were placed into evidence, primarily through the testimonies of Sorkin, the undercover officer who met with defendant, and defendant himself.

At the close of the State's evidence, defendant moved to dismiss, arguing that "attempted murder . . . . falls outside of the purview of the statute under the evidence . . . here." The motion was denied. At

1. Defendant supplemented his Motion to Continue at trial by requesting extra time to review discovery that he had received from the prosecutor the previous week and that he had been having trouble accessing. The Court withheld ruling on this motion until defendant was able to review the discovery during a break in the trial. Defense counsel did not renew this motion.

the close of all evidence, defendant renewed his motion to dismiss, arguing that "on the attempted murder charge . . . the act or the res that is being used, as I understand it . . . was in point of fact subsumed in the solicitation and not indicative of an attempt." The court denied defendant's renewed motion to dismiss.

The jury found defendant guilty of attempted first-degree murder and solicitation to commit first-degree murder. The court sentenced him to a term of 157 to 201 months for attempted first-degree murder and a consecutive term of 58 to 82 months for solicitation to commit first-degree murder. Defendant gave oral notice of appeal at trial.

The Court of Appeals first held that the trial court did not err in denying defendant's motion to dismiss the attempted murder charge because there was "sufficient evidence of an overt act to permit the case to go to the jury." *State v. Melton*, ___ N.C. App. ___, 801 S.E.2d 392, 2017 WL 2644445, at *2 (2017) (unpublished). Specifically, the Court of Appeals concluded that the evidence sufficiently showed an overt act because "[defendant] hired another man to kill his ex-wife." *Melton*, 2017 WL 2644445, at *2. The Court of Appeals also pointed to evidence indicating that defendant "provid[ed] details to ensure that the killer could carry out that act." *Id.* The Court of Appeals recognized that such details included

> his ex-wife's name, phone number, and daily routine; a photograph of her; and a description of her car. Melton gave the man a specific day to carry out the murder and even discussed what to do with the body. Finally, Melton gave the man $10,000 to pay for the murder. He then got out of the man's car and walked away, believing the murder would be carried out.

Id. Based on this evidence, the Court of Appeals reasoned that defendant had committed an overt act because, "[a]t that point, Melton had taken every step necessary to complete this contract killing." *Id.* The Court of Appeals added:

> All that remained was for the hitman (had he not been an undercover agent) to kill Melton's ex-wife. Melton provided the killer with everything he needed to complete the job, including key information on the target and the money to pay for the deed. In short, Melton took a key "step in a direct movement towards the commission of the offense[.]"

Id. (brackets in original) (quoting *State v. Parker*, 224 N.C. 524, 526, 31 S.E.2d 531, 531-32 (1944), *overruled in part on other grounds by State v. Hageman*, 307 N.C. 1, 14 n.1, 296 S.E.2d 433, 441 n.1 (1982)).

Additionally, the Court of Appeals observed without elaboration that "our holding is consistent with those in other jurisdictions, which uniformly hold that, although mere solicitation is insufficient to constitute attempt, specific acts taken to complete a murder-for-hire, such as those taken by [defendant] here, can satisfy the elements of attempted murder." *Id.* at *3 (citations omitted).

Second, the Court of Appeals held that the trial court did not violate defendant's right to be free from double jeopardy in punishing him for both solicitation and attempted murder based on the same conduct because "[e]ach of these two offenses 'requires proof of [an additional] fact which the other does not.' " *Id.* (quoting *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306, 309 (1932)). Specifically, the Court of Appeals observed that "[a]ttempt, unlike solicitation, requires an overt act," *id.* (quoting *State v. Clemmons*, 100 N.C. App. 286, 290, 396 S.E.2d 616, 618 (1990)), and "[s]olicitation, unlike attempt, requires 'enticing or inducing' another to commit a crime." *Id.* (quoting *State v. Tyner* 50 N.C. App. 206, 207, 272 S.E.2d 626, 627 (1980), *disc. rev. denied*, 302 N.C. 633, 280 S.E.2d 451 (1981)).

Following the decision by the Court of Appeals, defendant filed a petition for discretionary review, which we allowed on 1 November 2017. In his petition, defendant requested that we examine whether the Court of Appeals erred by (1) upholding defendant's conviction for attempted murder, and (2) holding that there was no double jeopardy violation in punishing defendant for both solicitation and attempted murder based upon the same conduct. We conclude that the evidence was insufficient to show that defendant committed attempted murder as defined by North Carolina law. Therefore, we reverse the decision upholding the denial of defendant's motion to dismiss the attempted murder charge. Because of this holding, we need not address the double jeopardy issue.

II. Analysis

We first conclude here that the Court of Appeals' reliance upon cases from other jurisdictions, all of which have statutory frameworks different from our own, provides inadequate support for its decision. Second, but more important, we conclude that under North Carolina law, the State's evidence adequately showed solicitation but fell short of showing the required overt acts for attempted first-degree murder, so that defendant's motion to dismiss that charge should have been allowed.

This Court reviews the decision of the Court of Appeals to determine whether it contains any errors of law. N.C. R. App. P. 16(a); *State v. Mumford*, 364 N.C. 394, 398, 699 S.E.2d 911, 914 (2010) (citation omitted). "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 549 (2018) (quoting *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781, *cert. denied*, 537 U.S. 1005, 123 S. Ct. 495, 154 L. Ed. 2d 403 (2002)). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* at 492, 809 S.E.2d at 549 (quoting *Mann*, 355 N.C. at 301, 560 S.E.2d at 781)). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *Id.* at 492, 809 S.E.2d at 549-50 (quoting *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995)). "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *Id.* at 492, 809 S.E.2d at 550 (quoting *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016)).

A. The Court of Appeals Relied on Inapposite Case Law from Other Jurisdictions in Concluding Defendant Committed Attempted Murder.

Under North Carolina law, "[t]he elements of an attempt to commit any crime are: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996) (first citing *State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993); then citing *State v. Smith*, 300 N.C. 71, 265 S.E.2d 164 (1980)).

The general rule in North Carolina for determining when conduct constitutes an overt act has developed at common law:

> In order to constitute an attempt, it is essential that the defendant, with the intent of committing the particular crime, should have done some overt act adapted to, approximating, and which in the ordinary and likely course of things would result in the commission thereof. Therefore, the act must reach far enough towards the

> accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory. In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made.

Id. at 668, 477 S.E.2d at 921 (quoting *State v. Price*, 280 N.C. 154, 158, 184 S.E.2d 866, 869 (1971)); *see Parker*, 224 N.C. at 525-26, 31 S.E.2d at 531-32; *State v. Addor*, 183 N.C. 687, 689, 110 S.E. 650, 651 (1922).

Although our General Assembly has not defined this offense in a statutory enactment as other states have done, the legislature has clearly expressed its policy preferences that solicitation and attempt are two different crimes and that attempt is to be punished more harshly than solicitation. N.C.G.S. § 14-2.5 (2017) ("Unless a different classification is expressly stated, an attempt to commit a misdemeanor or a felony is punishable under the *next lower* classification as the offense which the offender attempted to commit. An attempt to commit a Class A or Class B1 felony is a Class B2 felony, an attempt to commit a Class B2 felony is a Class C felony, an attempt to commit a Class I felony is a Class 1 misdemeanor, and an attempt to commit a Class 3 misdemeanor is a Class 3 misdemeanor." (emphasis added)); *id.* § 14-2.6(a) (2017) ("Unless a different classification is expressly stated, a person who solicits another person to commit a felony is guilty of a felony that is *two classes lower* than the felony the person solicited the other person to commit, except that a solicitation to commit a Class A or Class B1 felony is a Class C felony, a solicitation to commit a Class B2 felony is a Class D felony, a solicitation to commit a Class H felony is a Class 1 misdemeanor, and a solicitation to commit a Class I felony is a Class 2 misdemeanor."(emphasis added)). We may or may not agree with these policy choices, but we are not a legislative body and decline to engage in that analysis here.

In support of its conclusion that defendant committed an overt act, the Court of Appeals relied on several cases from other jurisdictions that it says "uniformly hold that, although mere solicitation is insufficient to constitute attempt, specific acts taken to complete a murder-for-hire, such as those taken by [defendant] here, can satisfy the elements of attempted murder." *Melton*, 2017 WL 2644445, at *3 (citing *State v. Mandel*, 78 Ariz. 226, 229-30, 278 P.2d 413, 416 (1954)); *People v. Superior Court*, 41 Cal. 4th 1, 11-12, 157 P.3d 1017, 1024 (2007); *Howell v. State*, 157 Ga. App.

451, 454-55, 278 S.E.2d 43, 46 (1981) (*cert. denied*, Apr. 10, 1981); *State v. Montecino*, 2004-0892, pp. 7-8 (La. App. 1 Cir. 2/11/05); 906 So. 2d 450, 454, *cert. denied*, 2005-0717 (La. 6/3/05); 903 So. 2d 456; *State v. Group*, 98 Ohio St. 3d 248, 2002-Ohio-7247, 781 N.E.2d 980 at ¶96. Having carefully considered these decisions, we conclude that to the extent the Court of Appeals relied on them, it erred because each comes from a jurisdiction whose attempt law is derived from a statutory framework materially different than our own.

Two of these decisions are from Georgia and Ohio, jurisdictions that have generally adopted the Model Penal Code (MPC). *See Howell*, 157 Ga. App. at 456, 278 S.E.2d at 47 (stating that the "substantial step" language in Georgia's criminal code was adopted from the MPC); *see also Group*, 98 Ohio St. 3d 248, 2002-Ohio-7247, 781 N.E.2d, at ¶¶ 101-102 (quoting and citing *State v. Woods*, 48 Ohio St. 2d 127, 132, 357 N.E.2d 1059, 1063 (1976), *judgment vacated and case remanded*, 438 U.S. 910, 98 S. Ct. 3133, 57 L. Ed. 2d 1153 (1978), which adopted the MPC's "substantial step" test to determine when an overt act has been committed). The MPC has been recognized as "broaden[ing] the scope of attempt liability." 2 Wayne R. LaFave, *Substantive Criminal Law* § 11.4(e), at 313 (3d ed. 2018) [hereinafter LaFave, *Substantive Criminal Law*] (citing Model Penal Code § 5.01 cmt. 6, at 329-30 (Am. Law Inst. 1985)); *see also Howell*, 157 Ga. App. at 456, 278 S.E.2d at 47 ("It is expected, in the normal case, that this approach will broaden the scope of attempt liability."). This broader scope of liability appears to result from the MPC's distinct concern with "restraining dangerous persons." LaFave, *Substantive Criminal Law* § 11.4(e), at 313 (citing Model Penal Code § 5.01 cmt. 6, at 329-30); *see also* Model Penal Code § 5.01(2), at 296 (stating that conduct will satisfy the Code's "substantial step" test if it is "strongly corroborative of the actor's criminal purpose"). In addition to widening the scope of attempt liability, the MPC switches the focus of the attempt analysis to "what the actor has already done rather than what remains to be done." LaFave, *Substantive Criminal Law* § 11.4(e), at 313; *see also State v. Daniel B.*, 164 Conn. App. 318, 328-29, 137 A.3d 837, 846 (2016); *People v. Hawkins*, 311 Ill. App. 3d 418, 424, 723 N.E.2d 1222, 1226-27 (2000); *State v. Lammers*, 479 S.W.3d 624, 633 (Mo. 2016) (en banc).

North Carolina has not adopted the MPC approach to attempt, nor has our legislature defined attempt by statute; instead, our definition of attempt has developed from the common law, which differs from the MPC approach in important respects. Specifically, our common law definition of attempt does not include conduct that is merely "*strongly corroborative* of the actor's criminal purpose." Model Penal Code

§ 5.01(2), at 296 (emphasis added). Our attempt law includes as overt acts conduct that "stand[s] either as the first or some subsequent step in *a direct movement towards the commission of the offense* after the preparations are made." *Miller*, 344 N.C. at 668, 477 S.E.2d at 921 (emphasis added) (quoting *Price*, 280 N.C. at 158, 184 S.E.2d at 869); *see Parker*, 224 N.C. at 526, 31 S.E.2d at 531-32; *Addor*, 183 N.C. at 689, 110 S.E. at 651. Simply put, our attempt law requires conduct more overt than that required under the MPC. Also, in determining whether the conduct is a "first or some subsequent step," our approach considers what remains to be done, and therefore differs in focus from the MPC. *Miller*, 344 N.C. at 668, 477 S.E.2d at 921 (quoting *Price*, 280 N.C. at 158, 184 S.E.2d at 869); *see Parker*, 224 N.C. at 526, 31 S.E.2d at 531; *Addor*, 183 N.C. at 689, 110 S.E. at 651.

Two of the other cases mentioned by the Court of Appeals are from jurisdictions that allow an overt act to be shown by "slight acts" when an intent to commit a crime is "clearly shown." *Mandel*, 78 Ariz. at 228, 278 P.2d at 415 (citations omitted); *People v. Superior Court*, 41 Cal. 4th at 8, 157 P.3d at 1022 (citations omitted). As noted above, North Carolina's attempt law varies from the MPC; our law also differs from the slight acts approach. Beyond mere "slight acts in furtherance" of a criminal intent, *Mandel*, 78 Ariz. at 228, 278 P.2d at 415 (citations omitted); *People v. Superior Court*, 41 Cal. 4th at 8, 157 P.3d at 1022 (citations omitted), our Court has required a defendant's conduct to "stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made." *Miller*, 344 N.C. at 668, 477 S.E.2d at 921 (quoting *Price*, 280 N.C. at 158, 184 S.E.2d at 869); *see Parker*, 224 N.C. at 526, 31 S.E.2d at 531-32; *Addor*, 183 N.C. at 689, 110 S.E. at 651.[2]

Finally, the Court of Appeals cited a case from Louisiana, a jurisdiction whose attempt statute did not require the defendant to have committed an act that would "have actually accomplished" the criminal purpose.

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2. It should be noted that we have quoted "slight acts" language in at least one prior case, *State v. Bell*, 311 N.C. 131, 141, 316 S.E.2d 611, 616 (1984) ("[W]henever the design of a person to commit a crime is clearly shown, slight acts in furtherance of the design will constitute an attempt." (quoting 21 Am. Jur. 2d *Criminal Law* § 159, at 316 (1981)); however, we have not adopted this approach for determining when an overt act has occurred. In *Bell* this language was included in our analysis of intent, not overt acts, and we included it to demonstrate that an intent to commit the underlying offense can be shown from the commission of an overt act. *See id.* at 140-41, 316 S.E.2d at 616 ("While it is true that the actual physical assault on [the victim] took place outside the presence of [the defendant], we nevertheless believe that . . . the attempt was complete upon [the] defendant's act in ordering the women to remove their clothes, an act which served to make the intent unequivocal.").

See Montecino, 2004-0892 at p. 6; 906 So.2d at 453 ("Any person who . . . does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt . . . and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose." (quoting La. Rev. Stat. Ann. § 14:27(A) (2005))). Unlike the approach in *Montecino*, North Carolina law requires a defendant to commit an act that "in the ordinary *and likely* course of things *would result in the commission thereof*." *Miller*, 344 N.C. at 668, 477 S.E.2d at 921 (emphases added) (quoting *Price*, 280 N.C. at 158, 184 S.E.2d at 869; *see Parker*, 224 N.C. at 525, 31 S.E.2d at 531; *Addor*, 183 N.C. at 689, 110 S.E. at 651.

For the above reasons, we conclude that the cases from other jurisdictions referenced and relied on by the Court of Appeals are rooted in jurisprudence inconsistent with the North Carolina legal framework and definition of attempt. Accordingly, we decline to follow this approach.

B. The Evidence Did Not Show an "Overt Act" Amounting to Attempt as Defined By North Carolina Law.

As discussed already, our legislature has not chosen to statutorily define the crime of attempt, although it has set forth the punishment structure. The contours of our law of attempt have thus evolved through the common law.

Our common law has developed several guidelines to distinguish acts of preparation from overt acts. In *Addor* we quoted the decision of the California Supreme Court in *People v. Murray* which provided that "[b]etween preparation for the attempt and the attempt itself[ ] there is a wide difference. The preparation[s] consist[ ] in devising or arranging the means or measures necessary for the commission of the offense[.] [T]he attempt is the direct movement toward[s] the commission after the preparations are made." *Addor*, 183 N.C. at 690, 110 S.E. at 651 (quoting *People v. Murray*, 14 Cal. 159, 159, 1859 WL 1186, at *1 (1859)). We then applied this test to determine that "the alleged attempt did not amount to a direct ineffectual act towards the present manufacture of spirituous liquors, to a 'commencement of the consummation,' " *id.* at 690, 110 S.E. at 652 (quoting *Hicks v. Commonwealth*, 86 Va. 223, 226, 9 S.E. 1024, 1025 (1889)), "but, as indicated in the opinion of *Chief Justice Fields* in the *California* case, the said acts consisted only in 'devising or arranging the means or measures necessary [to] the commission of the offense.' " *Id.* at 690, 110 S.E. at 652 (quoting *Murray*, 14 Cal. at 159, 1859 WL 1186, at *1).

Furthermore, in both *Addor* and *Parker* we stated that an overt act is committed when the act is, at least, "in part execution of a criminal design." *Parker*, 224 N.C. at 526, 31 S.E.2d at 532 (citations omitted); *Addor*, 183 N.C. at 688, 110 S.E. at 650 (citation omitted). Additionally, in both *Addor* and *Parker* we concluded that an overt act occurs when the act is "apparently adapted to produce the result intended." *Parker*, 224 N.C. at 526, 31 S.E.2d at 532 (citing *Addor*, 183 N.C. at 689, 110 S.E. at 651).

The Court of Appeals concluded that defendant attempted to kill his former wife by taking the following steps: (1) hiring another man to kill his former wife, (2) providing him the details necessary to complete the killing, (3) helping the hired killer formulate a plan to kill his former wife, and (4) paying the hired killer to commit the killing. *Melton*, 2017 WL 2644445, at *2. The Court of Appeals reasoned that "[a]ll that remained was for the hitman (had he not been an undercover agent) to kill [defendant's] ex-wife." *Id.*

We are not persuaded that the Court of Appeals properly applied our common law to these facts; while the evidence of defendant's conduct does show a completed solicitation, his actions fall short of an overt act constituting attempt. Specifically, in meeting with the supposed hired killer, tendering the $2,500 in cash as an initial payment, providing the hired killer the details necessary to complete the killing of defendant's former wife, and helping the hired killer plan how to get his former wife alone and how to kill her out of the presence of their daughter, defendant engaged in ample and horrifying acts of solicitation. "The gravamen of the offense of soliciting lies in counseling, enticing or inducing another to commit a crime." *State v. Furr*, 292 N.C. 711, 720, 235 S.E.2d 193, 199 (citation omitted), *cert. denied*, 434 U.S. 924, 98 S. Ct. 402, 54 L. Ed. 2d 281 (1977). Furthermore, evidence can still prove solicitation "when the solicitation is of no effect." *State v. Hampton*, 210 N.C. 283, 284, 186 S.E. 251, 252 (1936). The evidence here reveals that, intending that his wife be killed, defendant counseled the hired killer concerning how to complete that criminal objective. Moreover, evidence established that defendant enticed and induced the hired killer to commit the crime by tendering the $2,500 initial payment.

Nonetheless, evidence of these preparatory acts, calculating as they are, does not amount to proof of overt acts amounting to attempt under our law. Specifically, by providing details to the supposed hired killer to carry out the killing and giving him an initial payment, defendant certainly "devis[ed] or arrang[ed] the means or measures necessary for the commission of the offense." *Addor*, 183 N.C. at 690, 110 S.E. at 651

(quoting *Murray*, 14 Cal. at 159, 1859 WL1186, at *1). Yet, at that point, defendant had not begun to "execut[e]" the "criminal design" that he helped concoct. *Parker*, 224 N.C. at 526, 31 S.E.2d at 532; *Addor*, 183 N.C. at 688, 110 S.E. at 650. Moreover, the act of planning the killing and making an initial payment to the hired killer would not, without additional conduct, inexorably result in the commission of the offense in the "ordinary and likely course of things." *Miller*, 344 N.C. at 668, 477 S.E.2d at 921 (quoting *Price*, 280 N.C. at 158, 184 S.E.2d at 869); *see Parker*, 224 N.C. at 525, 31 S.E.2d at 531; *Addor*, 183 N.C. at 689, 110 S.E. at 651.

Furthermore, in striking an agreement with the hired killer to kill his former wife and paying the supposed hired killer in full, defendant engaged in more conduct than that minimally necessary for a solicitation; however, he did not commit an overt act amounting to attempt.[3]

We conclude that even though hiring and paying a hired killer exceeds the minimum conduct required to prove solicitation, such acts do not satisfy our requirement of overt acts necessary to prove attempt.[4] The Court of Appeals concluded that defendant had committed an overt act because "[a]ll that remained was for the hitman (had he not been an undercover agent) to kill [defendant's] ex-wife." *Melton*, 2017 WL 2644445, at *2. But, even in giving the State the benefit of every reasonable inference from these facts, we conclude that defendant's actions, reprehensible as they were, failed to qualify as attempt under

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3. Here the "hitman" was an undercover police officer who had no intention of killing defendant's former wife, and as such, defendant was not charged with conspiracy. Under North Carolina law, a conspiracy exists when "*two or more* persons" agree to "do an unlawful thing or to do a lawful thing in an unlawful way by unlawful means." *State v. Horton*, 275 N.C. 651, 656, 170 S.E.2d 466, 469 (1969) (emphasis added) (quoting *State v. Gallimore*, 272 N.C. 528, 532, 158 S.E.2d 505, 508 (1968)), *cert. denied*, 398 U.S. 959, 90 S. Ct. 2175, 26 L. Ed. 2d 545 (1970); *State v. Goldberg*, 261 N.C. 181, 202, 134 S.E. 2d 334, 348 (emphasis added), *cert. denied*, 377 U.S. 978, 84 S. Ct. 1884, 12 L. Ed. 2d 747 (1964), *disapproved on other grounds by News & Observer Publ'g Co. v. State ex rel. Starling*, 312 N.C. 276, 283, 322 S.E.2d 133, 138 (1984). "No overt act is necessary to complete the crime of conspiracy." *Goldberg*, 261 N.C. at 202, 134 S.E. 2d at 348 (citing *State v. Davenport*, 227 N.C. 475, 494, 42 S.E.2d 686, 699 (1947)). "The crime is complete when the agreement is made." *Horton*, 275 N.C. at 656, 170 S.E.2d at 469 (quoting *Gallimore*, 272 N.C. at 532, 158 S.E.2d at 508). Here, had the hired killer not actually been an undercover officer, and had the hired killer actually agreed to kill defendant's former wife, this gap where new conduct did not give rise to new criminal liability would have been filled by the conspiracy doctrine.

4. Because a solicitation is complete under North Carolina law even if it is "of no effect," *Hampton*, 210 N.C. at 284, 186 S.E. at 252, defendant had committed the solicitation even before he paid the hired killer in full and, earlier still, before he and the hired killer even reached an agreement.

our common law. Furthermore, although defendant and the supposed hired killer agreed to a "criminal design," neither defendant nor his apparent agent had begun to "execut[e]" it at the time defendant exited the "hitman's" car. *Parker*, 224 N.C. at 526, 31 S.E.2d at 532; *Addor*, 183 N.C. at 688, 110 S.E. at 650. We must conclude that, without more, none of defendant's conduct would have resulted in the commission of the offense in the "ordinary and likely course of things." *Miller*, 344 N.C. at 668, 477 S.E.2d at 921 (quoting *Price*, 280 N.C. at 158, 184 S.E.2d at 869); *see Parker*, 224 N.C. at 525, 31 S.E.2d at 531; *Addor*, 183 N.C. at 689, 110 S.E. at 651. Unless and until our legislature decides to define attempt differently by statute or to alter its current policy and equate solicitation with attempt, this evidence shows only solicitation.

Our conclusion here is strengthened by comparing these facts with those in other cases in which this Court has analyzed attempt. In *Addor* we concluded that there was "no unlawful attempt to commit the crime" of "unlawful manufacture of liquor." *Addor*, 183 N.C. at 691, 110 S.E. at 652. Specifically, we concluded that the defendants had not committed an overt act, because "at the time [they] had never made any liquor, did not have a still, and had not been able to procure one, thus showing that the perpetration of the alleged crime was at the time obviously impossible." *Id.* at 690, 110 S.E. at 652. Accordingly we reasoned that the defendants merely "devis[ed] or arrang[ed] the means or measures necessary [to] the commission of the offense." *Id.* at 690, 110 S.E. at 652 (quoting *Murray*, 14 Cal. at 159, 1859 WL 1186, at *1). This conclusion was supported by the fact that, at the time of arrest, the defendants merely

> "had some meal and bran; that, at the time of being arrested, defendants stated to the sheriff that they intended to make some liquor out of said meal and bran; that defendants did not have a still, but stated that some one had promised to let them have a still later; that defendants intended to make some liquor, if they could get a still, but they never got a still and never made any liquor."
>
> The above constitutes all the defendants did.

Id. at 688, 110 S.E. at 650 (quoting the jury's special verdict).

By contrast, we concluded in *Parker* that the defendants "with the intent to feloniously receive stolen property, knowing it to have been stolen, made an attempt" to do so when they "in the nighttime went to the place of concealment and were in the act of having [the property] rolled out to their truck." *Parker*, 224 N.C. at 526, 31 S.E.2d at 532. We concluded that "[t]his was more than an act of mere preparation. It was

an act that amounted to the commencement of the consummation, an act apparently adapted to produce the result intended." *Id.* at 526, 31 S.E.2d at 532.

In *Price* we also concluded that the evidence was sufficient to find that the defendant "attempt[ed] to rob another of personal property . . . with the use of a dangerous weapon, whereby the life of a person [was] endangered or threatened." 280 N.C. at 157, 184 S.E.2d at 869. There the defendant "entered the store with the intent to rob [the victim], struck him in the head with a blackjack, a dangerous weapon, for the purpose of accomplishing the intended robbery and thereby endangered his life." *Id.* at 158, 184 S.E.2d at 869. These overt acts amounted to an attempt. *Id.* at 158, 184 S.E.2d at 869.

In *Miller* we concluded that "there is sufficient evidence of intent to commit armed robbery and overt acts toward its commission, and so, by extension, to support the convictions for attempted armed robbery and first-degree murder under the felony murder rule." *Miller*, 344 N.C. at 669, 477 S.E.2d at 922. We concluded that sufficient evidence showed attempt based on the following facts:

> Here, defendant clearly intended to rob [the victim] and took substantial overt actions toward that end. His intent is evidenced by, *inter alia*, his statement to his cousin and his own admission to the authorities. In furtherance of the intended robbery, defendant took out his nine-millimeter handgun, sneaked up on [the victim], tried to fire, took the gun back down, removed the safety, and then fired two lethal shots into the head of the victim. It was only *after* seeing what he had done that defendant became scared and ran away. The sneak approach to the victim with the pistol drawn and the first attempt to shoot were each more than enough to constitute an overt act toward armed robbery, not to mention the two fatal shots fired thereafter.

Id. at 668-69, 477 S.E.2d at 922 (citing *State v. Powell*, 277 N.C. 672, 677-79, 178 S.E.2d 417, 420-21 (1971)).

We conclude the facts here are more comparable to *Addor* than to *Parker*, *Price*, or *Miller*. As in *Addor*, "the perpetration of the alleged crime was at the time obviously impossible," because a necessary component of the underlying crime was not within defendant's, or his agent's, reach. *Addor*, 183 N.C. at 690, 110 S.E. at 652. At the time of their arrest,

the defendants in *Addor* "did not have a still," *id.* at 690, 110 S.E. at 652; similarly, at the time of defendant's arrest here, no evidence showed that defendant had a weapon or an action plan other than for someone else to carry out the underlying crime. Moreover, at that time, the intended victim's whereabouts were not known, and the agent, as an undercover officer, was never actually going to kill defendant's former wife.

As discussed above, the evidence here showed acts by defendant that were all part of the solicitation, not the execution, of the crime solicited. We see no evidence here to establish that defendant committed an overt act that, "in the ordinary and likely course of things," would have resulted in the killing. *Miller*, 344 N.C. at 668, 477 S.E.2d at 921 (quoting *Price*, 280 N.C. at 158, 184 S.E.2d at 869); *see Parker*, 224 N.C. at 525, 31 S.E.2d at 531; *Addor*, 183 N.C. at 689, 110 S.E. at 651. Therefore, defendant's motion to dismiss was improperly denied.

III. Conclusion

Accordingly, we reverse the Court of Appeals' decision upholding defendant's conviction for attempted first-degree murder. Because of this holding, we need not address the double jeopardy issue. This case is remanded to the Court of Appeals for further remand to the trial court with instructions to vacate defendant's conviction for attempted first-degree murder and the judgment entered thereon, and for resentencing consistent with this opinion.

REVERSED IN PART; VACATED IN PART AND REMANDED.

Justice MORGAN dissenting.

I respectfully dissent from the majority's determination that defendant's motion to dismiss the charge of attempted first-degree murder was improperly denied by the trial court. In applying the well-established legal standards to assess the sufficiency of evidence offered by the prosecution in a criminal case in the face of a defendant's motion to dismiss, I strongly disagree with the ultimate conclusion of my learned colleagues in the majority that there is "*no* evidence here to establish that defendant committed an overt act that, 'in the ordinary and likely course of things,' would have resulted in the killing." (Emphasis added.) I would affirm the decision of the Court of Appeals in this matter and agree with its well-reasoned analysis that defendant's acts under review satisfied the elements of an attempt to commit first-degree murder.

It is well-established that

> [w]hen reviewing a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines "whether the State presented 'substantial evidence' in support of each element of the charged offense. " ' "Substantial evidence" is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion.' " In this determination, all evidence is considered " 'in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence.' ". . . "[I]f there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied."

State v. Hunt, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012) (quoting *State v. Abshire*, 363 N.C. 322, 327-28, 677 S.E.2d 444, 449 (2009) (citations omitted), *superseded on other grounds by statute*, An Act to Protect North Carolina's Children / Sex Offender Law Changes, ch. 247, Sec. 8(a), 2005 N.C. Sess. Laws (Reg. Sess. 2006) 1065, 1070-71, *as recognized in State v. Barnett*, 368 N.C. 710, 714-15, 782 S.E.2d 885, 889 (2016)). "Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009) (citations omitted). Both competent and incompetent evidence must be considered. *State v. Allen*, 279 N.C. 406, 407, 183 S.E.2d 680, 681 (1971). "[S]o long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also 'permits a reasonable inference of the defendant's innocence.' " *Miller*, 363 N.C. at 99, 678 S.E.2d at 594 (quoting *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 140 (2002)).

"The elements of an attempt to commit any crime are: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996) (citations omitted). With regard to the second element, this Court has opined that:

> it is essential that the defendant, with the intent of committing the particular crime, should have done some overt

> act adapted to, approximating, and which in the ordinary and likely course of things would result in the commission thereof. Therefore, the act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory. In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some *subsequent step in a direct movement towards the commission of the offense after the preparations are made.*

Id. at 668, 477 S.E.2d at 921 (quoting *State v. Price*, 280 N.C. 154, 158, 184 S.E.2d 866, 869 (1971) (emphasis added)).

In applying these unassailable and fundamental legal principles to the unique facts which are presented in the instant case, in my view it is clear that the State has presented *some* evidence to establish that defendant committed an overt act that, in the ordinary and likely course of things, would have resulted in the killing of defendant's ex-wife, but for the intended "hitman" actually being an undercover law enforcement officer. As the majority notes, the evidence produced at trial by the State showed that defendant originally disclosed to his acquaintance Lawrence Sorkin that defendant was feeling pressured by defendant's ongoing child custody dispute with his ex-wife, that defendant was willing to pay Sorkin $200 to discuss something that would be "beneficial" to defendant, that defendant was tired of going to court, and that defendant reminded Sorkin of an earlier conversation between the two of them in which Sorkin had stated that Sorkin's father had connections to men who could "break a few legs." This discussion led Sorkin to fear that defendant was actively contemplating the prospect of bringing harm upon defendant's ex-wife. After this conversation, defendant was amenable to participating in a meeting that transpired less than a month later in which Sorkin arranged for defendant to talk with someone unknown to defendant—the undercover officer posing as a "hitman"—with said meeting occurring in a retail store parking lot, initiated by defendant's entry into an unknown person's car at Sorkin's direction after which defendant was immediately queried by the "hitman" about the presence of any recording device on defendant's person. Upon the request of the "hitman," defendant readily displayed the $2500 in cash which defendant was instructed to bring to the meeting. The unknown "hitman" asked for detailed information about defendant's ex-wife, which defendant readily provided: her name, address, cellular telephone number, and car description. Defendant also supplied photographs of his ex-wife

to the "hitman." In response to this individual's questions about the manner in which he could get the ex-wife alone, defendant gave the "hitman" the name of their daughter's elementary school, the times at which the ex-wife would drop off the child at said school, and he informed the "hitman" that the ex-wife was always alone in her car after the daughter was taken to school. After obtaining this information, the undercover officer posing as the "hitman" gave defendant specific instructions concerning the payment of the remaining balance of $7500 for the "hit" on defendant's ex-wife, the six-day duration of time in which the "hitman" would purchase a telephone and during which defendant should obtain a certain kind of telephone at a specified time and send a text message to the "hitman" from defendant's designated telephone, defendant's receipt of information on where to send the outstanding $7500 when "it's done," and defendant's need to destroy defendant's designated telephone "when we're done." The "hitman" went on to ask defendant where defendant wanted his ex-wife's dead body, and after a further exchange, defendant stated, "I need to be the sole parent making every decision with my daughter all the time, and no chance of any more court cases. Totally no chance." When the "hitman" assured defendant that the "hitman" could provide defendant with sole custody of his daughter if this was defendant's desire, defendant reiterated that he wanted sole custody. As to where defendant wanted his ex-wife's dead body and the manner in which defendant wanted the "hitman" to "do it," defendant said, "[A]s long as there's no chance that I will answer questions or be involved, I want—I want to make sure that my daughter is with me all the time, only me, no chance of any further court cases or anything." Defendant then offered examples of school days and school time periods to the "hitman" at which times the "hit" could be accomplished in the absence of the daughter. On the subject posed by the "hitman" regarding how defendant "wanted it done," defendant replied, "I don't care about any details." Towards the end of the meeting, defendant voluntarily tendered the total sum of $10,000 for the killing of defendant's ex-wife to the "hitman," after which the "hitman" informed defendant that the two of them would have no further communication, and defendant would know when the ex-wife was dead. As the discussion ended, when the undercover law enforcement officer representing himself as the "hitman" told defendant that defendant's ex-wife could "disappear," defendant answered that he wanted her to "disappear." At that point, all but the actual "hit" was complete. From defendant's perspective, he had done all that he could do to achieve the murder of his ex-wife.

In light of the totality of these evidentiary facts adduced at trial, I would find that the State's presentation was sufficient to withstand

defendant's motion to dismiss the attempted first-degree murder charge and that the trial court correctly denied the motion. The State presented substantial evidence in support of each element of the charged offense of attempted first-degree murder. With the State's entitlement to the benefit of every reasonable inference supported by the evidence regarding whether or not defendant committed the criminal offense of attempted first-degree murder, it was up to the jury at trial to determine if defendant's state of mind, acts, statements, representations, suggestions, and offers—or the lack thereof—during his interactions with his acquaintance Sorkin and the undercover officer posing as a "hitman" all combined to render defendant guilty of the charged offense. In my view, the State in the case sub judice clearly established, in accordance with this Court's decision in *Miller*, that defendant had the intent to commit the substantive offense of first-degree murder of his ex-wife through his detailed arrangements with, and voluntary full payment of funds to, the supposed "hitman"; that defendant performed an overt act toward commission of the killing beyond mere preparation, by virtue of these detailed arrangements regarding the myriad of informational items supplied to the "hitman" about the ex-wife along with the full payment to the "hitman" of the price for the deadly deed; and that defendant had no part in the ultimate outcome here, namely the incompletion of the substantive offense of first-degree murder because of the actual nonexistence of the "hitman" with whom defendant assumed he had hired to perform the killing.

The majority here adopts the position that the evidence at trial did not satisfy the second prong of the three-part *Miller* test regarding the elements of an attempt to commit a crime because no overt act by defendant rose to the level of an attempt beyond mere solicitation of the undercover officer posing as a "hitman" to perpetrate the killing. According to the majority's scale of measure, the evidentiary facts that I delineated earlier and which the Court of Appeals likewise identified in its opinion do not "amount to proof of overt acts amounting to attempt under our law" or constitute any overt act "apparently adapted to produce the result intended" because "the act of planning the killing and making an initial payment to the hired killer would not, without additional conduct, inexorably result in the commission of the offense in the 'ordinary and likely course of things.' " The majority further deems defendant's conduct to constitute only solicitation and not an overt act amounting to attempt because "although defendant and the supposed hired killer agreed to a 'criminal design,' neither defendant nor his apparent agent had begun to 'execut[e]' it at the time defendant exited the 'hitman's' car." I believe that the majority has unconsciously and unfortunately

elevated the commission of an overt act as an element of attempt with these analytical conclusions, because defendant's willingness to allow the "hitman" to choose among the plethora of times, places, and circumstances that defendant himself has identified as potential aspects of the killing and the futuristic aspects of specific directives identified by the "hitman" regarding timelines of the perpetration of the plan, should not be deemed as fundamentally fatal to the prosecution's ability to allow the jury to determine whether or not defendant committed an overt act as an element of the offense of attempted first-degree murder. Under the circumstances presented in this case, particularly defendant's voluntary payment in full of the "hitman's" required sum, defendant had completed his role in his plan to murder his ex-wife.

For the reasons stated, I would affirm the opinion of the Court of Appeals in this case.

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

BREE RUSHING STOKES
v.
WILLIAM COREY STOKES, II

No. 82A18

Filed 7 December 2018

Venue—motion to change—as of right and discretionary—interlocutory

An answer is not required before the filing of a motion for a discretionary change of venue, and the trial court in this case had the authority to consider such a motion. However, the trial court's discretionary determination was interlocutory and affected no substantial right of either party and was properly dismissed by the Court of Appeals.

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. ___, 811 S.E.2d 693 (2018), dismissing an interlocutory appeal from an order changing venue entered on 9 February 2017 by Judge N. Hunt Gwyn in District Court, Union County. Heard in the Supreme Court on 30 August 2018.

Collins Family Law Group, by Rebecca K. Watts, for plaintiff-appellant.

Passenant & Shearin Law, by Brione B. Pattison, for defendant-appellee.

NEWBY, Justice.

In this case we consider the appropriate timing of a trial court's consideration of a motion to change venue based upon the convenience of witnesses and whether such a decision is an interlocutory order subject to immediate appellate review. In doing so, we must decide if filing an answer is a prerequisite for the trial court to enter a discretionary order changing venue. The trial court and Court of Appeals determined defendant's motion challenging venue was proper because it was equivalent to an "answer." While defendant's filing was not an answer under our Rules of Civil Procedure, we nonetheless hold that the trial court had the authority to enter the discretionary order changing venue. Defendant's appeal from this order is interlocutory and not subject to immediate review. Accordingly, we modify and affirm the decision of the Court of Appeals dismissing the appeal.

In April 2016, plaintiff Bree Stokes and defendant William Stokes separated after fourteen years of marriage. Plaintiff and defendant have two minor children. On 20 October 2016, plaintiff and the children moved from Pitt County to Union County without defendant's knowledge. On 24 October, four days after moving there, plaintiff filed a complaint in Union County seeking child custody, child support, and equitable distribution. On 26 October, seemingly before he was served with plaintiff's action, defendant filed a complaint in Pitt County seeking child custody.

In early November 2016, defendant filed in Union County a "Motion for Emergency *Ex Parte* Custody and Motion to Dismiss for Improper Venue, or in the alternative, Motion to Change Venue." Defendant argued that Union County was a legally improper venue because plaintiff and defendant continued to reside in Pitt County. Alternatively, defendant argued the trial court should order the venue changed to Pitt County for the convenience of the witnesses. Defendant alleged that both parties resided in Pitt County until plaintiff moved, that they own property and a business in Pitt County, and that their friends and family, who will likely be witnesses, are located in Pitt County. Defendant further alleged that the children have been lifelong residents of Pitt County and currently attend school in Pitt County, that the children's health care providers,

therapists, and counselors who could provide firsthand knowledge of the children's well-being are all located in Pitt County, and that the Pitt County Department of Social Services has had an ongoing investigation into plaintiff's alleged abuse of the children.

At the trial court hearing on 6 December 2016, defendant accused plaintiff of forum shopping by filing her action in Union County instead of Pitt County. Defendant also noted that he intentionally filed his motion without having first filed an answer for the apparent purpose of avoiding waiver of his legal venue objection. The trial court determined:

> 10. N.C.G.S. § 1-82 allows for the proper venue of cases to be heard in the county in which the Plaintiff's [sic] or the Defendant's [sic] reside with the emphasis on the word "or." The disjunctive allows some cases, such as this one, to be in either venue.
>
> 11. . . . . The Defendant filed a written response . . . within the time for answering and it is a written request of the court to change venue along with other relief requested. The Court finds this is a responsive pleading amounting to an answer and that was timely filed.

The trial court entered an order on 8 February 2017 denying defendant's motion to dismiss for legally improper venue but granting defendant's motion to change venue to Pitt County. Plaintiff appealed.

A divided panel of the Court of Appeals dismissed plaintiff's appeal as interlocutory. *Stokes v. Stokes*, ___ N.C. App. ___, ___, 811 S.E.2d 693, 699 (2018). The Court of Appeals determined that the trial court granted the motion to change venue for the convenience of the witnesses, N.C.G.S. § 1-83(2) (2017), and not for legally improper venue, *id.* § 1-83(1) (2017). *Stokes*, ___ N.C. App. at ___, 811 S.E.2d at 697. Relying upon this Court's decision in *Hartford Accident & Indemnity Co. v. Hood*, 225 N.C. 361, 34 S.E.2d 204 (1945), the Court of Appeals concluded defendant could only file the motion to change venue for the convenience of the witnesses either with or after filing an answer. *Stokes*, ___ N.C. App. at ___, 811 S.E.2d at 698 (quoting *Hartford*, 225 N.C. at 362, 34 S.E.2d at 204-05). Because the Court of Appeals concluded that defendant's filing "amount[ed] to an answer," the court determined that defendant simultaneously and timely filed his motion to change venue with his "answer." *Id.* at ___, 811 S.E.2d at 698-99. After further determining that the trial court's order for discretionary change of venue was interlocutory and did not affect a substantial right, the Court of Appeals

dismissed plaintiff's appeal. *Id.* at ___, 811 S.E.2d at 699 (citing *Kennon v. Kennon*, 72 N.C. App. 161, 164, 323 S.E.2d 741, 743 (1984)). The dissent argued that defendant's filing was not an answer. Therefore, defendant's motion was untimely, and the trial court's order changing venue should have been reversed. *Id.* at ___, 811 S.E.2d at 699 (Murphy, J., dissenting).

Venue is "[t]he proper or a possible place for a lawsuit to proceed, usu[ally] because the place has some connection either with the events that gave rise to the lawsuit or with the plaintiff or defendant." *Venue*, *Black's Law Dictionary* (10th ed. 2014). Section 1-82 of the North Carolina General Statutes states that venue is proper "in the county in which the plaintiffs or the defendants . . . reside at [the action's] commencement." N.C.G.S. § 1-82 (2017). Improper venue is not jurisdictional, and it is subject to waiver. *See id.* § 1A-1, Rule 12(h)(1) (2017) ("A defense of . . . improper venue . . . is waived (i) if omitted from a motion [raising other Rule 12 defenses], or (ii) if it is neither made by motion under this rule nor included in a responsive pleading . . . ."); *see also*, *e.g.*, *Hawley v. Hobgood*, 174 N.C. App. 606, 609-10, 622 S.E.2d 117, 119 (2005) ("[S]ince venue is not jurisdictional it may be waived . . . ." (quoting *Miller v. Miller*, 38 N.C. App. 95, 97, 247 S.E.2d 278, 279 (1978))).

A party may move for a change of venue (1) when the venue is legally improper or (2) when the change would promote "the convenience of witnesses and the ends of justice." N.C.G.S. § 1 83(1) (2). Our cases treat the first of these venue changes as mandatory; the second is discretionary. *See Zetino–Cruz v. Benitez–Zetino*, ___ N.C. App. ___, ___, 791 S.E.2d 100, 105 (2016).

Regarding legally improper venues, section 1-83 of the North Carolina General Statues provides:

> If the county designated . . . in the summons and complaint is not the proper [venue], the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.

N.C.G.S. § 1-83 (2017). Thus, if "before the time of answering expires" a party demonstrates the venue is legally improper, it has a right to a change of venue. *Id.* § 1-83(1). An interlocutory order changing venue as of right affects a substantial right and thus is immediately appealable. *See id.* § 7A-27(b)(3)(a) (2017) (providing appeal of right for an interlocutory order if it affects a substantial right); *Gardner v. Gardner*,

300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980) ("[A] right to venue established by statute is a substantial right.").

While a party has a right to a legally proper venue, a party does not have a right to a preferred venue. When the current venue is proper, a party may nonetheless request a venue change in the court's discretion. A party may file a motion to change venue for the convenience of the witnesses at any time before trial if the party can make the required showing. A trial court may grant such a discretionary venue change "[w]hen the convenience of witnesses and the ends of justice would be promoted by the change." N.C.G.S. § 1-83(2). Though "an appeal from a discretionary ruling as to venue is interlocutory, does not affect a substantial right, and is not immediately appealable," either party may appeal the venue change order upon final judgment. *Its Leasing, Inc. v. Ram Dog Enters.*, 206 N.C. App. 572, 574, 696 S.E.2d 880, 882 (2010) (citing *Kennon*, 72 N.C. App. at 164, 323 S.E.2d at 743); *see also, e.g.*, *Kennon*, 72 N.C. App. at 163-65, 323 S.E.2d at 742-43 (considering the trial court's discretionary decision to change venue upon appeal from the trial court's final judgment).

The courts below believed that a defendant must file an answer before a court could consider a discretionary change of venue. This perception arose from this Court's decision in *Hartford*, a case decided in 1945 under code pleading and predating the Rules of Civil Procedure. *See generally Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970) (noting and discussing North Carolina's transition to the Rules of Civil Procedure in 1970). In *Hartford* the defendant moved for a discretionary venue change before filing his answer. On appeal this Court determined that because "it is impossible to anticipate what issues may be raised" by a defendant, the court could not exercise its discretion "until the allegations of the complaint [were] traversed." *Hartford*, 225 N.C. at 362, 34 S.E.2d at 204-05. At that time, "traverse" may have implied the need for a formal answer under our code pleading system. *See Traverse*, *Black's Law Dictionary* (10th ed. 2014) (defined as "[a] formal denial of a factual allegation made in the opposing party's pleading").

Under our current notice pleading system, however, neither the Rules of Civil Procedure nor the plain text of N.C.G.S. § 1-83 prohibits a party from filing a motion for a discretionary venue change before filing an answer. The Rules of Civil Procedure merely require that a party provide the court sufficient information in a written motion so the trial court may appropriately exercise discretion to rule on the motion's merits. *See* N.C.G.S. § 1A-1, Rule 7(b)(1) (2017) (stating that motions typically "shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought"). *Hartford*'s

underlying rationale and principal holding that the defendant failed to provide sufficient information contesting the plaintiff's venue choice in a formal filing thus parallels the modern requirements under the Rules of Civil Procedure. As long as the party provides sufficient information in a motion, the trial court's discretionary venue change does not need to await a party's filing of an answer.[1]

Before filing an answer, defendant here moved to change venue both as of right and in the court's discretion. The trial court first found that, even though plaintiff recently moved to Union County, the venue was legally proper and could not be changed as of right. The trial court then properly evaluated whether to grant defendant's discretionary motion to change venue. Defendant's motion contained many facts affecting venue, such as the parents' and children's current and past residency information, as well as the location of the children's school, disputed assets, potential witnesses with firsthand knowledge, and the ongoing child abuse investigation.[2] Thus, defendant gave the trial court sufficient information, which allowed that court to exercise its discretion and order the venue changed to Pitt County. While the trial court had sufficient information to rule on the timely motion, the trial court's discretionary determination is interlocutory and affects no substantial right of either party. Therefore, plaintiff's appeal is premature and must be dismissed, though plaintiff may still challenge the trial court's discretionary venue decision in an appeal taken from a final judgment, if the issue is properly preserved.

In sum, we hold that defendant's motion, though not an answer, was timely filed and properly considered by the trial court. We further hold that plaintiff's appeal from the trial court's order is interlocutory and warrants dismissal. Accordingly, we modify and affirm the decision of the Court of Appeals dismissing the appeal as interlocutory.

MODIFIED AND AFFIRMED.

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1. While defendant's motion clearly contests many allegations of the complaint, it is, as captioned, a motion under Rule 7(b) of the Rules of Civil Procedure and not an answer under Rule 8(b). *See* N.C.G.S. § 1A-1, Rule 7(b); *id.*, Rule 8(b) (2017).

2. Plaintiff raises a question about whether the trial court should have considered discretionary venue change at the motion hearing. Any argument that addresses the merits of the trial court's decision to grant a discretionary change of venue, as compared to its authority to do so, is more properly addressed in an appeal from any final judgment in this case, if properly preserved. As a result, we express no opinion concerning whether the trial court may have erred in granting defendant's discretionary change of venue motion; instead, we simply hold that the trial court had the authority necessary to make such a decision.

IN RE ADOPTION OF K.P.J.

[371 N.C. 776 (2018)]

IN RE THE ADOPTION OF	)	
	)	From New Hanover County
K.P.J. AND K.L.J., MINOR CHILDREN	)	

No. 284P18

SPECIAL ORDER

Upon consideration of the petition filed by intervenor on 31 August 2018 in this matter for writ of certiorari to review the order of the North Carolina Court of Appeals dismissing intervenor's appeal, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

Allowed for the limited purpose of vacating the order of the Court of Appeals entered 27 July 2018 and remanding to the Court of Appeals with instructions that: (1) intervenor's appeal be treated in all respects as timely filed and procedurally proper; and (2) that the Court of Appeals reach the following issues presented by intervenor on appeal:

I. Was there error in the trial court's assertion of jurisdiction over an adoption of Indian children covered by the federal Indian Child Welfare Act when the tribal court initially exercising jurisdiction over the children continued to assert jurisdiction?

II. Did the trial court err in failing to give full faith and credit to the tribal court's earlier determination that the appellant was an Indian custodian of the children entitled to their return?

The parties are ordered to settle the record on appeal within thirty-five days.

By order of the Court in Conference, this the 7th day of December, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of December, 2018.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

INTERSAL, INC.	)	
	)	
v.	)	From Wake County
	)	
SUSI H. HAMILTON, SECRETARY, NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES, IN HER OFFICIAL CAPACITY, NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES, STATE OF NORTH CAROLINA, AND FRIENDS OF QUEEN ANNE'S REVENGE, A NON-PROFIT CORPORATION	)	

No. 115A18

ORDER

Because plaintiff's original notice of appeal designated the incorrect court, plaintiff's appeal based upon a right of appeal is dismissed. Thus, we allow "State Defendants' Motion to Dismiss Appeal" and "Defendant's (Friends of Queen Anne's Revenge) Motion to Dismiss Appeal." Nonetheless, plaintiff's "Petition for Writ of Certiorari to Review Order of Business Court" is allowed.

Defendants' "Motion to Stay Briefing" is dissolved. The Court sets the following briefing schedule: Plaintiff has already filed the record and its appellant brief. Defendants' appellee briefs will be due 8 January 2019. Should appellant wish to file a reply brief, the reply brief will be due on 22 January 2019.

By Order of the Court in Conference, this 5th day of December, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of December, 2018.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Cumberland County
	)	
EDWARD M. ALONZO	)	

No. 288P18

ORDER

The Petition for Discretionary Review filed by defendant in this case on 25 September 2018 is decided as follows: defendant's petition is allowed for the limited purpose of considering the first issue listed in defendant's petition. Except as specifically allowed in this order, defendant's Petition for Discretionary Review is denied.

By order of the Court in conference, this the 5th day of December, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of December, 2018.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

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

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Wilson County
	)	
JIMMY LEE FORTE	)	

No. 223P18

ORDER

The Petition for Discretionary Review filed by the State of North Carolina in this case on 6 August 2018 is decided as follows: The State's petition is allowed for the limited purpose of remanding this case to the Court of Appeals for the purpose of reconsidering defendant's challenge to the validity of the habitual felon indictment returned against him in this case in light of this Court's decision in *State v. Langley*, ___ N.C. ___, 817 S.E.2d 191 (2018), with the Court of Appeals' proceeding on remand to include consideration of any aspect of defendant's challenge to the habitual felon indictment that was not reached during the Court of Appeals' initial consideration of this case.

By order of the Court in conference, this the 5th day of December, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of December, 2018.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

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

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Durham County
	)	
ERNEST A. KING	)	

No. 69A94-3

ORDER

Upon consideration the "Petition for Writ of Mandamus" is allowed for the limited purpose of reissuing the attached order from this Court and directing the Superior Court, Durham County, to reconsider defendant's "Motion for Appropriate Relief in light of this Court's opinion in *State v. McHone*, 348 N.C. 254, 499 S.E.2d 761 (1998)" and to enter an appropriate order. *See McHone*, 348 N.C. at 258-60, 499 S.E.2d at 763-64 (holding that the defendant was entitled to an evidentiary hearing prior to a ruling on his Motion for Appropriate Relief where some of the asserted grounds for relief raised unresolved questions of fact).

By Order of the Court in Conference, this 5th day of December, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of December, 2018.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

NORTH CAROLINA REPORTS

VOLUME 348

SUPREME COURT OF NORTH CAROLINA

3 APRIL 1998

30 JULY 1998

RALEIGH
1999

STATE v. KELLY

No. 138P98

Case below: 129 N.C.App. 117

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 July 1998.

STATE v. KING

No. 69A94-2

Case below: Durham County Superior Court

Petition by defendant for writ of certiorari allowed 8 July 1998 for the limited purpose of remanding this case to the Superior Court, Durham County, for reconsideration of defendant's motion for appropriate relief in light of this Court's opinion in *State v. McHone*, 348 N.C. 254; in all other respects, the petition is denied.

STATE v. McCARVER

No. 384A92-2

Case below: Cabarrus County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Cabarrus County denied 8 July 1998.

STATE v. RANSOM

No. 140P98

Case below: 128 N.C.App. 753

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

STATE v. ROBINSON

No. 171P98

Case below: 129 N.C.App. 117

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 July 1998.

STATE OF NORTH CAROLINA	)	
	)	
v.	)	UNION COUNTY
	)	
MARVIN LOUIS MILLER, JR.	)	

No. 268P18

ORDER

Upon consideration of the Petition for Discretionary Review filed by the State on 11 September 2018, the Petition is ALLOWED for the limited purpose of remanding to the Court of Appeals for reconsideration in light of *State v. Rogers*, ___ N.C. ___, 817 S.E.2d 150 (2018).

By Order of this Court in Conference, this 5th day of December, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of December, 2018.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Mecklenburg County
	)	
EDWARD ALAN WOLD, JR.	)	

No. 328P18

ORDER

The Petition for Discretionary Review filed by defendant in this case on 24 September 2018 is decided as follows: The defendant's petition is allowed for the limited purpose of remanding this case to the Court of Appeals for the purpose of reconsidering defendant's petition for writ of certiorari in light of this Court's decision in *State v. Ledbetter*, ___ N.C. ___, 814 S.E.2d 39 (2018), with the Court of Appeals' proceeding on remand to include an exercise of its discretion to determine whether it should grant or deny defendant's petition for writ of certiorari.

By order of the Court in conference, this the 5th day of December, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of December, 2018.

AMY L. FUNDERBURK
Clerk, Supreme Court of
North Carolina

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

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

5 DECEMBER 2018

020P18-2	Vincent J. Mastanduno, Employee v. National Freight Industries, Employer and American Zurich Insurance Company, Carrier	1. Plt's Motion for Temporary Stay 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's Petition for *Writ of Certiorari* to Review Order of COA	1. Denied **11/05/2018** 2. Denied **11/05/2018** 3.
034P14-2	State v. George Lee Nobles	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-576) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. State's Conditional PDR Under N.C.G.S. § 7A-31	1. --- 2. Allowed 3. Allowed 4. Allowed
041P17-4	Arthur O. Armstrong v. Wilson County, et al.	Plt's *Pro Se* Motion for Petition for Rehearing	Dismissed
069A94-3	State v. Ernest A. King	Def's Petition for *Writ of Mandamus*	Special Order
115A18	Intersal, Inc. v. Susi H. Hamilton, Secretary, North Carolina Department of Natural and Cultural Resources, in her Official Capacity, North Carolina Department of Natural and Cultural Resources, State of North Carolina, and Friends of Queen Anne's Revenge, a Non-Profit Corporation	1. Plt's Petition for *Writ of Certiorari* to Review Order of Business Court 2. State Defs' Motion to Dismiss Appeal 3. Plt's Motion for Extension of Time to File Response 4. Plt's Motion for Extension of Time to Respond to Motion to Dismiss 5. Def's (Friends of Queen Anne's Revenge) Motion to Dismiss Appeal 6. Defs' Motion to Stay Briefing 7. Defs' Motion in the Alternative for Extension of Time to File Brief	1. Special Order 2. Special Order 3. Allowed **10/12/2018** 4. Allowed up to and including 19 October 2018 **10/02/2018** 5. Special Order 6. Allowed **11/08/2018** Dissolved by Special Order **12/05/2018** 7. Special Order

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

5 DECEMBER 2018

140P18	State v. Robert Dwayne Lewis	1. State's Motion for Temporary Stay (COA17-888) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/17/2018** 2. Allowed 3. Allowed 4. Allowed
141P18	State v. Robert Dwayne Lewis	1. State's Motion for Temporary Stay (COA17-1051) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/17/2018** 2. Allowed 3. Allowed 4. Allowed
143P18	State v. Ramelle Milek Lofton	1. State's Motion for Temporary Stay (COA17-716) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/21/2018** 2. Allowed 3. Allowed
151P18	State v. Ramar Dion Benjamin Crump	Def's PDR Under N.C.G.S. § 7A-31 (COA17-488)	Allowed
169P18	State v. James Bernard Bennett	Def's PDR Under N.C.G.S. § 7A-31 (COA17-986)	Denied
179A14-3	State v. Torrey Grady	1. American Civil Liberties Union Foundation and American Civil Liberties Union of North Carolina Legal Foundation's Motion for Leave to File Amicus Brief 2. Motion to Admit Brandon Jerel Buskey *Pro Hac Vice* 3. Motion to Admit Nathan Freed Wessler *Pro Hac Vice*	1. Allowed **11/06/2018** 2. Allowed **11/06/2018** 3. Allowed **11/06/2018**
181P18	State v. Toni Turnage	1. Def's Motion for Temporary Stay (COA17-803) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/20/2018** Dissolved **12/05/2018** 2. Denied 3. Denied

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

5 DECEMBER 2018

183P16-2	The City of Charlotte, a Municipal Corporation v. University Financial Properties, LLC, a North Carolina Limited Liability Company f/k/a University Bank Properties Limited Partnership; Bank of America, N.A. f/k/a NCNB National Bank of North Carolina, Tenant; and Any Other Parties in Interest	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA17-388) 2. Def's (University Financial Properties, LLC) Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed
193P18-4	State v. Joshua Bolen	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **11/20/2018**
210P16-3	Dale Patrick Martin v. Mike Slagle (Supt.)	1. Petitioner's *Pro Se* Petition for *Writ of Mandamus* (COAP18-632) 2. Petitioner's *Pro Se* Motion to Rebut Answer Response to *Habeas Corpus*	1. Denied 2. Denied **11/27/2018**
214P18	Melesio Ramirez v. Stuart Pierce Farms, Inc., Employer, FCCI Insurance Group, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-525)	Denied
218P18	State v. Rodney Veney	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-1323) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
223P18	State v. Jimmy Lee Forte, Jr.	1. State's Motion for Temporary Stay (COA17-669) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/18/2018** Dissolved **12/05/2018** 2. Dismissed as moot 3. Special Order 4. Denied

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

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227P14-3	State v. Max Tracy Earls	Def's *Pro Se* Motion for Rehearing *En Banc* Constitutional Question	Dismissed
229P18	Serafino Vince Cordaro, Plaintiff v. Harrington Bank, FSB, n/k/a Bank of North Carolina, a North Carolina Bank, Defendant ——————— Bank of North Carolina, Third-Party Plaintiff v. Danny D. Goodwin d/b/a Danny Goodwin Appraisals, Third-Party Defendant	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-1032)	Denied
230P17-3	State v. Anthony Lee McNair	Def's *Pro Se* Motion for Respond and Reply for Remedy and Relief to the State's	Dismissed
231A18	The Committee to Elect Dan Forest, a Political Committee v. Employees Political Action Committee (EMPAC), a Political Committee	1. Def's Notice of Appeal Based Upon a Dissent (COA17-569) 2. Def's PDR as to Additional Issues	1. --- 2. Allowed
236P18	State v. Dennis Raynard Steele	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-868)	Denied
239A18	State v. Neil Wayne Hoyle	1. State's Motion for Temporary Stay (COA17-1324) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent 4. State's PDR as to Additional Issues 5. Def's PDR as to Additional Issues	1. Allowed **08/03/2018** 2. Allowed 3. --- 4. Allowed 5. Allowed

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

5 DECEMBER 2018

245P18	State v. Manno Heshumi Beam	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-1232) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
246P18	State v. Nashid Porter	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-738) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
247P16-4	State v. Jonathan Eugene Brunson	1. Def's *Pro Se* Motion for PDR (COAP16-399) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Amend PDR	1. Dismissed 2. Allowed 3. Dismissed as moot
249P18	Russ Carroll Bryan v. Suzanne Dailey	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-788)	Denied
251PA18	Sykes, et al. v. Health Network Solutions, Inc., et al.	1. Plts' Motion to Seal Portions of Appellants' Brief 2. Plts' Motion to Substitute Brief and to Deem Substitute Brief Timely Filed	1. Allowed **10/31/2018** 2. Allowed **10/31/2018**
254P18	State v. Jimmy A. Sevilla-Briones	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Mecklenburg County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
257P18	State v. Sydney Shakur Mercer	1. State's Motion for Temporary Stay (COA17-1279) 2. State's Petition for *Writ of Supersedeas* 3. State's Motion to File Petition for *Writ of Supersedeas* and Application for Temporary Stay with Corrected Certificate of Service 4. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/21/2018** 2. Allowed 3. Allowed **09/28/2018** 4. Allowed

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

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260P18	State v. Bobby Tray Wyche	1. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Durham County 2. State's Motion for Extension of Time to File Response	1. Dismissed 2. Allowed **08/31/2018**
264P18	In the Matter of B.O.A.	1. Petitioner's Motion for Temporary Stay (COA18-7) 2. Petitioner's Petition for *Writ of Supersedeas* 3. Petitioner's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/23/2018** 2. Allowed 3. Allowed
265P18	State v. Shenondoah Perry and Earl Lamont Powell	1. State's Motion for Temporary Stay (COA17-714) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/22/2018** Dissolved **12/05/2018** 2. Denied 3. Denied
268P18	State v. Marvin Louis Miller, Jr.	1. State's Motion for Temporary Stay (COA17-1215) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/23/2018** Dissolved **12/05/2018** 2. Dismissed as moot 3. Special Order
271A18	State *ex rel.* Utilities Commission v. Attorney General	Joint Motion to Consolidate Appeals and to Enter Briefing Schedule	Allowed **11/29/2018**
276P18	State v. Dominick Romeo Delegge	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-1002)	Denied **Ervin, J., recused**
277P18-2	State v. Gabriel Adrian Ferrari	Def's *Pro Se* Motion to Strike Notice/Letter	Dismissed
281P18-2	State v. Jason Robert Vickers	Def's PDR Under N.C.G.S. § 7A-31 (COA18-35)	Denied

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

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283P18	Steven Grodensky v. Roger McLendon, MD, Duke University Health System, Inc. d/b/a Duke University Medical Center, Associated Health Services, Inc., Duke Medicine Global Support Corporation, The Duke University School of Medicine Research Foundation, and Private Diagnostic Clinic	Def's (Roger McLendon, MD) PDR Under N.C.G.S. § 7A-31 (COA17-1258, COA17-1258-2)	Denied
284P18	In re The Adoption of K.P.J. and K.L.J., Minor Children	1. Intervenor Appellant's (Jean Caudle Coffman) PDR Under N.C.G.S. § 7A-31 (COA17-1390) 2. Intervenor Appellant's (Jean Caudle Coffman) Petition in the Alternative for *Writ of Certiorari* to Review Order of COA 3. Intervenor Appellant's (Jean Caudle Coffman) Petition in the Alternative for *Writ of Mandamus*	1. Dismissed as moot 2. Special Order 3. Dismissed as moot
286P18	Karene McLean v. Harnett County Child Support Enforcement, Corrine Mathis, Paulette Strickland	1. Petitioner's *Pro Se* Petition for *Writ of Mandamus* 2. Petitioner's *Pro Se* Motion for Command to Terminate and Vacate as a Matter of Law 3. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of District Court, Harnett County	1. Dismissed 2. Dismissed 3. Dismissed
288P18	State v. Edward M. Alonzo	1. Def's Application for Temporary Stay (COA17-1186) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31 4. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/07/2018** 2. Allowed 3. Special Order 4. Allowed

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

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289P18	DM Trust, LLC, a North Carolina Limited Liability Company; and Mary Anne Owen v. McCabe and Company	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-1193) 2. Plts' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
290P15-2	State v. Jeffrey Tryon Collington	1. State's Motion for Temporary Stay (COA17-726) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. State's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA	1. Allowed **04/27/2018** 2. Allowed 3. Allowed 4. Dismissed as moot
291P18	State v. Jasen Wilson	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1317)	Denied
292P18	State v. Alfonso Moore	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-75)	Denied
293P18	Debra S. Jones v. Wells Fargo Company and Joshua Hodgin	Plt's Petition for *Writ of Certiorari* to Review Decision of COA (COA18-96)	Denied
297P18	State v. Antwaun Kyral Sims	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-45) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Allowed 3. Allowed
299A18	State v. Samuel Calleros Alvarez	1. Def's Notice of Appeal Based Upon a Dissent (COA17-945) 2. Def's PDR as to Additional Issues	1. --- 2. Denied
301A18	State v. Aaron Kenard Westbrook	1. State's Motion for Temporary Stay (COA18-32) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent 4. Def's Motion to Dismiss State's Appeal 5. Def's Motion to Stay Briefing Schedule Until Resolution of Motion to Dismiss	1. Allowed **09/13/2018** 2. Allowed **09/13/2018** 3. 4. 5. Allowed **11/08/2018**

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

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302A18	State v. Michelle Smith White	1. State's Motion for Temporary Stay (COA18-39) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent 4. Def's Motion to Dismiss State's Appeal 5. Def's Motion to Stay Briefing Schedule Until Resolution of the Motion to Dismiss	1. Allowed **09/13/2018** 2. Allowed **09/13/2018** 3 4. 5. Allowed **11/08/2018**
310P18	Christopher Charles Harris v. Iredell County, et al.	Plt's *Pro Se* Motion to Compel Iredell County Superior Court to Allow Plaintiff to Proceed as Indigent	Denied **Ervin, J., recused**
316P18	State v. Johnny Jermain McMillan	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1305)	Denied
317P18	State v. Jeffrey Michael Charette	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1238)	Denied
318A17	Andrea Morrell, G. Pony Morrell, and The Pasta Wench, Inc. v. Hardin Creek, Inc., John Sidney Greene, and Hardin Creek Timberframe and Millwork, Inc.	1. Defs' Notice of Appeal Based Upon a Dissent (COA16-878) 2. Defs' PDR as to Additional Issues 3. Plts' Motion to Supplement the Printed Record on Appeal 4. Plts' Conditional PDR Under N.C.G.S. § 7A-31 5. Plts' Motion to Amend Response to PDR	1. — **11/01/2017** 2. Allowed **11/01/2017** 3. Dismissed as moot 4. Denied **11/01/2017** 5. Allowed **11/01/2017**
320P18	State v. Jeffrey Keith Hobson	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1052)	Denied
322P18	Town of Littleton v. Layne Heavy Civil, Inc. f/d/b/a Reynolds, Inc.; Layne Inliner, LLC f/d/b/a Reynolds Inliner, LLC; and Mack Gay Associates, P.A.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA17-1137) 2. Plt's Motion to Amend PDR	1. 2. Allowed **11/07/2018**

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

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324P18	State v. Howard Earl Bates	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-970) 2. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Rutherford County	1. Denied 2. Denied
325A18	Albert S. Daughtridge, Jr. and Mary Margret Holloman Daughtridge v. Tanager Land, LLC	1. Plts' Notice of Appeal Based Upon a Dissent (COA17-554) 2. Plts' Conditional PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal 4. Def's Motion for Extension of Time to File Appellee Brief	1. --- 2. Allowed 3. Allowed 4. Dismissed as moot
328P18	State v. Edward Alan Wold, Jr.	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COA17-1219)	Special Order
333P18	State v. Douglas Wayne Stanaland	1. Def's *Pro Se* Motion for Discovery 2. Def's *Pro Se* Motion for Production of Documents 3. Def's *Pro Se* Motion to Take Judicial Notice	1. Dismissed 2. Dismissed 3. Denied
338P18	State v. Shane Michael White	Def's PDR Under N.C.G.S. § 7A-31 (COA18-36)	Denied
340P18	State v. Charles T. Mathis	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-1302)	Denied
345P18	State v. Mark Leon Conner	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1293)	Denied
347P18	State v. Derald Hafner	1. Def's *Pro Se* Motion for Petition for *Writ of Error Coram [N]obis* 2. Def's *Pro Se* Petition for *Writ of Certiorari*	1. Dismissed 2. Dismissed
349P18	State v. Frederick Lynn Atwater	1. Def's *Pro Se* Motion for Notice of Appeal (COAP16-128) 2. Def's *Pro Se* Motion for PDR	1. Dismissed 2. Dismissed
350P18	In the Matter of Harry James Fowler v. Honorable Gary M. Gavenus	Plt's *Pro Se* Motion for *De Novo* Appeal	Dismissed **Ervin, J., recused**

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

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351P18	State v. Jamier Stevon Heard	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-1242) 2. Def's *Pro Se* Motion to Deem Petition Timely Filed	1. Denied 2. Dismissed as moot
353P18	State v. David Kenneth Fowler	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-723) 2. Def's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA	1. Denied 2. Denied
356P18	Briana Washington Glover, and Husband, Randie Janson Glover, Individually v. The Charlotte-Mecklenburg Hospital Authority, a North Carolina Hospital Authority, d/b/a Carolinas Healthcare System, Carolinas Medical Center, Carolinas Healthcare System University, Carolinas Medical Center-University, CMC-University, Carolinas Healthcare System Mercy, Carolinas Medical Center Mercy, CMC-Mercy, Greater Carolinas Women's Center, and Carolinas Laboratory Network; and Glen Ellis Powell, II, MD, Individually	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA17-1398) 2. North Carolina Association of Defense Attorneys' Conditional Motion for Leave to File Amicus Brief 3. Plts' Conditional PDR Under N.C.G.S. § 7A-31 4. Motion for Temporary Stay of the Decision of the COA 5. Petition for *Writ of Supersedeas*	1. 2. 3. 4. Allowed **11/01/2018** 5.
358P18	State v. Assante M. Sims	Def's *Pro Se* Motion of Dismissal	Dismissed

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

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361P18	Celina Quevedo-Woolf v. Merry Eileen Overholser and Daniel Carter	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA17-1344, 17-675) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Plt's Motion for Temporary Stay 4. Plt's Petition for *Writ of Supersedeas* 5. Plt's Motion for Addendum 6. Plt's Motion to Stay 6 November 2018 Trial Court Hearing	1. 2. 3. Allowed **11/05/2018** 4. 5. 6. Denied **11/05/2018**
365A18	State v. Gabriel Arthur Thabet	1. Def's Notice of Appeal Based Upon a Dissent (COA17-1417) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
377P18	State v. Joshua James Goff	Def's *Pro Se* Motion for PDR (COAP18-204)	Dismissed
378P18	State v. Napier Sandford Fuller	1. Def's *Pro Se* Petition for *Writ of Mandamus* (COAP18-623) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA 3. Def's *Pro Se* Motion in Alternative for Temporary Stay 4. Def's *Pro Se* Motion to Seal Portions of Petition of *Writ of Certiorari* and *Mandamus* 5. Def's *Pro Se* Motion for Addendum to Petition for *Writ of Certiorari* and *Mandamus*	1. Denied **10/31/2018** 2. Denied **10/31/2018** 3. Denied **10/31/2018** 4. Allowed **10/31/2018** 5. Denied **10/31/2018**
381P18	State v. Ferrante Vermond Perry	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Mecklenburg County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
384P18	State v. Wendell Curtis Owenby	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-151)	Denied

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

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386P18	State v. Harold J. Brandon	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Durham County 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
387P18	In the Matter of the Imprisonment of Jashawn A. Summers	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **11/02/2018**
388P18	Adam T. Cheatham, Sr. v. Town of Taylortown	Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COA18-625)	Denied
391P18	Joseph Lee Ham v. Supt. David Millis, et al.	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **11/27/2018**
393P18	Paul Painter v. North Carolina Department of Public Safety, et al.	1. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP18-542) 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Plt's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Allowed 3. Dismissed as moot
395P18	State v. Roderick Jerome Wooten	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Durham County 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
401A18	State *ex rel*. Utilities Commission v. Attorney General	Joint Motion to Consolidate Appeals and to Enter Briefing Schedule	Allowed **11/29/2018**
407P18	State v. James Daren Sisk	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-211) 2. Def's Motion to Withdraw *Pro Se* PDR 3. Def's Motion for Temporary Stay 4. Def's Petition for *Writ of Supersedeas* 5. Def's PDR Under N.C.G.S. § 7A-31	1. 2. 3. Allowed **11/21/2018** 4. 5.

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

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410P18	Town of Apex v. Beverly L. Rubin	1. Plt's Motion for Temporary Stay (COA17-955) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/21/2018** 2. 3.
416P18	State v. Joseph Gill	1. State's Motion for Temporary Stay (COA18-191) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **11/21/2018** 2.
417P18	State v. Rudolph Coles, Jr.	1. State's Motion for Temporary Stay (COA18-357) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **11/26/2018** 2.
420P18	State v. Temon Tavoi McNeil	1. State's Motion for Temporary Stay (COA18-175) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **11/28/2018** 2.
426P17-2	Annah Awartani; Gilma Varinia Bonilla; Crystal Kim Parker, Individually and for Others Similarly Situated v. The Moses H. Cone Memorial Hospital Operating Corporation	1. Plts' Notice of Appeal Based Upon a Constitutional Question (COA17-1300) 2. Plts' PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. — 2. Denied 3. Allowed 4. Dismissed as moot
435P15-3	State v. Sulyaman Alisla Wasalaam	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **11/21/2018**
480P06-2	State v. Devon Maurice Glynn	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **11/06/2018**

ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA

v.

PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, AND TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES

No. 409PA17

Filed 21 December 2018

Governor—Cabinet—senatorial confirmation—separation of powers

The Supreme Court held that senatorial confirmation of members of the Governor's Cabinet did not violate the separation of powers clause because the Governor retained the power to nominate them, had strong supervisory authority over them, and had the power to remove them at will. The appointments provision of N.C.G.S. § 143B-9(a) did not unconstitutionally impede the Governor's ability to take care that the laws be faithfully executed, and the constitution did not otherwise prohibit the General Assembly from requiring senatorial confirmation of members of the Governor's Cabinet.

On discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal of right of a substantial constitutional question pursuant to N.C.G.S. § 7A-30(1) of a unanimous, per curiam decision of the Court of Appeals, ___ N.C. App. ___, 807 S.E.2d 176 (2017), affirming an order of summary judgment entered on 17 March 2017 in Superior Court, Wake County, by a three-judge panel under N.C.G.S. § 1-267.1. Heard in the Supreme Court on 2 October 2018.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Daniel F.E. Smith, Jim W. Phillips, Jr., and Eric M. David, for plaintiff-appellant.

Nelson Mullins Riley & Scarborough LLP, by D. Martin Warf, Noah H. Huffstetler, III, and Candace Friel, for defendant-appellees.

MARTIN, Chief Justice.

The Governor is our state's chief executive. He or she bears the ultimate responsibility of ensuring that our laws are properly enforced. *See State ex rel. McCrory v. Berger*, 368 N.C. 633, 635, 781 S.E.2d 248, 250 (2016). Indeed, the Constitution of North Carolina enshrines this

executive duty: "The Governor shall take care that the laws be faithfully executed." N.C. Const. art. III, § 5(4).

But the Governor is not alone in this task. Our state constitution establishes nine other offices in the executive branch. *See id.* art. III, §§ 2, 7. These offices are elected and consist of the Lieutenant Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance. *Id.* Collectively, these ten offices are known as the Council of State. *See id.* art. III, § 8.[1]

To further assist the executive branch in fulfilling its purpose, our constitution requires the General Assembly to "prescribe the functions, powers, and duties of the administrative departments and agencies of the State." *Id.* art. III, § 5(10). The heads of the administrative departments that are not headed by members of the Council of State are appointed to their posts rather than being elected by the people. *See* N.C.G.S. § 143B-9(a) (2017). These appointed officers make up the membership of the Governor's Cabinet. *See*, *e.g.*, *id.* § 126-6.3 (2017 & Supp. 2018) (referring to the administrative departments created by Chapter 143B of the North Carolina General Statutes as "Cabinet agencies"); *id.* § 143-745(a)(1) (2017) (defining "Agency head" as "the Governor, a Council of State member, *a cabinet secretary*, . . . and other independent appointed officers with authority over a State agency" (emphasis added)). "[T]o perform his constitutional duty," the Governor must have "enough control" over the members of his Cabinet to take care that the laws be faithfully executed. *McCrory*, 368 N.C. at 646, 781 S.E.2d at 256.

In this case, plaintiff Roy A. Cooper, III, the Governor of North Carolina, challenges the appointments provision of N.C.G.S. § 143B-9(a),

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1. The historical roots of the Council of State can be traced to the advisory councils of the English monarchs. The Research Branch, Div. of Archives & History, N.C. Dept. of Cultural Res., *The Council of State in North Carolina: An Historical Research Report* 8 (1986). In North Carolina, the use of an executive council predates our earliest constitution. *See generally id.* at 8-127 (discussing the development of the Council of State before the American Revolution). At the founding, the Council of State consisted of seven persons appointed by the General Assembly to advise the Governor. N.C. Const. of 1776, § XVI. With the passage of the Constitution of 1868, "the Council of State became a body of directly elected officers, with executive duties of their own." John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 124-25 (2d ed. 2013); *see also* N.C. Const. of 1868, art. III, § 14 ("The Secretary of State, Auditor, Treasurer, Superintendent of Public Works, and Superintendent of Public Instruction, shall constitute, *ex officio*, the Council of State . . . . The Attorney General shall be, *ex officio*, the legal adviser of the Executive Department."). The most recent iteration of the Council of State—consisting of the ten elected Article III officers that we have just listed—has remained unchanged since our current constitution was ratified. *See* N.C. Const. art III, §§ 7-8.

which grants the North Carolina Senate the power to confirm the people that he nominates to serve in his Cabinet. Plaintiff alleges that senatorial confirmation undermines his control over the views and priorities of those who serve in his administration and violates the separation of powers that our constitution guarantees. *See* N.C. Const. art. I, § 6.

We hold that senatorial confirmation of the members of the Governor's Cabinet does not violate the separation of powers clause when, as is the case here, the Governor retains the power to nominate them, has strong supervisory authority over them, and has the power to remove them at will. The Governor's power to nominate is significant, and the ultimate appointee will be a person that he alone has chosen, subject only to an up-or-down vote by the Senate. The Governor's supervisory and removal powers, moreover, ensure that the Governor retains ample post-appointment control over how his Cabinet members perform their duties. As a result, subsection 143B-9(a)'s senatorial confirmation requirement leaves the Governor with enough control to take care that the laws be faithfully executed, and therefore does not violate the separation of powers clause.

I

N.C.G.S. § 143A-11 creates ten principal administrative departments headed by the members of the Council of State—sometimes called the "Council of State agencies." *See*, *e.g.*, N.C.G.S. § 126-6.3; *see also* N.C. Const. art. III, §§ 2, 7, 8. Supplementing these departments are eleven additional principal administrative departments named in N.C.G.S. § 143B-6—the Community Colleges System Office and the Departments of Natural and Cultural Resources, Health and Human Services, Revenue, Public Safety, Environmental Quality, Transportation, Administration, Commerce, Information Technology, and Military and Veterans Affairs. These eleven departments are sometimes called "Cabinet agencies." *See*, *e.g.*, *id.* § 126-6.3. The constitution does not directly mention any of these departments; they are statutory creations.

The heads of these departments—i.e., the members of the Governor's Cabinet—are statutory officers; they hold offices created by statute. *See*, *e.g.*, *id.* § 143B-52 (2017) (naming the Secretary of Natural and Cultural Resources as the head of the corresponding department); *id.* § 143B-139 (2017) (doing likewise for the Secretary of Health and Human Services). These officers are appointed according to a process defined by statute. That statute currently grants the Governor the power to "appoint[ ]" individuals to fill each Cabinet position, "subject to senatorial advice and consent in conformance with Section 5(8) of Article III of the North

Carolina Constitution [i.e., the constitution's appointments clause]." *Id.* § 143B-9(a); *see also* N.C. Const. art. III, § 5(8) ("The Governor shall nominate and by and with the advice and consent of a majority of the Senators appoint all officers whose appointments are not otherwise provided for.").

Other provisions of Chapter 143B address the Governor's ability to supervise and remove Cabinet members. N.C.G.S. § 143B-4 reiterates the Governor's role as "the Chief Executive Officer of the State." *See also* N.C. Const. art III, § 1 (vesting the executive power of the State in the Governor). That same statute gives the Governor final authority to "formulat[e] and administer[ ] the policies of the executive branch." N.C.G.S. § 143B-4 (2017). In addition, Cabinet members must provide the Governor with extensive information about the work of their respective departments. For example, Cabinet members must "submit to the Governor an annual plan of work" and "an annual report covering programs and activities for each fiscal year." *Id.* § 143B-10(h) (2017). Cabinet members must also "develop and report to the Governor legislative, budgetary, and administrative programs to accomplish" long-term policy goals. *Id.* § 143B-10(i) (2017). If the Governor wishes to remove any of the members of his Cabinet, he or she may do so at any time, for any reason. *See id.* § 143B-9(a).

Plaintiff alleges that the appointments process for Cabinet members set forth in N.C.G.S. § 143B-9(a) is unconstitutional. On 30 December 2016, plaintiff filed a complaint in Superior Court, Wake County, challenging the constitutionality of another act of the General Assembly.[2] On 10 January 2017, plaintiff amended his complaint to allege that a separate act requiring senatorial confirmation of his Cabinet members violates the appointments clause and the separation of powers clause of our state constitution. *See* N.C. Const. art. I, § 6 (separation of powers clause); *id.* art. III, § 5(8) (appointments clause). Plaintiff sought a declaration that this aspect of subsection 143B-9(a)'s appointments process is unconstitutional and a permanent injunction barring the operation of section 143B-9 as written.

A divided three-judge panel of the superior court determined that the appointments process in subsection 143B-9(a) does not violate the constitution and granted summary judgment to defendants. Plaintiff appealed this decision to the Court of Appeals. On 7 November 2017, the Court of Appeals issued a per curiam opinion affirming the trial court's

2. The legislative act initially challenged is not a subject of this appeal.

decision. *Cooper v. Berger*, ___ N.C. App. ___, ___, 807 S.E.2d 176, 181-82 (2017) (per curiam). Plaintiff then filed a notice of appeal of a substantial constitutional question pursuant to N.C.G.S. § 7A-30(1) and also petitioned this Court for discretionary review of the same constitutional question pursuant to N.C.G.S. § 7A-31. We retained plaintiff's notice of appeal and allowed plaintiff's petition.

II

North Carolina courts have the power and the duty to determine whether challenged acts of the General Assembly violate the constitution. *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 6-7 (1787). This Court interprets the provisions of the Constitution of North Carolina with finality. *E.g.*, *McCrory*, 368 N.C. at 638, 781 S.E.2d at 252; *Hart v. State*, 368 N.C. 122, 130, 774 S.E.2d 281, 287 (2015). We review constitutional questions de novo. *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001).

Plaintiff alleges that the Senate's "authority to approve, or disapprove, the persons selected by the Governor to serve" as Cabinet members pursuant to subsection 143B-9(a) "improperly encroaches upon the Governor's constitutional authority." In his own words, plaintiff's challenge pertains to "the structure created by" subsection 143B-9(a) and to the degree of control that subsection 143B-9(a) allows the Senate to exercise, "not [to] whether the [Senate] actually exerted that control." *Cf. McCrory*, 368 N.C. at 647, 781 S.E.2d at 257 (indicating that, when legislative involvement in the appointment of executive officers is at issue, the separation of powers clause requires this Court to evaluate how much control the legislation in question "*allows* the General Assembly to exert over the execution of the laws" (emphasis added)). Plaintiff's challenge thus amounts to a facial challenge to the constitutionality of N.C.G.S. § 143B-9(a)—that is, a challenge that subsection 143B 9(a)'s advice-and-consent provision is unconstitutional in all circumstances. *Cf. Hart*, 368 N.C. at 131, 774 S.E.2d at 288 ("[T]he party making [a] facial challenge [must] meet the high bar of showing 'that there are no circumstances under which the statute might be constitutional.' " (quoting *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009))).[3]

3. While it is possible to envision a scenario in which the Senate's arbitrary rejection of capable nominees for a particular office might violate the separation of powers clause, "[t]he fact that a statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 486 (2005) (quoting *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998)).

When reviewing an act of the General Assembly, we presume that the act is constitutional, and we will declare it invalid only if it violates the constitution beyond a reasonable doubt. *Id.* at 131, 774 S.E.2d at 287-88 (citing *Baker v. Martin*, 330 N.C. 331, 334-35, 410 S.E.2d 887, 889 (1991)). "[A] facial challenge to the constitutionality of an act . . . is the most difficult challenge to mount successfully." *Id.* at 131, 774 S.E.2d at 288. "We seldom uphold facial challenges because it is the role of the legislature, rather than this Court, to balance disparate interests and find a workable compromise among them." *Beaufort Cty. Bd. of Educ.*, 363 N.C. at 502, 681 S.E.2d at 280. These well-established principles provide the lens through which we view this case.

A

The separation of powers clause states that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. This concept is "a cornerstone of our state and federal governments." *State ex rel. Wallace v. Bone*, 304 N.C. 591, 601, 286 S.E.2d 79, 84 (1982). Separating the powers of the government preserves individual liberty by safeguarding against the tyranny that may arise from the accumulation of power in one person or one body. *See* Montesquieu, *The Spirit of the Laws* 151-52 (Thomas Nugent trans., Hafner Press 1949) (asserting that "there can be no liberty" where two or more of these governmental powers "are united in the same person"). "The clearest violation of the separation of powers clause occurs when one branch exercises power that the constitution vests exclusively in another branch." *McCrory*, 368 N.C. at 645, 781 S.E.2d at 256. Whether or not a violation of this kind has occurred is a binary question, not a question of degree; one branch either is, or is not, exercising power vested exclusively in another branch.

In *State ex rel. Wallace v. Bone*, for example, we considered the constitutionality of a law providing for the appointment of four sitting legislators to the North Carolina Environmental Management Commission (EMC). 304 N.C. at 591-92, 606-07, 286 S.E.2d at 79, 87. The General Assembly created the EMC as a commission of one of the Cabinet agencies and tasked it with "promulgat[ing] rules and regulations" aimed at protecting our state's water and air. *Id.* at 607, 286 S.E.2d at 87-88. The EMC's powers included "grant[ing] and revok[ing] permits," investigating regulatory violations, and "issu[ing] special orders pursuant to certain statutes to any person whom the commission finds responsible" for regulatory violations. *Id.* at 607, 286 S.E.2d at 88. This Court found it "crystal clear" that the EMC's functions and duties were "administrative or executive in character." *Id.* at 608, 286 S.E.2d at 88. We held that the

General Assembly "cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation *by appointing legislators to the governing body of the instrumentality*." *Id.* (emphasis added). In other words, legislators were wielding executive power, which violated the per se rule prohibiting one branch of government from exercising powers vested exclusively in another branch.

In this case, though, the per se rule from *Wallace* does not apply. As we held in *McCrory*, the appointments clause "authorizes the Governor to appoint all *constitutional* officers whose appointments are not otherwise provided for by the constitution." 368 N.C. at 644, 781 S.E.2d at 255 (emphasis added). The appointments clause therefore does not prohibit the General Assembly from appointing, or from confirming the nominations of, *statutory* officers. *See id.*[4] And this Court has long held "that appointing statutory officers is not an exclusively executive prerogative." *See id.* at 648, 781 S.E.2d at 258 (first citing *Cunningham v. Sprinkle*, 124 N.C. 638, 643, 33 S.E. 138, 139 (1899); and then citing *Trs. of Univ. of N.C. v. McIver*, 72 N.C. 76, 85 (1875)). Because the power to appoint statutory officers is not vested exclusively in any branch, the lesser power to *confirm* statutory officers is not vested exclusively in any branch, either. As a result, no branch can, in exercising the power to confirm statutory officers, violate the per se separation of powers rule that *Wallace* established.

Cabinet members are statutory officers. Their existence stems directly from the Executive Organization Act of 1973, codified in Chapter 143B of our General Statutes, not from any provision of the constitution. It follows that the appointments process in subsection 143B-9(a), which governs the appointments of these statutory officers, does not violate the per se *Wallace* rule.

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4. Our state constitution's appointment model thus differs from the federal appointment model, in which "[t]he [United States Constitution's] Appointments Clause prescribes the *exclusive* means of appointing 'Officers.' " *Lucia v. SEC*, ___ U.S. ___, ___,138 S. Ct. 2044, 2051 (2018) (emphasis added); *see also McCrory*, 368 N.C. at 640 n.3, 781 S.E.2d at 252 n.3 (quoting *Buckley v. Valeo*, 424 U.S. 1, 132, 96 S. Ct. 612, 688 (1976) (per curiam)) (explaining that the federal appointments clause "deliberately denie[s] Congress" any appointment power over officers, and highlighting how that clause differs from our state constitution's appointments clause). Because of the nature of the federal model, the relevant inquiry under the Federal Constitution is not whether the office is constitutional or statutory, but whether the appointee is an officer or a "non-officer employee[ ]." *See Lucia*, ___ U.S. at ___, 138 S. Ct. at 2051 (stating that, if the appointees in question are non-officer employees, "the Appointments Clause cares not a whit about who named them").

B

Next, we must address whether the challenged process satisfies the functional separation of powers test set forth in *McCrory*—which, unlike *Wallace*'s per se rule, *is* a question of degree. *Cf. McCrory*, 368 N.C. at 646-47, 781 S.E.2d at 257 ("*We cannot adopt a categorical rule* that would resolve every separation of powers challenge to the legislative appointment of executive officers. . . . [W]e must examine *the degree of control* that the challenged legislation allows the General Assembly to exert over the execution of the laws." (emphases added)). When the challenge involves the Governor's constitutional authority, we must ask "whether the actions of a coordinate branch 'unreasonably disrupt a core power of the executive.' " *Id.* at 645, 781 S.E.2d at 256 (quoting *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001)).

Our constitution gives the Governor the power and the duty to "take care that the laws be faithfully executed." N.C. Const. art. III, § 5(4); *see also McCrory*, 368 N.C. at 645, 649, 781 S.E.2d at 256, 258. While, as we have just discussed, the appointments clause places no per se restrictions on the appointment of statutory officers, the separation of powers clause requires that the Governor have "enough control over" executive officers "to perform his constitutional duty" under the take care clause. *McCrory*, 368 N.C. at 646, 781 S.E.2d at 256.[5] Because there is no categorical rule that determines whether a statutory framework which involves the General Assembly in the appointment of executive-branch statutory officers affords the Governor enough control over those officers, "we must resolve each challenge by carefully examining its specific factual and legal context." *Id.* at 646-47, 781 S.E.2d at 257.

As we have previously indicated, the degree of control that the Governor has over executive officers can be measured by considering "his ability to appoint [them], to supervise their day-to-day activities, and to remove them from office." *Id.* at 646, 781 S.E.2d at 256. In *McCrory*, we considered the balance between these factors within the statutory frameworks of three administrative commissions. *See id.* at 636, 781 S.E.2d at 250. In each framework, the General Assembly had granted itself the majority of appointments on the commission in question, had insulated the commission from gubernatorial supervision, and had allowed the Governor to remove commissioners only for cause. *Id.*

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5. As in *McCrory*, "[o]ur opinion takes no position on how the separation of powers clause applies to those executive departments that are headed by the independently elected members of the Council of State." *Id.* at 646 n.5, 781 S.E.2d at 256 n.5.

at 646, 781 S.E.2d at 256-57. These frameworks, we noted, "le[ft] the Governor with little control over the views and priorities of the officers that the General Assembly appoints" and enabled "the General Assembly . . . [to] exert most of the control over . . . executive policy . . . in any area of the law that the commission[s] regulate[d]." *Id.* at 647, 781 S.E.2d at 257. We therefore found that the provisions challenged there violated the separation of powers clause. *See id.*

Turning to the facts of this case, we first acknowledge that the officers at issue here are not just members of administrative commissions; they are the heads of entire administrative departments. As department heads, Cabinet members have far more discretion, and wield far more executive power, than the commissioners in *McCrory* did. Among other things, they have the authority to reorganize their departments, to create and fill subordinate staff positions, and to establish advisory committees. N.C.G.S. § 143B-10 (2017). In addition, Cabinet members are some of the Governor's closest deputies, and are critical to the Governor's ability to take care that the laws be faithfully executed.

So the authority of these appointees is undoubtedly substantial. But a faithful application of the three-factor test set forth in *McCrory* shows that the Governor retains enough control over them to perform his constitutional duties. In short, senatorial confirmation of Cabinet members does not unconstitutionally impede the Governor's power and duty under the take care clause because the Governor still has the power to nominate them, has strong supervisory authority over them, and has the power to remove them at will.

With respect to the first *McCrory* factor, senatorial confirmation curtails the Governor's appointment power only minimally. As Federalist 76 suggests, the power to nominate is superior to the power to confirm. "In the act of nomination, [the chief executive's] judgment alone would be exercised . . . ." The Federalist No. 76 (Alexander Hamilton); *see also Myers v. United States*, 272 U.S. 52, 121, 47 S. Ct. 21, 27 (1926) (observing that, in the federal model, the Senate's rejection of a nominee "does not greatly embarrass [the President] in the conscientious discharge of his high duties in the selection of those who are to aid him, because the President usually has an ample field from which to select for office, according to his preference, competent and capable men"). The universe of people from whom the Governor may choose is open—he may nominate any eligible person to serve as a member of his Cabinet. In granting the Senate the power to confirm Cabinet nominees, the General Assembly has undoubtedly granted the Senate some piece of the appointment power. But the Governor retains the most important

role in the process: the ability to choose, from the universe of all eligible people, the person on whom the Senate will have an up-or-down vote.

This arrangement starkly contrasts with the statutory frameworks at issue in our recent separation-of-powers-clause decisions. In *McCrory*, we struck down legislation in which the General Assembly had granted itself the unilateral authority to appoint a majority of the commissioners on each of the commissions at issue. 368 N.C. at 637, 781 S.E.2d at 251. And in *Cooper v. Berger*, we rejected a framework in which the Governor had to choose his appointees from two short lists prepared "by the State party chair[s] of the two political parties with the highest number of registered affiliates," with an equal number of members to be drawn from each list. 370 N.C. 392, 396, 809 S.E.2d 98, 101 (2018). Here, the Governor may select his nominees from a virtually unlimited pool of qualified people.

With respect to the second *McCrory* factor, moreover, the Governor's supervisory powers augment his control over the views and priorities of his Cabinet members. The Governor is ultimately "responsible for formulating and administering the policies of the executive branch of the State government." N.C.G.S. § 143B-4. Each Cabinet member must "submit to the Governor an annual plan of work for the next fiscal year," *id.* § 143B-10(h), and "report to the Governor legislative, budgetary, and administrative programs to accomplish comprehensive, long-range coordinated planning and policy formulation in the work of his department," *id.* § 143B-10(i). And many of the Cabinet members' discretionary decisions regarding department organization and operation require the Governor's approval before taking effect. *See*, *e.g.*, *id.* § 143B-10(b) (providing that each principal State department head may, "[w]ith the approval of the Governor, . . . establish or abolish . . . any division" within the department head's department); *id.* § 143B-10(j)(2) (providing that each principal State department head "may adopt . . . [r]ules, approved by the Governor, to govern the management of the department, which shall include the functions of planning, organizing, staffing, directing, coordinating, reporting, budgeting, and budget preparation which affect private rights or procedures available to the public"). In short, the Governor has extensive supervisory power, allowing him to directly manage his Cabinet members in virtually every aspect of their authority.

Finally, with respect to the third *McCrory* factor, members of the Governor's Cabinet "serve at the Governor's pleasure," *id.* § 143B-9(a), meaning that the Governor may remove them for any reason or for no reason at all. If a Cabinet member's performance does not conform to the Governor's wishes, the Governor may remove him or her. If a

Cabinet member acts too slowly to implement the Governor's policies, the Governor may remove him or her. If the Governor decides to change directions in a given policy area and the corresponding Cabinet member is not willing to be flexible, the Governor may remove him or her. In other words, the Governor retains plenary authority to remove the members of his Cabinet. With that authority, he may prevent any member of his Cabinet from refusing to properly implement his preferred policies.

In light of the Governor's broad power to supervise and remove his Cabinet members, and in light of the open universe from which the Governor may select his Cabinet nominees, the confirmation power gives the Senate little ability to determine who will be executing the law or how they will do so. Once confirmed, Cabinet members are—to the extent that they are subject to control by another government official—subject to complete control by the Governor. It follows that any effort by the Senate to block one qualified nominee in the hopes that the Governor would then nominate someone who shares the views and priorities of a majority of senators (assuming that the views and priorities of a majority of senators differ from those of the Governor) would likely be futile. Thus, although the Governor does not have sole appointment power under subsection 143B-9(a), he has immense influence over who serves in his Cabinet and over what his Cabinet members do. More fundamentally, he retains enough control over the members of his Cabinet to take care that the laws be faithfully executed.

Applying these factors to the statutory scheme as a whole, we hold that senatorial confirmation of the Governor's Cabinet nominees does not unconstitutionally impede the Governor's ability to take care that the laws be faithfully executed.

III

Plaintiff makes four additional arguments to support his contention that senatorial confirmation of Cabinet members is unconstitutional. Although these arguments deal with many of the same concepts as separation-of-powers-clause challenges do, they do not themselves arise out of the separation of powers clause. Instead, they purport to use methods of constitutional construction, or methods of construction that apply to legal texts more broadly, to establish the unconstitutionality of subsection 143B-9(a)'s appointments process.

Each argument revolves, in one way or another, around two constitutional provisions that specify some form of legislative confirmation of gubernatorial appointees. First, plaintiff cites the appointments clause, which requires constitutional officers whose appointments are

not otherwise provided for by the constitution to be nominated by the Governor and confirmed by a majority of the Senate. N.C. Const. art. III, § 5(8); *McCrory*, 368 N.C. at 644, 781 S.E.2d at 255. Second, he cites Article IX, Section 4(1), which states that "eleven members" of the State Board of Education shall be "appointed by the Governor, subject to confirmation by the General Assembly in joint session."[6]

Plaintiff argues, based on these two provisions, that senatorial confirmation of members of the Governor's Cabinet is unconstitutional based on the canon of *expressio unius est exclusio alterius*. Plaintiff essentially claims that, because the constitution twice mentions some form of legislative confirmation for certain constitutional officers but fails to require any form of legislative confirmation for statutory officers, the constitution implicitly prohibits the General Assembly from requiring legislative confirmation of statutory officers.

"Under the doctrine of *expressio unius est exclusio alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list." *Evans v. Diaz*, 333 N.C. 774, 779-80, 430 S.E.2d 244, 247 (1993) (citing *Alberti v. Manufactured Homes, Inc.*, 329 N.C. 727, 732, 407 S.E.2d 819, 822 (1991)). "The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81, 122 S. Ct. 2045, 2050 (2002). In other words, sometimes a provision is written (or a set of provisions are written) in such a way that a reasonable negative inference can and should be drawn. *See, e.g.*, *Jennings v. Rodriguez*, ___ U.S. ___, ___, 138 S. Ct. 830, 844 (2018). Because the application of the *expressio unius* canon "depends so much on context," however, "it must be applied with great caution." Antonin Scalia & Bryan Garner, *Reading Law* 107 (2012).

Context significantly limits the application of this canon in cases like this one, in which the scope of the General Assembly's power is at issue. "[O]ur State Constitution is not a grant of power. All power which

6. To the extent that plaintiff asserts in his reply brief that "the power of appointment is an executive power," this premise directly conflicts with our prior decisions. The power of appointment is not inherently executive, *see Cunningham v. Sprinkle*, 124 N.C. 638, 643, 33 S.E. 138, 139 (1899) ("[T]he election of officers is not an executive, legislative or judicial power, but only a mode of filling the offices created by law . . . ."), and therefore is not an "executive power of the State . . . vested in the Governor" by Article III, Section 1 of our state constitution. *See, e.g.*, *McCrory*, 368 N.C. at 648, 781 S.E.2d at 258 (first citing *Cunningham*, 124 N.C. at 643, 33 S.E. at 139; and then citing *McIver*, 72 N.C. 76, 85).

is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution." *State ex rel. Martin v. Preston*, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989) (citation omitted) (first citing *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961); then citing *Lassiter v. Northampton Cty. Bd. of Elections*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958), *aff'd*, 360 U.S. 45, 79 S. Ct. 985 (1959); and then citing *Greensboro-High Point Airport Auth. v. Johnson*, 226 N.C. 1, 8, 36 S.E.2d 803, 809 (1946)).[7] "Unless the Constitution *expressly* or by *necessary implication* restricts the actions of the legislative branch, the General Assembly is free to implement legislation as long as that legislation does not offend some specific constitutional provision." *Baker*, 330 N.C. at 338-39, 410 S.E.2d at 891-92; *see id.* at 343, 410 S.E.2d at 896 (Mitchell, J., dissenting) (asserting that the *expressio unius* canon "should not be applied blindly in cases of state constitutional interpretation"). In the context of finding limitations on the General Assembly's power, therefore, the constitution must *necessarily imply* any reasonable negative inference if we are to draw that inference through the use of the *expressio unius* canon.

The two provisions in question here do have a necessary implication, but not one that limits the General Assembly's power. The necessary inference to be drawn from the fact that the constitution *requires* some form of legislative confirmation as to certain constitutional officers—but stays silent on the method of selection of statutory officers—is that the constitution *does not require* some form of legislative confirmation as to statutory officers. That is essentially what we held in *McCrory*. In saying that the appointments clause, standing alone, does not prohibit the General Assembly from giving itself the power to appoint certain statutory officers outright, we were saying that the appointments process did not have to conform to the processes specified in the two constitutional provisions in question. *See McCrory*, 368 N.C. at 644, 781 S.E.2d at 255. In other words, the reasonable inference to be drawn

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7. This is a fundamental distinction between our state and federal constitutions. The Constitution of the United States is a grant of power to the federal government—that is, the federal government can act only in ways *permitted* by the Constitution. *See, e.g.*, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (stating that the federal government "is acknowledged by all to be one of enumerated powers" that "can exercise only the powers granted to it"). Our state constitution, by contrast, functions in the opposite manner—that is, the General Assembly is generally free to act unless *prohibited* by our constitution. *See, e.g.*, *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570-71, 21 S.E. 787, 787 (1895) ("The only limitation upon [the General Assembly's] power is found in the organic law, as declared by the delegates of the people in convention assembled from time to time.").

from the constitution's failure to specify how statutory officers are to be appointed or otherwise selected is that the constitution simply leaves this matter to be determined by the political process.

We reached a similar decision in *In re Spivey*, where we addressed the respondent's argument that, because district attorneys are "independent constitutional officer[s]," they can be removed only by impeachment. *In re Spivey*, 345 N.C. 404, 410, 480 S.E.2d 693, 696 (1997). We used the *expressio unius* canon[8] to hold that, because the constitution and an arguably pertinent statute "expressly provide[d] that most constitutional officers are removable by impeachment" but did not "provide[ ] that district attorneys are subject to removal by impeachment," neither the constitution nor the statute subjected district attorneys to removal by impeachment. *Id.* at 412, 480 S.E.2d at 697. *Spivey* therefore construed the absence of a method of removal that is stated elsewhere in the constitution to mean that the constitution does not *require* that method of removal where it is absent. That is precisely analogous to how we construe the constitutional provisions that plaintiff raises here: the absence of a legislative confirmation requirement elsewhere in the constitution means that the constitution does not require statutory officers to be confirmed by the legislature. Nothing more, nothing less.

In contrast, plaintiff suggests that, when the constitution requires a process in one circumstance, it implicitly *prohibits* that process from being used in all other circumstances. But if we drew *that* inference, plaintiff's argument would be self-defeating. After all, the constitution delegates to the Governor the power to nominate or appoint a number of constitutional officers—in these two provisions and in others. *See also*, *e.g.*, N.C. Const. art. III, § 7(3) (granting the Governor the power to fill vacant offices in the Council of State); *id.* art. IV, § 19 (granting the Governor the power to fill vacant Article IV offices unless another process is constitutionally specified). As with the two provisions that give the General Assembly some form of confirmation power over constitutional officers, these provisions give the *Governor* the power to nominate or appoint constitutional officers. But, just as no constitutional provision gives the General Assembly the power to confirm statutory officers, no constitutional provision gives the Governor the power to nominate or appoint statutory officers. Thus, applying plaintiff's

8. In *Spivey*, we called the *expressio unius* canon by its alternative name—"*inclusio unius est exclusio alterius* (inclusion of one is exclusion of another)," *id.* at 412, 480 S.E.2d at 697; *see also* Scalia & Garner, at 107 (explaining that *expressio unius* and *inclusion unius* are interchangeable names for the same interpretive canon).

suggested interpretation, it would follow that the Governor could not nominate or appoint statutory officers. This does *not* follow, however, and the constitution permits, but does not require, the Governor to be able to nominate and appoint statutory officers. It likewise permits, but does not require, the General Assembly to be able to confirm statutory officers.

In so concluding, we acknowledge that plaintiff cites several cases from our sister states in support of his *expressio unius* argument. But using out-of-state cases as persuasive authority in interpreting our own constitution can be ill-advised; each state constitution has its own unique history of development, both in terms of the constitutional text itself and of the judiciary's interpretation of that text. *See, e.g.*, *McCrory*, 368 N.C. at 640-44, 781 S.E.2d at 253-55 (discussing the history of the appointment power in North Carolina with reference to a number of state-specific constitutional ratifications and amendments); *Rampton v. Barlow*, 464 P.2d 378, 379 (Utah 1970) (discussing the connection between the Constitution of Utah and the Organic Act creating the Territory of Utah). The opinions that plaintiff cites from Alaska and Utah are a case in point. They stand only for the proposition that, *when the appointment power is an executive power*, the legislature may not confirm gubernatorial appointees unless the state constitution expressly permits it to do so. *See Bradner v. Hammond*, 553 P.2d 1, 7 (Alaska 1976) ("[U]nder Alaska's constitution the appointment of subordinate executive officers by the governor is an executive function . . . ."); *Matheson v. Ferry*, 657 P.2d 240, 245 (Utah 1982) (Stewart, J., concurring). But as we have already discussed, our courts have long held that the appointment power in North Carolina is "not an executive, legislative or judicial power, but only a mode of filling the offices created by law." *Cunningham*, 124 N.C. at 643, 33 S.E. at 139; *see also McCrory*, 368 N.C. at 648, 781 S.E.2d at 258 ("[A]ppointing statutory officers is not an exclusively executive prerogative.").[9] Thus, these opinions reach a different result than we do because they rest on a different premise that arises from different texts and histories.

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9. Though the states are not unanimous in this view of the appointment power, North Carolina is hardly an outlier in this respect. This theory of the appointment power is long established and remains the law both here and in a number of other jurisdictions. *See, e.g.*, *Clinton v. Clinton*, 305 Ark. 585, 590, 810 S.W.2d 923, 926 (1991) (reaffirming "that there was no inherent appointment power in the Governor" (emphasis omitted) (citing *Cox v. State*, 72 Ark. 94, 78 S.W. 756 (1904))); *Marine Forests Soc'y v. Cal. Coastal Comm'n*, 36 Cal. 4th 1, 34, 113 P.3d 1062, 1080 (2005) (reaffirming the principle that "[t]he power to fill an office is political, and this power is exercised in common by the Legislatures, the Governors, and other executive officers, of every State in the Union, unless it has been expressly withdrawn, by the organic law of the State" (quoting *People ex rel. Aylett v. Langdon*, 8 Cal. 1, 16 (1857))); *Stroger v. Reg'l Transp. Auth.*, 201 Ill. 2d 508, 527, 778

In declining to adopt plaintiff's application of the *expressio unius* canon, we do not, as he suggests, render superfluous the language of the two constitutional provisions that require some form of legislative confirmation. Consider the appointments clause: "The Governor shall nominate and *by and with the advice and consent of a majority of the Senators* appoint all officers whose appointments are not otherwise provided for." N.C. Const. art. III, § 5(8) (emphasis added). If one were to remove the language that we have italicized, the Governor is left with the complete power to "nominate and appoint" constitutional officers—a power that is not subject to any form of legislative confirmation. Alternatively, if one were to remove the italicized language plus the word "and" before it and the word "appoint" after it, the appointments clause would be incomplete; it would describe only how constitutional officers "whose appointments are not otherwise provided for" are to be *nominated*, not how they are to be appointed. Either way, removing the language requiring senatorial confirmation would alter the meaning of the appointments clause. Thus, that language is not superfluous, even if one rejects plaintiff's *expressio unius* argument.

So too with the Board of Education provision. If one were to remove the confirmation requirement from Article IX, Section 4(1), the clause in question would simply provide for "eleven members" of that Board to be "appointed by the Governor"—full stop. That too would morph the Governor's appointment power from one that is subject to legislative confirmation to one that is not, even accepting our application of the *expressio unius* canon. As a result, the legislative confirmation language in this provision is also not superfluous.

N.E.2d 683, 694 (2002) (reaffirming the principle that "[t]he power to appoint to office is not inherent in the executive department unless conferred by the constitution or the legislature" and that "[t]he creation of officers, the delegation and regulation of the powers and duties of officers and the prescribing of the manner of their appointment or election are legislative functions, which are restrained only by the Constitution" (quoting *People ex rel. Gullett v. McCullough*, 254 Ill. 9, 16, 98 N.E. 156, 158 (1912))); *Schisler v. State*, 394 Md. 519, 584, 907 A.2d 175, 213-14 (2006) (explaining "that the Legislature can by express provision in a prospective statute commit the appointment process to entities other than the Executive," reaffirming that court's earlier holding in *Mayor of Baltimore v. State*, 15 Md. 376, 455 (1860)); *State ex rel. Clarke v. Irwin*, 5 Nev. 111, 127 (1869) (stating that, "[i]n the Constitution of the State of Nevada, the appointing power of the Legislature is neither cut up by the roots, nor in any manner hampered, save where the Constitution itself . . . provides for filling a vacancy"); *Richardson v. Young*, 122 Tenn. 471, 515-16, 125 S.W. 664, 674 (1909) ("We have no difficulty in coming to the conclusion that [the appointment] power, under the constitution of this State, is not an executive function, inherently in the executive department when not otherwise expressly vested, but a political power, which, consistently with the distribution of powers of government, may properly be vested in either the legislative, executive, or judicial departments by the general assembly.").

Next, quoting the report of the North Carolina Study Commission that drafted our current constitution, plaintiff argues that—because our constitution restricts, rather than enumerates, the General Assembly's power—a constitutional provision that "may appear in form to be a grant of authority to the General Assembly to act on a particular matter normally is in legal effect a limitation, not a grant." *Report of the North Carolina State Constitution Study Commission* 2 (1968). In light of the rule expressed in this statement, plaintiff concludes that the two provisions of the constitution that confer confirmation capability on the General Assembly show that the General Assembly has no *general* power to confirm. Accordingly, plaintiff maintains, these provisions must actually *limit* the General Assembly's ability to confirm to the two constitutionally specified instances.

We do not have to decide, and do not decide, whether the statement from the Commission report that plaintiff quotes is accurate. It is enough to say that its use of the word "normally" permits exceptions to its purported rule, and that, even if that rule is correct, the two constitutional provisions in question would both qualify as exceptions to it. The grant of power to the General Assembly in those provisions must be viewed hand-in-hand with the power that those provisions grant to the Governor. When viewed in this way, it is easy see that, when the constitution creates appointments processes in which both the General Assembly and the Governor have a role, it needs to specify the power of both actors in those processes. That is all that the constitution has done here. Accordingly, those provisions specifying the appointments processes of constitutional officers should not be read as limitations on the General Assembly as to the appointments of statutory officers.

Finally, plaintiff takes issue with the language of subsection 143B-9(a) that requires Cabinet members to be confirmed "in conformance with" the appointments clause. He claims that, because the appointments clause applies only to constitutional officers, the appointments clause cannot "authorize" the General Assembly to require senatorial confirmation of Cabinet members.

But, as plaintiff concedes, our constitution does not enumerate the powers of the General Assembly. As we have already mentioned, unlike the powers of Congress in the federal model, the General Assembly has the power to legislate on all matters unless the constitution prohibits it from doing so. *See McIntyre*, 254 N.C. at 515, 119 S.E.2d at 891 ("All power which is not limited by the Constitution inheres in the people, and an act of a State legislature is legal when the Constitution contains no prohibition against it."); *see also Pope v. Easley*, 354 N.C. 544, 546,

556 S.E.2d 265, 267 (2001) (per curiam) ("[T]he power [that] remains with the people . . . is exercised through the General Assembly . . . ."). Thus, the General Assembly need not identify the constitutional source of its power when it enacts statutes. In fact, in most instances, there will be no particular grant of constitutional authority on which the General Assembly will rely. It will instead rely on its general power to legislate, which it retains as an arm of the people.

Plaintiff's argument therefore makes sense only in conjunction with one or more of his earlier arguments that the constitution implicitly limits the General Assembly's legislative confirmation power to the two instances enumerated in the appointments clause and in Article IX, Section 4(1). His argument is predicated, in other words, on the theory that the constitution elsewhere limits the General Assembly's authority to confirm executive officers, which would then require express constitutional authorization for the General Assembly to be able to call for senatorial confirmation in this instance. Because plaintiff's earlier arguments are unavailing, though, this argument is as well.

Notably, under our analysis, subsection 143B-9(a) would still be constitutional even if the General Assembly had mistakenly intended the "in conformance with" phrase to identify the constitutional source of its authority. The General Assembly would still *in fact* have the authority to enact this statutory provision as long as its enactment was not otherwise prohibited by the constitution—which it is not. And we would therefore uphold the statute as a valid exercise of that authority—even if the General Assembly had not properly identified the source of its authority.

But it is also worth noting that the "in conformance with" language does not appear to be intended to provide constitutional authority for the General Assembly's enactment anyway. *McCrory* clearly holds that the appointments clause refers only to constitutional officers, not to statutory ones. *See* 368 N.C. at 644, 781 S.E.2d at 255. We have long held that "[t]he Legislature is presumed to know the law." *Purnell v. Page*, 133 N.C. 125, 130, 45 S.E. 534, 536 (1903). And it is undisputed that the General Assembly added the senatorial confirmation language to subsection 143B-9(a) after we handed down *McCrory*. We therefore presume that the General Assembly knew that the appointments clause could not be the source of its authority to require senatorial confirmation of Cabinet members. The best reading of the "in conformance with" language, then, is that it does *not* provide the source of the General Assembly's constitutional authority; rather, it simply requires that the appointments process for Cabinet members mirror the process recited in the appointments clause. After all, if one removes the phrase

"in conformance with Section 5(8) of Article III of the North Carolina Constitution" from subsection 143B-9(a), the statute would fail to tell us how many senators must consent in order to confirm the Governor's appointees. By including that language, the statute appears to be telling us that a majority of senators must consent in order for a Cabinet member to be confirmed.

Because none of plaintiff's arguments about how to properly construe the two legislative confirmation provisions in the constitution are convincing, these arguments do not give us any basis on which to hold the senatorial confirmation provision in subsection 143B-9(a) unconstitutional.

It has long been the practice of the General Assembly, moreover, to require confirmation of certain gubernatorial nominees to statutory offices. *See*, *e.g.*, An Act of March 8, 1941, ch. 97, sec. 2, 1943 N.C. Pub. [Sess.] Laws 151, 151 (codified as amended at N.C.G.S. § 62-10(a) (2017 & Supp. 2018)) (requiring legislative confirmation of gubernatorial nominees for the North Carolina Utilities Commission); *see also* Current Operations and Capital Improvements Appropriations Act of 2014, ch. 100, sec. 18B.6, 2013 N.C. Sess. Laws (Reg. Sess. 2014) 328, 539 (codified as amended at N.C.G.S. § 7A-45.1(a10) (2017)) (requiring legislative confirmation of gubernatorial nominees for special superior court judgeships); Protecting and Putting North Carolina Back to Work Act, ch. 287, sec. 17, 2011 N.C. Sess. Laws 1087, 1099 (codified as amended at N.C.G.S. § 97-77(a), (a1) (2017 & Supp. 2018)) (requiring legislative confirmation of gubernatorial nominees for the North Carolina Industrial Commission). Because these appointments processes are consistent with the demands of the constitution, "it is entirely within the power of the Legislature to deal with [statutory officers] as public policy may suggest and public interest may demand." *N.C. State Bd. of Educ. v. State*, ___ N.C. ___, ___, 815 S.E.2d 67, 74 (2018) (quoting *Mial v. Ellington*, 134 N.C. 131, 162, 46 S.E. 961, 971 (1903)).

* * *

The separation of powers clause safeguards the Governor's ability to have enough control over his Cabinet members to perform his duty under the take care clause. Because Cabinet members play such a critical role in executive branch functions, the Governor's control over them must be significant. Here, however, the Governor has unfettered power to nominate any eligible individual to serve in his Cabinet, has significant supervisory power over his Cabinet members, and has the power to remove Cabinet members at will. The constitution, moreover, does not otherwise prohibit the General Assembly from requiring senatorial

confirmation of members of the Governor's Cabinet. As a result, the appointments provision of subsection 143B-9(a) withstands plaintiff's facial constitutional challenge. We therefore affirm the decision of the Court of Appeals.

AFFIRMED.

BILLY BRUCE JUSTUS, AS ADMINISTRATOR OF THE ESTATE OF PAMELA JANE JUSTUS

v.

MICHAEL J. ROSNER, M.D.; MICHAEL J. ROSNER, M.D., P.A.; FLETCHER HOSPITAL, INC. D/B/A PARK RIDGE HOSPITAL; ADVENTIST HEALTH SYSTEM; AND ADVENTIST HEALTH SYSTEM SUNBELT HEALTHCARE CORPORATION

No. 255A17

Filed 21 December 2018

1. Trials—medical malpractice—verdict set aside

The Court of Appeals correctly concluded that the trial court did not abuse its discretion by setting aside a verdict in a medical malpractice action based on N.C. Civil Procedure Rule 59(a)(7). The trial judge is in the best position to determine whether a verdict is against the greater weight of the evidence, including whether the jurors were affected by misleading suggestions from expert witnesses.

2. Costs—medical malpractice—expert witnesses

The trial court did not abuse its discretion in an award of costs in a medical malpractice action against a doctor and hospitals where the doctor contended that it was improper to assess fees for the testimony of experts whose testimony concerned the only the hospitals. The experts did address issues relating to the doctor in addition to the hospitals. There was no issue concerning N.C.G.S. § 7A-305(d)(11), which authorizes certain costs.

3. Appeal and Error—partial retrial ordered—authority of Court of Appeals

On the unusual facts of the case, the Court of Appeals did not err by awarding a partial rather than a full retrial in a medical malpractice case where the trial court set aside the verdict and entered an amended verdict. The only remedy available to the trial court was a new trial in whole or in part, the trial court's substantive decision to grant plaintiff relief from the original verdict was not disturbed on appeal, and the Court of Appeals had ample authority to

order implementation of the relief that could be properly afforded to plaintiff on remand.

Chief Justice MARTIN concurring in part and dissenting in part.

Justice JACKSON joins in this opinion.

Justice NEWBY dissenting.

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 142 (2017), affirming an order awarding costs, affirming in part and reversing in part an order granting plaintiff's motion to alter or amend judgment, and vacating an amended judgment, all entered on 3 March 2015 by Judge Zoro J. Guice, Jr. in Superior Court, Henderson County, and remanding for a new trial on damages. On 28 September 2017, the Supreme Court allowed defendants' petition for discretionary review of additional issues. Heard in the Supreme Court on 12 March 2018.

Law Offices of Wade Byrd, P.A., by Wade E. Byrd, for plaintiff-appellee.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for defendant-appellants, Michael J. Rosner, M.D. and Michael J. Rosner, M.D., P.A.

HUDSON, Justice.

Here we consider whether the trial court erred in setting aside the jury's verdict in this medical malpractice suit on the ground that the jury awarded insufficient damages to plaintiff Billy Bruce Justus (plaintiff) after finding that defendant Michael J. Rosner, M.D. performed unnecessary surgeries on plaintiff's now-deceased wife, Pamela Jane Justus. For the reasons stated below, we affirm the decision of the Court of Appeals to remand this action for a new trial.

I. FACTUAL AND PROCEDURAL BACKGROUND

Pamela came to Dr. Rosner in 2000 after suffering from serious neurological symptoms for many years and being treated by a variety of neurologists and pain clinics since the mid-1990s. She complained to Dr. Rosner of severe pain in the back of her neck and right temple as well

as diminished memory and cognition, dizziness, and balance problems. Based upon his examination, Dr. Rosner discussed with Pamela the possibility of performing a laminectomy surgery to decompress her spinal cord. Pamela elected to undergo the laminectomy, which Dr. Rosner performed in June 2000.

By December 2000, Pamela reported to Dr. Rosner that she was doing "horribly" and experiencing severe neck pain. Based upon Dr. Rosner's advice, Pamela agreed to undergo a C1 laminectomy and suboccipital craniectomy, which Dr. Rosner performed in February 2001. Dr. Rosner last saw Pamela as a patient on 21 March 2001. During that appointment, she was advised to return in two months and to contact Dr. Rosner's office several weeks beforehand if she had not improved significantly so that an MRI could be ordered. Pamela called Dr. Rosner's office on 29 May 2001 complaining of severe neck pain and an inability to hold her head up. Dr. Rosner's physician's assistant advised Pamela to return for an MRI, but Pamela refused to return, stating that she was "afraid" to come back to the office and that her insurance was no longer accepted.

Over the following months and years, Pamela saw numerous doctors for diagnosis and treatment of her neck condition. In just the year after she stopped seeing Dr. Rosner, she made at least nine medical visits for various reasons and procedures, including: an MRI in August 2001; possible treatments for vocal cord damage stemming from Dr. Rosner's February 2001 surgery; neurological evaluations at multiple practices; and injections for nerve pain.

In April 2004 Domagoj Coric, M.D. performed a fusion surgery on Pamela's neck to address her inability to lift her head off of her chest. After that surgery did not solve the problem, Dr. Coric performed a second operation in 2011. Pamela passed away in September 2012; her death certificate listed non-alcohol related kidney and liver problems as her immediate cause of death.

In June 2003, plaintiff and Pamela filed suit against Dr. Rosner; and his medical practice, Michael J. Rosner, P.A. (defendants); and Fletcher Hospital, Inc. d/b/a Park Ridge Hospital, Adventist Health System, and Adventist Health System Sunbelt Healthcare Corporation (the hospital defendants). The complaint included claims against Dr. Rosner for negligence, lack of informed consent, fraud, loss of consortium, the value of services rendered to Pamela, and willful and wanton conduct. The thrust of the suit was that Dr. Rosner performed unwarranted, unnecessary, and contraindicated experimental surgeries on Pamela and failed to fully inform her of their novelty and risks. This case, along with twenty-four related actions against Dr. Rosner, was designated as exceptional

under Rule 2.1 of the General Rules of Practice for the Superior and District Courts. After Pamela passed away in 2012, plaintiff, in his capacity as administrator of her estate, was substituted as a party plaintiff for Pamela and allowed to amend the complaint to assert claims for wrongful death and civil conspiracy.

The case was tried in Superior Court, Henderson County, beginning on 28 July 2014 before Judge Zoro J. Guice, Jr. During the trial, Dr. Rosner offered the testimony of several expert witnesses who suggested that Pamela could have avoided the chin-on-chest deformity she developed as a result of Dr. Rosner's surgeries if she had returned specifically to him for follow-up care. For instance, Michael Seiff, M.D. testified in pertinent part as follows:

> Q. And to your knowledge, did [Pamela] follow up as instructed *with Dr. Rosner*?
>
> A. No.
>
> Q. Had she done so, as an expert in the field of neurosurgery, do you believe that this chin-on-chest deformity could have been avoided with appropriate follow-up by [Pamela] *with Dr. Rosner*?
>
> A. Absolutely.

(Emphases added.) Similarly, an exchange with Konstantin Slavin, M.D. went as follows:

> Q. . . . [D]id you know that Pam Justus stopped going to Dr. Rosner and was essentially -- I don't want to say lost in follow-up. She refused to return *to Dr. Rosner* following her second operation. Were you aware of that?
>
> A. That's my understanding, yes.
>
> Q. Do you believe, Doctor, had she followed up *with Dr. Rosner*, that this deformity, this chin-to-chest, this kyphosis, could have been caught earlier and remedied earlier, had she simply been following up as she should have?
>
> A. That's a definite possibility, yes.

(Emphases added.) Likewise, the examination of Donald Richardson, M.D. included the following exchange:

> Q. . . .[H]ave you, as a neurosurgeon, who's looked at the films, who's looked at the records, have you formed

> an opinion to a reasonable degree of medical certainty about whether or not Pam Justus's failure to follow up *with Dr. Rosner* was a proximate cause of her development of chin-on-chest deformity? The question is simply yes or no.
>
> A. Yes.

(Emphasis added.)

The jury returned its verdict on 25 September 2014 finding defendants liable for negligence and finding no liability against defendants on other grounds or against the hospital defendants.[1] On its verdict form, the jury found that Pamela had suffered damages in the amount of $512,162.00 but that her damages should be reduced by $512,161.00 because of her "unreasonable failure . . . to avoid or minimize her damages." Accordingly, the trial court entered judgment in the amount of $1.00.

On 31 October 2014, plaintiff moved to alter or amend the judgment under Rule 59 of the North Carolina Rules of Civil Procedure. Specifically, plaintiff asserted that the jury's finding regarding Pamela's failure to mitigate damages was "contrary to the greater weight of credible testimony" and "contrary to law," and displayed "a manifest disregard of the jury to the instructions of the [c]ourt." Plaintiff asserted that the principal evidence to support the mitigation finding was that Pamela did not return to Dr. Rosner for follow-up care and that, as a matter of law, "she had no duty to seek medical attention specifically from Dr. Rosner rather than from other health care providers." Plaintiff also argued that the evidence showed that Pamela affirmatively took reasonable steps to mitigate damages by seeing numerous doctors in the wake of Dr. Rosner's negligent surgeries.

Following a hearing, the trial court entered an order on 3 March 2015 granting plaintiff's Rule 59 motion. Regarding the jury's mitigation of damages verdict, the court found that (1) Dr. Rosner's expert witnesses in neurology "testified that Mrs. Justus' condition could have been ameliorated had she promptly sought follow-up care from Dr. Rosner" and (2) "the overall impression created by these witnesses (and thus communicated to the jury) is that Mrs. Justus had an obligation to return specifically to *Dr. Rosner*; and that, by failing to do so, she allowed her condition to worsen." The court further found that "[t]here was no evidence presented that Ms. Justus unreasonably delayed trying to have her

1. Plaintiff dismissed his individual claims during the charge conference.

problems diagnosed and corrected" and that, "[g]iven the uncontested evidence that Ms. Justus promptly and persistently made diligent efforts to obtain treatment from other physicians after she terminated her relationship with Dr. Rosner, no reasonable person could conclude that she failed to exercise reasonable care to mitigate her damages." In addition, the court found that "the amount of the jury's mitigation finding—i.e., that Mrs. Justus' condition was almost *entirely her own fault* (except for $1.00)—vastly exceeds, and is grossly disproportionate to, the extent to which, according to Dr. Rosner's neurosurgical experts, her condition could have been ameliorated had she timely sought follow-up care."

In its conclusions of law, the trial court determined that "[p]atients have no legal obligation to seek medical treatment from any particular health care provider" and that "[t]he testimony by Dr. Rosner's neurosurgical experts suggesting that Mrs. Justus had a duty to return specifically to Dr. Rosner was inaccurate and misleading." The court also concluded that "Dr. Rosner presented no legally competent evidence sufficient to support a finding that Mrs. Justus unreasonably failed to mitigate her damages" and that the "jury's $1.00 damage award is manifestly inadequate." The court further concluded that the "jury also appears to have reduced its damage finding ($512,161.00) under the influence of passion or prejudice; specifically, the cumulative impact of misleading testimony from multiple experts." The court also noted that "[e]ven aside from the lack of evidence to support *any* mitigation finding at all, the influence of passion or prejudice is further manifested in the grossly excessive *amount* of the jury's mitigation finding."

As a result of these and other findings and conclusions, the trial court set aside the jury's verdict and the court's judgment and entered an amended judgment awarding damages in the amount of $512,162.00. The court also entered an order awarding costs to plaintiff in the amount of $175,547.59. Defendants appealed from the order granting the motion to alter or amend the judgment, the amended judgment, and the order awarding costs.

At the Court of Appeals, defendants argued that the trial court erred by setting aside the jury verdict based on the mitigation of damages issue. In the alternative, they argued that even if the trial court did not err in granting the Rule 59 motion, it erred by entering an amended judgment rather than granting a new trial on all issues, including the defense of contributory negligence, upon which the trial court had declined to instruct the jury. Defendants also argued that the trial court's award of costs constituted reversible error. The Court of Appeals issued a partially divided opinion on 20 June 2017 in which the majority upheld the trial

court's decisions to set aside the jury verdict, deny defendants' request to instruct the jury on contributory negligence, and award costs. *Justus v. Rosner*, ___ N.C. App. ___, 802 S.E.2d 142 (2017). It concluded, however, that the trial court erred by entering an amended judgment rather than ordering a new trial. The Court of Appeals vacated the amended judgment and remanded for a new trial on damages. The dissent agreed with the majority that the trial court properly refused to deliver a contributory negligence instruction and that, once it decided to set aside the verdict, the trial court should have ordered a new trial rather than entering an amended judgment; however, the dissenting judge disagreed that the trial court had sufficient grounds to set aside the verdict or enter its order of costs. Defendants filed a notice of appeal to this Court based on the dissent. We also allowed defendants' petition for discretionary review on the issues of contributory negligence and whether the new trial should again address defendants' liability for Pamela's injuries, rather than being confined only to the issue of damages.

II. ANALYSIS

A. Rule 59

[1] In their appeal based on the dissenting opinion, defendants contend that the Court of Appeals majority erred by upholding the trial court's decision to grant plaintiff's motion to set aside the jury verdict under Rule 59(a). Although the trial court and the Court of Appeals touched upon a number of potential grounds for setting aside the verdict, we need only conclude that one ground supports the trial court's decision to grant relief pursuant to Rule 59 in order to affirm that ruling. Rule 59 states, in part, that "[a] new trial may be granted to all or any of the parties and on all or part of the issues" based upon, among other grounds, "[i]nsufficiency of the evidence to justify the verdict or that the verdict is contrary to law." N.C. R. Civ. P. 59(a)(7). Here the trial court concluded that "Dr. Rosner presented no legally competent evidence sufficient to support a finding that Mrs. Justus unreasonably failed to mitigate her damages," that "[t]he jury's $1.00 damage award is manifestly inadequate," and that "the influence of passion or prejudice is further manifested in the grossly excessive *amount* of the jury's mitigation finding," which falls within Rule 59(a)(7)'s ground of "[i]nsufficiency of the evidence to justify the verdict."

"[A] motion for a new trial for insufficiency of the evidence pursuant to Rule 59(a)(7) is addressed to the discretion of the trial court." *In re Will of Buck*, 350 N.C. 621, 624, 516 S.E.2d 858, 860 (1999) (citing *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 380-81, 329 S.E.2d 333,

343-44 (1985)); *see also Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982) (plurality opinion) ("It has been long settled in our jurisdiction that an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." (citing *Goldston v. Chambers*, 272 N.C. 53, 59, 157 S.E.2d 676, 680 (1967))). Accordingly, "in the absence of an abuse of discretion, a trial court's ruling on a motion for a new trial due to the insufficiency of evidence is not reversible on appeal." *In re Buck*, 350 N.C. at 624, 516 S.E.2d at 860.

We have explained that in the Rule 59(a)(7) context, the phrase " 'insufficiency of the evidence' means that the verdict 'was against the greater weight of the evidence.' " *Id.* at 624, 516 S.E.2d at 860 (quoting *Nationwide Mut. Ins. Co. v. Chantos*, 298 N.C. 246, 252, 258 S.E.2d 334, 338 (1979)). Therefore, "[t]he trial court has discretionary authority to appraise the evidence and to 'order a new trial whenever in [its] opinion the verdict is contrary to the greater weight of the credible testimony.' " *Id.* at 624-25, 516 S.E.2d at 860 (quoting *Britt v. Allen*, 291 N.C. 630, 634, 231 S.E.2d 607, 611 (1977)). Finally, in applying the abuse of discretion standard, "[a]n appellate court should not disturb a *discretionary* Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Id.* at 625, 516 S.E.2d at 861 (quoting *Anderson v. Hollifield*, 345 N.C. 480, 483, 480 S.E.2d 661, 663 (1997) (emphasis added)).

Here, the trial court's order granting plaintiff's Rule 59 motion included the following findings of fact:

> 5. Dr. Rosner contended at trial that Mrs. Justus unreasonably failed to mitigate her damages.
>
> 6. To support the foregoing defense, Dr. Rosner called four neurosurgical experts (Drs. Michael Seiff, Donald Richardson, Peter Jannetta, and Konstantin Slavin) to testify on his behalf.
>
> 7. These neurosurgical experts testified that Mrs. Justus' condition could have been ameliorated had she promptly sought follow-up care from Dr. Rosner.
>
> 8. Based upon the Court's opportunity to observe the evidence as it was presented and the attendant circumstances, together with the demeanor of Dr. Rosner's neurosurgical experts and considering all of their testimony

> in context, this Court finds that the overall impression created by these witnesses (and thus communicated to the jury) is that Mrs. Justus had an obligation to return specifically *to Dr. Rosner*; and that, by failing to do so, she allowed her condition to worsen.
>
> 9. That Dr. Rosner elicited this testimony from four different experts, moreover, intensified its cumulative impact upon the jury.
>
> 10. There was no evidence presented that Ms. Justus unreasonably delayed trying to have her problems diagnosed and corrected.
>
> 11. On the contrary, her attempts to mitigate her damages were reasonable and all that could be expected.
>
> 12. Given the uncontested evidence that Ms. Justus promptly and persistently made diligent efforts to obtain treatment from other physicians after she terminated her relationship with Dr. Rosner, no reasonable person could conclude that she failed to exercise reasonable care to mitigate her damages.

The trial court's conclusions of law included the following:

> 1. Patients have no legal obligation to seek medical treatment from any particular health care provider.
>
> 2. Mrs. Justus therefore had no duty to return to Dr. Rosner, rather than to other health care providers.
>
> 3. The testimony by Dr. Rosner's neurosurgical experts suggesting that Mrs. Justus had a duty to return specifically to Dr. Rosner was inaccurate and misleading.
>
> 4. The misleading effect of the foregoing testimony was compounded by its repetition from four different expert witnesses.
>
> 5. Dr. Rosner presented no legally competent evidence sufficient to support a finding that Mrs. Justus unreasonably failed to mitigate her damages.

The Court of Appeals majority held that "the trial court's actions, in determining evidence of mitigation of damages was insufficient to justify the verdict, did not amount to an abuse of discretion." *Justus*, ___ N.C. App. at ___, 802 S.E.2d at 151. We agree.

Regarding a plaintiff's duty to mitigate damages,

> [t]he rule in North Carolina is that an injured plaintiff, whether h[er] case be tort or contract, must exercise reasonable care and diligence to avoid or lessen the consequences of the defendant's wrong. If [s]he fails to do so, for any part of the loss incident to such failure, no recovery can be had. This rule is known as the doctrine of avoidable consequences or the duty to minimize damages. Failure to minimize damages does not bar the remedy; it goes only to the amount of damages recoverable.

Miller v. Miller, 273 N.C. 228, 239, 160 S.E.2d 65, 73-74 (1968) (first citing *Johnson v. Atl. Coast Line R.R., Co.*, 184 N.C. 101, 113 S.E. 606 (1922); and then citing 22 Am. Jur. 2d *Damages* §§ 30-32 (1965)).

In their brief to this Court, defendants challenge the trial court's determination that the jury's finding that Pamela failed to mitigate all but $1.00 in damages resulted from the impression created by defendants' experts that Pamela's damages were principally caused by her failure to return specifically to Dr. Rosner for follow-up care after the second surgery he performed on her. As the excerpts from the expert testimonies set forth above show, however, there was evidence at trial to support the trial court's finding that defendants' experts created the impression that Pamela had a duty to return to Dr. Rosner in particular and that this impression influenced the jury's decision to award only nominal damages.[2]

Moreover, defendants do not argue that a patient's failure to seek additional treatment from the doctor who provided negligent medical care to her—care which caused or contributed to the very harm the patient needed to mitigate—constitutes a failure to mitigate damages. Defendants do not dispute that a plaintiff is required only to "exercise reasonable care and diligence to avoid or lessen the consequences of

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2. Defendants find "particularly troublesome" that in Finding No. 8 the trial court characterized the "demeanor" of defendants' experts as contributing to an impression that Pamela had an obligation to return specifically to Dr. Rosner and that she allowed her condition to worsen by failing to do so. This challenge to the trial court's discussion of demeanor is unpersuasive because one of the very reasons we apply an abuse of discretion standard to a trial court's ruling on a Rule 59 motion is that the trial judge is present at trial and is thus in the best position to assess the impact of witnesses' testimony on the jury. *See In re Buck*, 350 N.C. at 628, 516 S.E.2d at 863 ("Only the trial court has directly observed the evidence as it was presented and the attendant circumstances, *as well as the demeanor and characteristics of the witnesses*." (emphasis added)).

the defendant's wrong." *Miller*, 273 N.C. at 239, 160 S.E.2d at 74. We have already noted that the evidence showed that, after leaving Dr. Rosner's care, Pamela *did* seek and obtain further medical care from a variety of other medical professionals, including undergoing an MRI on 17 August 2001—the same diagnostic test recommended to Pamela by Dr. Rosner's physician's assistant during the 29 May 2001 phone call.

The jury's determination of "failure . . . to minimize damages" is further undermined by the evidence that much of the pain and suffering Pamela experienced as a result of Dr. Rosner's negligent surgeries occurred before she would have had the opportunity to mitigate damages. Even so, the jury found that she completely failed to mitigate damages except for $1.00.

Given this evidence, we cannot say that the trial court's decision to set aside the jury's verdict was an abuse of discretion because we are not "convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *In re Buck*, 350 N.C. at 625, 516 S.E.2d at 861 (quoting *Anderson*, 345 N.C. at 483, 480 S.E.2d at 663)). As we have reiterated over the years,

> our appellate courts should place great faith and confidence in the ability of our trial judges to make the right decision, fairly and without partiality, regarding the necessity [of] a new trial. Due to their active participation in the trial, their first-hand acquaintance with the evidence presented, their observa[tions] of the parties, the witnesses, the jurors and the attorneys involved, and their knowledge of various other attendant circumstances, presiding judges have the superior advantage in best determining what justice requires in a certain case.

Id. at 626, 516 S.E.2d at 861 (quoting *Worthington*, 305 N.C. at 487, 290 S.E.2d at 605). The trial court here was in the best position to determine whether the jury's verdict on mitigation of damages went against the greater weight of the evidence, including whether the jurors were affected by the experts' suggestion that Pamela's failure to return specifically to Dr. Rosner caused her health to deteriorate. Accordingly, we affirm the Court of Appeals majority's conclusion that the trial court did not abuse its discretion in setting aside the verdict based on Rule 59(a)(7).[3]

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3. Like the Court of Appeals majority, we decline to address the appropriateness of awarding relief under other subsections of Rule 59.

B. Costs

[2] In the second issue in their appeal based on the dissenting opinion, defendants argue that the Court of Appeals majority erred by affirming the trial court's assessment of $175,547.59 in costs against them. Defendants contend that the trial court lacked authority to assess expert witness costs for experts whose testimony concerned the hospital defendants—which the jury did not find liable—rather than Dr. Rosner.

"In actions where allowance of costs is not otherwise provided by the General Statutes, costs may be allowed in the discretion of the court. Costs awarded by the court are subject to the limitations on assessable or recoverable costs set forth in G.S. 7A-305(d), unless specifically provided for otherwise in the General Statutes." N.C.G.S. § 6-20 (2017). N.C.G.S. 7A-305(d) states in pertinent part:

> (d) The following expenses, when incurred, are assessable or recoverable, as the case may be. The expenses set forth in this subsection are complete and exclusive and constitute a limit on the trial court's discretion to tax costs pursuant to G.S. 6-20:
>
> > (1) Witness fees, as provided by law.
> >
> > . . . .
> >
> > (10) Reasonable and necessary expenses for stenographic and videographic assistance directly related to the taking of depositions and for the cost of deposition transcripts.
> >
> > (11) Reasonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings.

Id. § 7A-305(d) (2017). Although the assessment of costs is generally within the discretion of the trial court, *see id.* § 6-20, "when the validity of an award of costs hinges upon the extent to which the trial court properly interpreted the applicable statutory provisions, the issue before the appellate court is one of statutory construction, which is subject to de novo review." *Lassiter ex rel. Baize v. N.C. Baptist Hosps., Inc.*, 368 N.C. 367, 375, 778 S.E.2d 68, 73 (2015) (citation omitted).

Here plaintiff requested various costs from defendants, including $89,789.84 for depositions, $85,757.75 for experts at trial, and $458,089.30 for "additional expert witness fees." The trial court ordered

that defendants pay plaintiff a lump sum of $175,547.59, which totals the costs requested for depositions and experts' trial testimony.

Defendants contend that this assessment was improper because it included fees connected to the trial testimonies of experts—Drs. Arthur Caplan, Brian Currie, and David Barton Smith—who testified against the hospital defendants rather than against Dr. Rosner. That is, defendants argue, the testimonies of these medical experts cannot support an award of costs against defendants because "[e]ach of these experts expressly did not offer criticisms of Dr. Rosner and, instead, limited their testimony to criticisms of the Hospital Defendants, whom the jury found not liable."

The Court of Appeals rejected this argument, concluding that "defendant [Rosner] fails to establish that ordering payment of these expert fees was an abuse of discretion," *Justus*, ___ N.C. App. at ___, 802 S.E.2d at 156 (citation omitted). The dissent, however, rejected both the majority's result as well as the abuse of discretion standard of review it employed. The dissent stated that the question of which experts' trial testimony could support the assessment of costs against defendants is a legal question because it "hinges upon the extent to which the trial court properly interpreted the applicable statutory provisions . . . , which is subject to de novo review." *Id.* at ___, 802 S.E.2d at 160 (Tyson, J., concurring in part and dissenting in part) (quoting *Lassiter ex rel. Baize*, 368 N.C. at 375, 778 S.E.2d at 73). The dissent then concluded that "the trial court misinterpreted N.C. Gen. Stat. § 7A-305(d)(11) and awarded costs for three of plaintiff's expert witnesses, who offered testimonies directed against actions by the hospital defendant[s], which were acquitted by the jury, and did not testify to Dr. Rosner's standard of care or alleged acts of negligence." *Id.* at ___, 802 S.E.2d at 160.

These experts' testimonies did, however, address issues relating to Dr. Rosner in addition to the hospital defendants. For instance, both Dr. Caplan and Dr. Smith testified that Dr. Rosner's surgeries were experimental, which was one aspect of the negligence claim against him. And Dr. Currie testified to another aspect of Dr. Rosner's alleged negligence in that he allowed the hospital to market his services inaccurately. Given that the testimonies of these experts did bear to some extent upon issues concerning Dr. Rosner's negligence, we do not face the statutory construction issue defendants assert is present.

Accordingly, rather than applying de novo review, the only question here is whether the trial court abused its discretion in its award of costs. As plaintiff observes, the total award of $175,547.59 corresponds to the

costs itemized in plaintiff's motion for the stenographic and videographic costs of taking depositions ($89,789.84) and the expert fees incurred to provide trial testimony ($85,757.75), both categories of costs allowable under statute. *See* N.C.G.S. § 7A-305(d)(10) ("Reasonable and necessary expenses for stenographic and videographic assistance directly related to the taking of depositions and for the cost of deposition transcripts."); *Id.* § 7A-305(d)(11) ("Reasonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings."). We cannot conclude that the trial court abused its discretion in its award of costs and we therefore affirm the Court of Appeals on this issue.

Defendants' remaining arguments are based upon our allowing their petition for discretionary review on the following issues:

> ADDITIONAL AND ALTERNATIVE ISSUES TO BE BRIEFED
>
> I. The trial court erroneously granted directed verdict against Defendants-Appellants on their contributory negligence defense where the evidence showed Ms. Justus' medical problems including kyphosis were caused by her failure to follow medical advice and continue a course of treatment or seek treatment for worsening symptoms.
>
> II. The Court of Appeals erroneously granted Plaintiff a partial new trial on the sole issue of damages where: (A) Plaintiff did not challenge the jury's damage calculation; and (B) Plaintiff's efforts to overturn the jury verdict implicated the entire verdict requiring a new trial on both liability and damages.

The dissenting opinion of the Court of Appeals, on which the Notice of Appeal was based, concurred with the majority's holding that the trial court did not err in granting directed verdict on contributory negligence; that issue is raised by Issue I above in defendants' petition for discretionary review. As to this issue, we now conclude that discretionary review was improvidently allowed.

[3] In their argument in support of Issue II above, defendants contend that the Court of Appeals erroneously remanded for a new trial on damages only. The dissenting opinion specifically agreed with the majority's conclusion that the trial court erred in altering the amount of damages to be awarded. The dissenting opinion, however, did not address the following portion of the majority opinion:

> Rule 59(a) authorizes a new trial limited to issues that do not affect the entire verdict, such as, in this case, damages. Accordingly, we remand this matter to the trial court for a new trial on the issue of damages only. Defendant is not restricted from presenting any evidence which bears on plaintiff's alleged damages and Pamela Justus's failure to mitigate her damages.

Justus, ___ N.C. App. at ___, 802 S.E.2d at 153.

As to the second issue in defendant's petition for discretionary review, we conclude that the Court of Appeals was within its authority to vacate the trial court's amended judgment and order that a new trial be held with respect to the issue of damages. In seeking relief from the original judgment, plaintiff relied upon N.C.G.S. § 1A-1, Rule 59(a), which authorizes a trial judge to grant "[a] new trial" "to all or any of the parties and on all or part of the issues" for a number of different reasons. For the reasons stated by the Court of Appeals, we conclude that the trial court erred by simply striking the jury's mitigation determination and entering judgment in favor of plaintiff and against defendant in the amount of the jury's damages award. *Bethea v. Town of Kenly*, 261 N.C. 730, 732, 136 S.E.2d 38, 40 (1964) (per curiam) (holding that, while "the judge should have set aside the verdict . . . if he deemed it against the weight of the evidence or considered the damages excessive," instead, "he attempted to change the verdict, . . . and this he could not do" (citing *Winn v. C.W. Finch & Son*, 171 N.C. 272, 277, 88 S.E. 332, 334-35 (1916))). Moreover, we see no reason why the Court of Appeals was required to remand this case to the trial court for a determination either of whether relief should be granted at all or whether to grant a full or partial new trial.

While we are unaware of any decision of this Court involving a fact pattern identical to the unusual one here, even a cursory examination of the record reveals that the trial court determined that plaintiff was entitled to relief from what the jury did when it greatly reduced the damages awarded due to Pamela's alleged failure to mitigate. Furthermore, the plain language of N.C.G.S. § 1A-1, Rule 59(a) states explicitly that, once that determination had been made, the only relief that the trial court may award to plaintiff is a new trial. Because this one and only remedy was available to the trial court, and because the trial court's substantive decision that plaintiff was entitled to relief from the jury's original verdict has not been disturbed on appeal, we see no reason why this case should be remanded to the trial court to choose between awarding plaintiff a new trial or denying plaintiff any relief from the jury's verdict

at all.[4] As a result, given that the trial court has already decided that relief should be afforded to plaintiff and given that the trial court's only option was to award a new trial in whole or in part in the event of such a determination, we conclude that the Court of Appeals had ample authority to order implementation of the relief that could be properly afforded to plaintiff on remand.

In addition, we conclude that the Court of Appeals did not err by awarding plaintiff a new trial on the issue of damages only. This Court has previously held that, in the event that a reviewing court determines that a trial court has erred ruling on a motion made pursuant to N.C.G.S. § 1A-1, Rule 59(a), the reviewing court has the authority to determine the scope of the new trial that should be awarded even though the trial court did not address that issue. *Robertson v. Stanley*, 285 N.C. 561, 568, 206 S.E.2d 190, 195 (1974) (overturning the trial court's decision to deny the plaintiff's motion for a partial new trial predicated upon an inconsistent jury verdict and ordering a full new trial on the grounds that "[i]t is settled beyond controversy that it is entirely discretionary with the Court, Superior or Supreme, whether it will grant a partial new trial" (quoting *Table Rock Lumber Co. v. Branch*, 158 N.C. 251, 253, 73 S.E. 164, 165 (1911))). In addition, we are not persuaded that "the error in

4. Although we have stated on many occasions that, "[w]here a ruling is based upon a misapprehension of the applicable law, the cause will be remanded in order that the matter may be considered in its true legal light," *Nationwide Mut. Ins. Co. v. Chantos*, 298 N.C. 246, 252, 258 S.E.2d 334, 338 (1979) (citing 1 Strong's North Carolina Index 3d: *Appeal and Error* § 63), we do not believe that this principle has any bearing upon the proper resolution of this issue. Instead, the "misapprehension" rule has typically been applied to require the remanding of trial court decisions concerning issues in which either the exercise of discretion was appropriate, *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 523, 398 S.E.2d 586, 603 (1990) (overturning a trial court's decision to deny a motion for leave to amend a complaint to add an additional third-party defendant based upon the mistaken belief that none of the claims asserted in the plaintiffs' original complaint survived the defendants' summary judgment motion); *Chantos*, 298 N.C. at 251-52, 258 S.E.2d at 337-38 (overturning a trial court's refusal to set aside the verdict as against the greater weight of the evidence based upon the mistaken belief that this Court had determined that the issue in question could only be resolved by a jury), or to resolve a disputed issue of substantive law in light of the relevant facts, *Hanford v. McSwain*, 230 N.C. 229, 233-34, 53 S.E.2d 84, 87-88 (1949) (overturning a trial court decision denying a defendant's request for relief from a judgment because the defendant had failed to show the existence of a meritorious defense when the defendant had, in fact, demonstrated the potential existence of such a defense); *McGill v. Town of Lumberton*, 215 N.C. 752, 754, 3 S.E.2d 324, 326 (1939) (overturning an Industrial Commission decision to deny an application for workers' compensation benefits on the grounds that the Commission had failed to recognize the existence of a presumption that a compensable injury had occurred when the employee suffered a violent death). As a result of the fact that the trial court had no authority to grant any relief aside from a new trial, the "misapprehension" principle simply does not apply here.

assessing damages tainted the entire verdict," making it "unfair to the defendant to order a partial new trial on the issue of damages alone." *Id.* at 569, 206 S.E.2d at 196. Unlike in *Robertson*, the jury here did not find, in essence, that a minor plaintiff who might or might not have been contributorily negligent and who suffered injuries that resulted in $1,970.00 in medical expenses was entitled to no compensatory damages at all. Instead, the jury here was properly instructed to determine the amount of damages that plaintiff was entitled to recover only after having resolved the issue of liability. *Housing, Inc. v. Weaver*, 305 N.C. 428, 443, 290 S.E.2d 642, 651 (1982) (noting, in upholding the trial court's decision to award a partial new trial on the issue of damages, that when the case was initially tried, "[t]he jurors were instructed further specifically to answer the question of liability *before considering the issue of the amount of damages*"). The jury then reduced the amount of damages awarded to plaintiff by what the trial court believed to have been an unjustified finding of "failure to mitigate" based upon a misapprehension of the steps plaintiff was required to take to properly mitigate her damages. Despite the fact that the jury did not specify the theory upon which it found defendants to have been negligent, the record contains no indication that the applicable measure of damages would have varied depending upon the theory of liability that the jury found to have merit. *Weyerhaeuser Co. v. Godwin Bldg. Supply Co.*, 292 N.C. 557, 564, 234 S.E.2d 605, 609 (1977) (requiring a full new trial, rather than a partial new trial on the issues of damages alone, on the grounds that "it is impossible for us to determine upon what theory the jury relied in finding a breach [of contract] and whether the different theories of breach would have resulted in different measures of damages"). The trial court clearly did not believe that the jury's verdict with respect to the mitigation issue tainted its verdict on the liability issue, since it simply struck the jury's mitigation verdict without in any way disturbing the liability verdict. We see no reason to second-guess that determination or the Court of Appeals' decision to implement that determination in the proper manner. As a result, even though the $1.00 difference between the amount of the jury's damage award and the amount of the "failure to mitigate" offset that the jury deemed to be appropriate appears to be anomalous, nothing in the record persuades us that this anomaly stemmed from a compromise involving the issue of liability rather than the jury's acceptance of the argument that the trial court found to have been erroneously advanced by defendants' expert witnesses—specifically, that Pamela failed to properly mitigate her damages because she did not return to defendant Rosner for further treatment. Therefore, in light of the unusual facts disclosed by the record here, we cannot say

that the Court of Appeals erred by awarding a partial, rather than a full, new trial in this case.

III. CONCLUSION

For the foregoing reasons, we affirm the decision of the Court of Appeals to vacate the trial court's amended judgment and order a new trial with respect to the issue of damages and remand this case to that court for further remand to the Superior Court, Henderson County, for retrial. Moreover, we affirm the decision of the Court of Appeals on the issue of costs. As for Issue I in defendants' petition for discretionary review, we conclude that discretionary review was improvidently allowed; accordingly, the Court of Appeals' disposition of this issue remains undisturbed. As for Issue II in defendants' petition for discretionary review, we affirm for the reasons discussed here.

AFFIRMED IN PART AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

Chief Justice MARTIN concurring in part and dissenting in part.

I agree with the majority that the trial court did not abuse its discretion when it determined that plaintiff was entitled to some form of relief under North Carolina Rule of Civil Procedure 59(a)(7).[1] I also agree with the majority, as well as both parties and the dissent, that the relief that the trial court ordered was not permitted under Rule 59 and that only a new trial, in whole or in part, could have been granted. I do not agree with the majority, however, that either we or the Court of Appeals should usurp the critical role of the trial court under Rule 59 and determine what parts of a new trial are justified in this complex medical malpractice case based on the cold appellate record. In my view, once a trial court appropriately decides to grant a new trial, Rule 59 leaves the trial court in the best position to determine the scope of that new trial. *See* N.C. R. Civ. P. 59(a) ("A new trial may be granted to *all or any* of the parties and on *all or part* of the issues") (emphasis added). Once the Court of Appeals determined that the trial court misapprehended the law in this case by choosing relief that cannot be granted after a jury trial under Rule 59, it would uphold best practices for the Court of Appeals (and this Court) to remand the case for reconsideration under the proper legal standard.

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1. Rule 59 provides that a new trial may be granted on several grounds, including the "[i]nsufficiency of the evidence to justify the verdict or [when] the verdict is contrary to law." N.C. R. Civ. P. 59(a)(7).

In this case, after a jury verdict, plaintiff filed a motion under Rule 59 seeking an amended judgment or, in the alternative, a new trial on the issue of damages. The trial court granted the motion and amended the judgment, rather than granting a new trial. But, as the Court of Appeals properly held and no party challenges here, the trial court misapprehended the applicable law when it amended the judgment. *See Justus v. Rosner*, ___ N.C. App. ___, ___, 802 S.E.2d 142, 152 (2017). While Rule 59 establishes grounds that allow a trial court to grant a new trial "on all or part of the issues," Rule 59 does not let the court "direct the entry of a new judgment" after a verdict by a jury. *See* N.C. R. Civ. P. 59(a). The rule allows entry of a new judgment only "in an action tried *without* a jury." *See id.* (emphasis added).

When this Court (or any court acting as an appellate court) finds that a trial court's ruling on a motion is based on a misapprehension of law, that ruling should be vacated or reversed and the case should be remanded to the trial court to decide the motion according to a proper understanding of the law. *See Concerned Citizens of Brunswick Cty. Taxpayers Ass'n v. State ex rel. Rhodes*, 329 N.C. 37, 54-55, 404 S.E.2d 677, 688 (1991) ("When the order or judgment appealed from was entered under a misapprehension of the applicable law, the judgment, including the findings of fact and conclusions of law on which the judgment was based, will be vacated and the case remanded for further proceedings."). We have applied this rule, for instance, when a trial court misapprehended one factor in a multi-factor test, which, in effect, led the trial court to apply the wrong legal rule, *see Concerned Citizens*, 329 N.C. at 45-46, 404 S.E.2d at 682-83; when a trial court denied, under a misapprehension of law, a motion to terminate a requirement to register as a sex offender, *see State v. Moir*, 369 N.C. 370, 389-90, 794 S.E.2d 685, 698-99 (2016); when a trial court necessarily applied an incorrect articulation of the law of judicial estoppel, *see Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 38, 591 S.E.2d 870, 894 (2004); and when a trial court mistakenly concluded that it had no discretion to extend the time for service of a summons, *Lemons v. Old Hickory Council, Boy Scouts of Am., Inc.*, 322 N.C. 271, 277, 367 S.E.2d 655, 658 (1988). I see no compelling reason for us to depart from this rule here.[2]

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2. Although this Court has previously stated that "[i]t is settled beyond controversy that it is entirely discretionary with the Court, Superior or Supreme, whether it will grant a partial new trial," *Robertson v. Stanley*, 285 N.C. 561, 568, 206 S.E.2d 190, 195 (1974) (quoting *Table Rock Lumber Co. v. Branch*, 158 N.C. 251, 253, 73 S.E. 164, 165 (1911)), I am skeptical of the application of Rule 59 discretionary authority here. No one can seriously dispute that the trial court is in the best institutional position to exercise the type of discretionary authority envisioned by Rule 59(a). Moreover, I do not see how the majority

Here, after a jury verdict in a complex medical malpractice trial, the trial court found that Rule 59 relief was warranted, but then amended the judgment—a form of relief that Rule 59 does not permit after a jury trial. In doing so, the trial court misapprehended the law as to what relief Rule 59 would allow in this case. Because, here, the trial court only had the discretion to order "[a] new trial . . . on all or part of the issues," N.C. R. Civ. P. 59(a), we should remand this case to the trial court so that the trial court may determine which issue(s) require a new trial. In this case, that means the trial court should determine if the new trial should address liability, damages, mitigation, or some combination of these and the myriad other issues decided by the jury. As appellate courts, both we and the Court of Appeals should be mindful of our appellate role, which in this instance means exercising restraint and reviewing the trial court's discretionary decision under Rule 59. In doing so, we can identify that the trial court ordered impermissible relief under Rule 59 and that the only permissible relief in this case would have been a new trial, in whole or in part. But we should not then substitute our own discretion—or encourage the Court of Appeals to do so—to determine, in the first instance, the *scope* of the new trial.

This standard of appellate review is not just more consistent with our institutional role as an appellate court. It also squares with the reason that appellate courts generally review Rule 59 orders for abuse of discretion instead of de novo—namely, that the trial court is better positioned to exercise the discretion that this standard of review vests in it. We have previously held that determining if a verdict has "been given under the influence of passion or prejudice," N.C. R. Civ. P. 59(a)(6), requires more than interpreting a cold record. It requires a complete understanding of the nuances and subtleties of the entire proceeding—something which is only available to the judicial officer who presided over the trial. *See Worthington v. Bynum*, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982) (plurality opinion) (recognizing that "[d]ue to their active participation in the trial, their first-hand acquaintance with the evidence presented, their observances of the parties, the witnesses, the jurors and the attorneys involved, and their knowledge of various other attendant circumstances, presiding judges have the superior advantage in best determining what justice requires"). Similar reasoning applies to other grounds listed in Rule 59. For example, the trial judge who evaluated the

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can possibly ensure, in its order for a partial new trial on damages only based on this cold record, that "no possible injustice can be done to either party." *Id.* Finally, even a casual observer would quickly discern that *Robertson* relies on *Table Rock*, a case that precedes both the state and federal rules of civil procedure.

evidence when crafting jury instructions is in the best position to determine if there was "[m]anifest disregard by the jury of the instructions of the court." N.C. R. Civ. P. 59(a)(5).

The same logic applies to determining the scope of relief to be granted under Rule 59(a). Once the trial court determines that one or more of the grounds for relief under Rule 59(a) have been shown, it uses the knowledge and experience gained from its unique vantage point to fashion an appropriate form of relief. The trial court may have to determine, for example, which issues were infected by problematic evidence. That determination would affect the proper scope of the new trial—whether it needed to cover damages, liability, mitigation, or some combination of issues. In other words, because the *scope of the relief* to be granted under Rule 59 is so closely linked to the *decision to grant* Rule 59 relief, it is generally best for the trial judge to decide both questions in the first instance, and for those decisions to then be reviewed only for abuse of discretion. *Cf. Worthington*, 305 N.C. at 487, 290 S.E.2d at 605 ("We believe that our appellate courts should place great faith and confidence in the ability of our trial judges to make the right decision, fairly and without partiality, regarding the necessity for a new trial."). This is especially true in this case, where the trial court has found multiple grounds for relief under Rule 59(a), while we only consider the legal sufficiency of one.

Admittedly, no party has raised the issue of whether an appellate court should substitute its own discretion to determine the scope of a new trial under a Rule 59 motion in this case. That is not surprising. The parties in this case want the issue to be decided *in their favor*; they likely care little, if they care at all, about *which court* decides the issue. But, as this State's appellate court of last resort, we should care about the role of the trial courts and their " 'institutional advantages' over appellate courts in the 'application of facts to fact-dependent legal standards.' " *Whitacre P'ship*, 358 N.C. at 38, 591 S.E.2d at 894 (quoting *Augur v. Augur*, 356 N.C. 582, 586, 573 S.E.2d 125, 129 (2002)). Otherwise, we leave it to parties appearing before us to determine the scope of appellate remedial authority as they alone see fit. Put simply, we should be vigilant to protect the salutary practice of allowing our trial courts to make this type of discretionary decision under Rule 59 in the first instance.

We should not depart from our customary appellate role here. Now that we have corrected the trial court's misapprehension of law, it would be best to let that court exercise its discretion within its proper bounds—discretion that would, of course, be subject to appellate review in the

ordinary course for abuse of discretion. I therefore concur in part and dissent in part from the majority opinion.

Justice JACKSON joins in this opinion.

Justice NEWBY dissenting.

Jury trials constitute the bedrock of our common law system. Since 1776 our state constitutions have safeguarded the right to a trial by jury. Thus, trial courts have always given great deference to juries' decisions. Only in limited, rare circumstances will courts invade the province of the jury. We afford particular deference to juries when cases have been fairly and fully litigated and a verdict is returned in the form of a general finding, not referencing any particular theory of liability or damages on which the jury made its determination. When the trial court takes the unusual step of overturning a jury's verdict, it must do so in a well-reasoned, legally sound manner. If the court proceeds under a misapprehension of law, the role of the appellate court is to correct the error and then return the matter to the trial court to proceed again, this time with the correct legal basis.

In this case, over the course of a two-month trial, the jury considered a complex medical malpractice case involving several parties. The jury heard multiple expert witnesses testify about numerous questions of liability and damages. In its instructions, based on the evidence, the trial court presented the jury with fifteen theories of negligence against defendant Rosner as well as an instruction to consider plaintiff's legal duty to mitigate her damages. Though the jury found defendant Rosner negligent, it did not specify upon which of those theories it relied. Despite the finding of negligence, the jury significantly reduced the damages awarded to plaintiff, concluding plaintiff failed to mitigate her damages. During this lengthy trial, plaintiff did not object to the mitigation evidence. Moreover, plaintiff furnished the language generally used for the trial court's jury instruction on mitigation. After the jury issued the verdict, plaintiff asked the trial court to modify the amount of damages. The trial court, laboring under a misapprehension of law, revised the damages awarded to plaintiff. Indisputably, this revision was error. Upon review the Court of Appeals should have accurately set forth the law and remanded the case to the trial court to make an informed post-trial determination; instead, the appellate court assumed the role of the trial court and crafted a different remedy for plaintiff: a new trial solely on damages. With little analysis, the majority now compounds this error by giving unwarranted deference to the Court of Appeals' decision

to grant a new trial solely on damages despite the findings by the trial court which support a completely new trial. Because I believe these actions constitute an improper invasion of the roles of the jury and the trial court, I dissent.

On 12 June 2003, three years after her first surgery, plaintiff[1] filed a complaint against defendant Rosner, his medical practice, Michael J. Rosner, M.D., P.A.,[2] Fletcher Hospital, Inc. d/b/a Park Ridge Hospital, Adventist Health System, and Adventist Health System Sunbelt Healthcare Corporation. The complaint included claims for negligence, lack of informed consent, fraud, loss of consortium, and willful and wanton conduct. Plaintiff later amended the complaint to include claims for conspiracy and wrongful death. Plaintiff advanced fifteen theories of how defendant Rosner was negligent, which included performing unnecessary and medically unsound procedures, failing to obtain informed consent and adequately inform plaintiff of the nature of the surgical procedures, misleading plaintiff about her condition and the necessity of the procedures, and conspiring with the hospital to dishonestly market the surgical procedures at issue. Plaintiff contended that the hospital defendants were similarly negligent in failing to monitor these procedures or take actions to prevent them, that the hospital defendants knew or should have known Rosner was performing unnecessary surgeries, and that all defendants conspired, *inter alia*, to promote their reputations and enhance their profits from these procedures.

During the almost two-month trial in August and September 2014, defendant Rosner presented evidence that the surgeries were necessary and in line with the standard of care for neurosurgeons in the community, and that plaintiff knew and consented to the procedures despite the commonly known risks associated with them. Throughout trial defendant Rosner introduced evidence of plaintiff's failure to mitigate damages, including plaintiff's failure to seek appropriate follow-up treatment, failure to properly address her pre-existing and ongoing health issues, and her continued smoking before surgery and post surgery.[3]

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1. Though plaintiff Pamela Justus initiated the action and underwent the surgeries at issue, after her death during the pendency of litigation, the administrator of her estate was substituted as plaintiff in this action. For simplicity, the term "plaintiff" encompasses both and should be read in context.

2. For simplicity, defendant Michael J. Rosner, M.D. and his medical practice Michael J. Rosner, M.D., P.A. are referred to as "defendant Rosner" throughout.

3. The allegations that plaintiff failed to mitigate her damages primarily related to plaintiff's injury arising from her inability to support her head, i.e., kyphosis or chin-on-chest

While various witnesses indicated that plaintiff's conditions worsened when she did not follow up with Rosner, defendant presented a plethora of evidence about plaintiff's general failure to pursue proper care in a timely manner.[4]

For example, on recross-examination, one of defendant's expert witnesses testified, "So the fact that [plaintiff's deformity] was chin on chest was because it went unaddressed for about three years before the time she presented to [Dr.] Coric. If she had been following up, as she should have, it would have been detected that she was developing a post-laminectomy kyphotic deformity and she would have had the appropriate surgery much sooner than when she presented with a chin-on-chest deformity." Another one of defendant's expert witnesses testified on cross-examination that he believed that plaintiff was not injured by the surgeries, which actually helped an ongoing condition, but that plaintiff "had a progressive descending spiral . . . and didn't get any care" for her slowly declining condition. A third expert testified on direct examination that, had plaintiff received physical therapy and worn a neck brace, her condition "could have been avoided probably." Over the course of this multi-week trial, plaintiff's counsel did not object to any of the failure to mitigate evidence as misleading, and the trial court did not intervene.

At the jury charge conference, defendant argued that sufficient evidence existed to show plaintiff was contributorily negligent. While plaintiff's counsel objected to any proposed instruction on contributory negligence, plaintiff's counsel gave extensive input on the mitigation instructions and jury verdict form. Several times, plaintiff's counsel requested to add language to the jury instruction referencing the reasonableness of plaintiff's failure to follow up specifically with Dr. Rosner. The trial court agreed to give a modified version of the mitigation instruction requested by plaintiff, instructing the jury on the nature of plaintiff's duty to mitigate damages.

After the charge conference, the trial court instructed the jury, *inter alia*, that it must determine whether defendant Rosner was negligent. In doing so, the trial court submitted fifteen theories on which the jury

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deformity that developed post surgery, and involved whether plaintiff delayed seeking appropriate and timely preventative treatment after her procedures.

4. The majority opinion states that plaintiff "saw numerous doctors for diagnosis and treatment of her neck condition" following her surgeries. Most of these appointments with pain doctors, however, only addressed plaintiff's symptoms. The record reflects plaintiff's being seen at Wake Forest Baptist and Duke University Hospitals during the critical period after she left Rosner's care, but plaintiff did not properly follow up with either.

could find defendant liable, instructing the jury that it could find defendant liable if it determined that defendant:

> 1: Performed unnecessary surgery on Pamela Justus;
>
> 2: Performed surgery on Pam Justus which was not medically indicated by imaging studies;
>
> 3: Performed surgery on Pam Justus which was not medically indicated by clinical signs and symptoms;
>
> 4: Performed surgery on Pam Justus without first obtaining adequate informed consent;
>
> 5: Misleading Pam Justus as to her condition regarding radiographic information;
>
> 6: Obtained Pam Justus's consent to surgery by misrepresenting that the surgery was necessary;
>
> 7: Fraudulently induced Pam Justus to undergo surgery that was not medically indicated;
>
> 8: Performed experimental surgery on Pam Justus;
>
> 9: Performed surgery on Pam Justus without adequate peer review and/or oversight;
>
> 10: Performed traditional surgery on Pam Justus for nontraditional reasons;
>
> 11: Performed surgeries on Pam Justus for conditions not treatable by surgery;
>
> 12: Failed to apply evidence-based medicine in treating Pam Justus;
>
> 13: By allowing the Hospital to dishonestly market his surgeries;
>
> 14: Conspired with the Hospital defendants to perform medically unnecessary surgeries on Pam Justus and others similarly situated at Park Ridge Hospital;
>
> And 15: Failed to assure that Pam Justus was aware of the controversial nature of the diagnosis claimed by Dr. Rosner as a reason for such surgery.

Having received input from and consent of plaintiff's counsel, the trial court also instructed the jury that it should determine "[b]y what

amount, if any, should the plaintiffs' actual damages be reduced because of Pamela Justus's unreasonable failure to avoid or minimize her damages?" The trial court then gave the following mitigation instruction, which is a slightly modified version of the pattern jury instruction:

> A person injured by the negligent conduct of another is nonetheless under a duty to use that degree of care which a reasonable person would use under the same or similar circumstances to seek treatment to get well and to avoid or minimize the harmful consequences of her injury. A person is not permitted to recover for injuries she could have avoided by using means which a reasonably prudent person would have used to cure her injury or alleviate her pain.
>
> However, a person is not prevented from recovering damages she could have avoided unless her failure to avoid those damages was unreasonable.
>
> If you find that a healthcare provider advised the plaintiff to follow up in her care and treatment, you would not necessarily conclude that Pamela Justus acted unreasonably in declining such advice. In determining whether Pamela Justus' conduct was reasonable, you must consider all of the circumstances as they appeared to Pamela Justus at the time she chose not to follow the healthcare provider's advice.
>
> These may include the financial condition of the plaintiff, the degree of risk involved, the amount of pain involved, the chances for success, the benefits to be obtained from the procedures and treatment, the availability of alternate procedures and treatment, or the knowledge or lack of knowledge of the plaintiff Pamela Justus.

On 25 September 2014, the jury returned its verdict finding defendant Rosner liable under some unspecified theory of negligence but not liable for all other claims against him. The jury also found no liability against any other defendants. Though the trial court instructed the jury on numerous theories of negligence and several factors of mitigation, the jury verdict sheet only included the following questions related to defendant Rosner:

> 1. Was Pamela Justus injured by the negligence of the defendant, Michael J. Rosner, M.D.? (Answer "YES" or "NO" in the space provided below.)

ANSWER: Yes

. . . .

3. Was the death of Pamela Justus caused by the negligence of the defendant, Michael J. Rosner, M.D.? (Answer "YES" or "NO" in the space provided below.)

ANSWER: No

. . . .

5. Was the plaintiff damaged by the fraud of the defendants?: (A) Michael J. Rosner, MD; . . . . (Answer this issue "Yes" or "No" as to each of the . . . defendants.)

A. Michael J. Rosner MD No

. . . .

6. Did the defendants take advantage of a position of trust and confidence to bring about the surgeries of Pamela Justus? (Answer this issue "Yes" or "No" only as to any Defendant for which you answered "NO" in Issue No. 5 above.)

A. Michael J. Rosner MD No

. . . .

If you answered Issue No. 6 "YES" as to any Defendant, then you must answer Issue No. 7 as to that Defendant(s).

7. Did the defendants act openly, fairly and honestly in bringing about the surgeries of Pamela Justus? (Answer this issue "Yes" or "No" as to each of the following defendants.)

A. Michael J. Rosner MD _____

. . . .

8. Did Dr. Rosner conspire with Adventist Health System and/or Park Ridge Hospital to allow or enable Dr. Rosner to perform on members of the public, including Pamela Justus, surgeries which were unnecessary or not medically indicated with the intent and purpose of generating income for Dr. Rosner and Park Ridge Hospital? (Answer "YES" or "NO" in the space provided below.)

ANSWER: No

While the jury also indicated on its verdict form that plaintiff suffered unspecified damages totaling $512,162.00, the jury reduced that award by $512,161.00 due to plaintiff's "unreasonable failure . . . to avoid or minimize her damages." The trial court entered judgment accordingly, awarding plaintiff $1.00.

On 30 October 2014, plaintiff moved to alter or amend the verdict, citing Rule 59(a)(7). *See* N.C.G.S. § 1A-1, Rule 59(a)(7) (2017) ("Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law").[5] Specifically, in her motion plaintiff asserted that defendants' expert witness testimony led the jury to believe that plaintiff had a duty to return to Dr. Rosner to mitigate her damages, which plaintiff was not required to do by law. The motion argued:

> 8. The Plaintiff alleges and contends that the verdict of the jury as to [the mitigation issue] was and is contrary to the greater weight of credible testimony; that the jury was misled by unreliable testimony into rendering an erroneous verdict. . . .
>
> . . . .
>
> 10. That the verdict as to [the mitigation issue] is contrary to law.
>
> 11. That, as to [the mitigation issue], the burden is upon the Defendant(s). As a matter of fact and of law alike, the Defendants failed to carry that burden, for they presented legally insufficient evidence to support the jury's finding as to [mitigation]. Defendants' sole evidence that [plaintiff] supposedly failed to mitigate her damages is that she did not allow Dr. Rosner to perform corrective surgery. As a matter of law, however, she had no duty to seek medical attention specifically from Dr. Rosner rather than from other health care providers.

Thus, plaintiff requested that the court amend the verdict to award $512,161.00 in damages or, alternatively, order a new trial on damages. In addition, plaintiff moved for costs for, *inter alia*, expenses related to expert witness depositions and trial testimony.

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5. Though plaintiff also cited Rule 59(a)(5) in her initial motion, plaintiff's counsel expressly stated that he was abandoning this argument at the trial court hearing. *See* N.C.G.S. § 1A-1, Rule 59(a)(5) (2017) ("Manifest disregard by the jury of the instructions of the court").

On 3 March 2015, the trial court entered an order granting plaintiff's motion to alter or amend the judgment by setting aside the jury's mitigation finding and entering judgment for $512,162.00. The trial court determined that "the overall impression created by [the expert] witnesses (and thus communicated to the jury) is that [plaintiff] had an obligation to return specifically to Dr. Rosner; and that, by failing to do so, she allowed her condition to worsen." The trial court further found that "[t]here was no evidence presented that [plaintiff] unreasonably delayed trying to have her problems diagnosed and corrected." Thus, the trial court noted that, "[g]iven the uncontested evidence that Ms. Justus promptly and persistently made diligent efforts to obtain treatment from other physicians after she terminated her relationship with Dr. Rosner, no reasonable person could conclude that she failed to exercise reasonable care to mitigate her damages."

Based on these findings of fact, the trial court made the following conclusions of law:

> 3. The testimony by Dr. Rosner's neurosurgical experts suggesting that Mrs. Justus had a duty to return specifically to Dr. Rosner was inaccurate and misleading.
>
> 4. The misleading effect of the foregoing testimony was compounded by its repetition from four different expert witnesses.
>
> 5. Dr. Rosner presented no legally competent evidence sufficient to support a finding that [plaintiff] unreasonably failed to mitigate her damages.
>
> 6. This Court committed prejudicial error in submitting [mitigation] to the jury.
>
> 7. The jury's $1.00 damage award is manifestly inadequate.
>
> 8. The jury appears to have made its initial damage finding ($512,161.00) under the influence of passion or prejudice, for the finding entirely omits any sum for pain and suffering despite the uncontroverted evidence that [plaintiff] experienced severe pain and suffering.
>
> 9. The jury also appears to have reduced its damage finding ($512,161.00) under the influence of passion or prejudice; specifically, the cumulative impact of misleading testimony from multiple experts.

> 10. Even aside from the lack of evidence to support *any* mitigation finding at all, the influence of passion or prejudice is further manifested in the grossly excessive *amount* of the jury's mitigation finding.

Believing it had the authority to modify the judgment as requested by plaintiff, the trial court revised the amount of damages from $1.00 to $512,162.00. The trial court did not award a new trial for damages or make any alternative holding. Finally, the trial court granted plaintiff's motion for costs, awarding plaintiff $175,547.59, the amount that plaintiff requested for depositions and all experts' trial testimony.

In reviewing the trial court's determination, the Court of Appeals unanimously concluded that the trial court erred by modifying the judgment. *Justus v. Rosner*, ___ N.C. App. ___, ___ n.5, ___, 802 S.E.2d 142, 149 n.5, 152-53 (2017). Nonetheless, the majority crafted a new remedy in awarding a new trial solely on damages. *Id.* at ___, 802 S.E.2d at 152-53. The Court of Appeals believed that, though the trial court had proceeded under a misapprehension of law, based on the trial court's findings of fact and conclusions of law, this new remedy was appropriate. *Id.* at ___, 802 S.E.2d at 152-53. In its analysis the majority added to plaintiff's rationale as presented to the trial court under Rule 59(a)(7) and considered additional grounds under Rule 59(a)(6). *Id.* at ___, 802 S.E.2d at 152. The Court of Appeals majority recognized that the trial court had improperly relied on Rule 59(a)(8), allowing the court to order a new trial for an "[e]rror in law occurring at the trial," because plaintiff did not, as required by that provision, object to the evidence at any point during trial. *Id.* at ___, 802 S.E.2d at 152. Ultimately, the Court of Appeals vacated the trial court's modified damages award and granted a new trial on damages only. *Id.* at ___, 802 S.E.2d at 144.

Though the dissenting judge agreed that the trial court erred by rewriting the damages award, he argued that plaintiff was not entitled to relief on any Rule 59 grounds. *Id.* at ___, 802 S.E.2d at 156 (Tyson, J., concurring in part and dissenting in part). The dissent noted that, in granting plaintiff relief, the trial court "substitute[d] its judgment for that of the jury's without knowing which theory or theories of negligence the jury's verdict relies upon." *Id.* at ___, 802 S.E.2d at 157. Moreover, the dissent noted that plaintiff's failure to "seek appropriate medical treatment to mitigate her damages" is a "proper area of expert medical testimony" that is solely a factual issue appropriate for the jury to decide. *Id.* at ___, 802 S.E.2d at 158. The dissent also asserted that plaintiff and the trial court put "their own emphasis upon the questions and answers posed to Dr. Rosner's experts" when, in fact, "[t]he expert witnesses *did*

not state and the jury *was not instructed* that [plaintiff] was required to return specifically to Dr. Rosner." *Id.* at ___, 802 S.E.2d at 159. Viewed in light of all the evidence, the dissent opined that the "un-objected to testimonies of defendant's medical experts on areas within their expertise does not support the trial court's decision to set aside the jury verdict." *Id.* at ___, 802 S.E.2d at 159. Therefore, the dissent would vacate the trial court's order and remand for that court to reinstate the jury's verdict. *Id.* at ___, 802 S.E.2d at 160.

Defendant Rosner appealed the decision of the Court of Appeals based on the dissenting opinion. This Court also granted defendant Rosner's petition for discretionary review on the issue of whether, if a new trial is necessary, the new trial should encompass both damages and liability.[6]

The majority agrees that the trial court erred in some of its rationale and in its granting a revised damages award. The majority nonetheless, with little analysis, upholds the appellate court-created remedy of a new trial as to damages only by mistakenly applying a deferential standard of review. As the cases hold, trial court decisions receive a deferential standard of review, *not* those of the Court of Appeals. Thus, with only conclusory statements, the majority allows the remedy of a new trial solely as to damages. In reaching its conclusion, the majority contravenes precedent by wrongly invading the jury room and somehow pinpointing the single theory of negligence the jury chose. After selecting one of the fifteen possible theories of negligence, the majority then determines the damages are "insufficient" under that particular theory but nonetheless concludes the verdict did not represent a compromise.

Because the trial court labored under a misapprehension of the law in its assessment of plaintiff's motion and its remedy, this Court should return the matter to the trial court for a proper review of plaintiff's motion. The trial court should limit itself to the legal grounds raised by plaintiff's motion and fairly assess the un-objected to evidence presented at trial. The trial court should not guess which theory of negligence the jury found, but should inquire whether any theory of negligence supports the jury's assessment of damages. Likewise, the trial court should

6. This Court likewise granted defendant Rosner's petition for discretionary review regarding the issue of contributory negligence. Defendant Rosner argued that the trial court should have instructed the jury on contributory negligence because, in his view, much of what plaintiff conceded was mitigation evidence actually supported a defense of contributory negligence. This Court decides that it improvidently allowed discretionary review of the contributory negligence issue.

not reweigh the mitigation evidence, but looking carefully at all of it, consider whether any evidence supports the jury's mitigation decision.

I.

While "[i]t is impossible to place precise boundaries on the trial court's exercise of its discretion to grant a new trial," a trial court's decision to interfere with a jury verdict should be made with "great care and exceeding reluctance." *In re Will of Buck*, 350 N.C. 621, 626, 516 S.E.2d 858, 861 (1999) (emphasis omitted); *see also Bird v. Bradburn*, 131 N.C. 488, 489, 42 S.E. 936, 937 (1902) (noting that a trial judge "will be reluctant to set his opinion against that of the twelve [jurors]" (parentheses omitted)). "This is so because the exercise of this discretion sets aside a jury verdict and, therefore, will always have some tendency to diminish the fundamental right to trial by jury in civil cases which is guaranteed by our Constitution." *In re Buck*, 350 N.C. at 626, 516 S.E.2d at 861; *see also Worthington v. Bynum*, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982) ("[T]rial judges of this state have traditionally exercised their discretionary power to grant a new trial in civil cases quite sparingly in proper deference to the finality and sanctity of the jury's findings."); *State v. Little*, 174 N.C. 800, 802, 94 S.E. 1, 2 (1917) ("It is the province of the jury to weigh the testimony and to sift the true from the false." (citations omitted)).

Rule 59 of the North Carolina Rules of Civil Procedure codifies the authority of a trial court to set aside a jury verdict by granting a new trial or altering or amending a jury verdict in limited circumstances. *See* N.C.G.S. § 1A-1, Rule 59 (2017); *Bird*, 131 N.C. at 489, 42 S.E. at 936 (recognizing the trial court's inherent power to set aside a jury verdict as a matter of discretion). Under Rule 59, the parties in a case may move for a new trial or an altered or amended judgment, or alternatively, the trial court may order a new trial on its own initiative so long as it does so "[n]ot later than 10 days after entry of judgment." N.C.G.S. § 1A-1, Rule 59(d). Specifically, Rule 59(a)(7) allows the trial court to grant a new trial "on all or part of the issues" when there is "[i]nsufficien[t] . . . evidence to justify the verdict or . . . the verdict is contrary to law." *Id.*, Rule 59(a)(7). A trial court should grant a motion under Rule 59(a)(7) in only "those exceptional situations where the verdict is contrary to the evidence presented and [where the verdict] will result in a miscarriage of justice." *In re Buck*, 350 N.C. at 628, 516 S.E.2d at 862.

When a trial court properly addresses a Rule 59 motion, a trial court's action is reviewed only for an abuse of discretion. *See id.* at 625, 516 S.E.2d at 860-61 ("Like any other ruling left to the discretion of a trial

court, the trial court's appraisal of the evidence and its ruling on whether a new trial is warranted due to the insufficiency of evidence is *not* to be reviewed on appeal as presenting a question of law."); *Worthington*, 305 N.C. at 487, 290 S.E.2d at 605 ("[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice."). We afford this deference because the trial court, unlike an appellate court, "active[ly] participat[es] in the trial," is "acquaint[ed] with the evidence presented," and observes all parties involved. *Worthington*, 305 N.C. at 487, 290 S.E.2d at 605.

A trial court abuses its discretion when it misapprehends the applicable law. *See*, *e.g.*, *In re Estate of Skinner*, 370 N.C. 126, 139-40, 804 S.E.2d 449, 457-58 (2017). For instance, while Rule 59 affords the trial court the ability to alter or amend the verdict, the trial court may not increase the monetary judgment for a reason other than to award interest. *See Bethea v. Town of Kenly*, 261 N.C. 730, 732, 136 S.E.2d 38, 40 (1964) (per curiam) ("It is a cardinal rule that the judgment must follow the verdict, and if the jury have given a specified sum as damages, the court cannot increase or diminish the amount, except to add interest, where it is allowed by law and has not been included in the findings of the jury." (first quoting 2 McIntosh, *North Carolina Practice and Procedure* § 1691 (2d ed. 1956); and then citing *City of Durham v. Davis*, 171 N.C. 305, 88 S.E. 433 (1916))).

When the trial court commits such an error of law, an appellate court should not usurp the role of the trial court; rather, the appropriate remedy is to vacate the order or judgment on that issue, state the law, and remand to the appropriate lower court to apply the correct legal standard. *See*, *e.g.*, *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 523, 398 S.E.2d 586, 603 (1990) ("Since the judge's order was signed under a misapprehension of the law, we believe the better approach is to vacate the order and remand for reconsideration of plaintiffs' motion . . . in light of our opinion in this case . . . ."); *Nationwide Mut. Ins. Co. v. Chantos*, 298 N.C. 246, 252, 258 S.E.2d 334, 338 (1979) (reasoning that, when a trial judge misunderstood his authority under Rule 59, the proper remedy would be to remand the case to the trial court to make the appropriate determination); *Hanford v. McSwain*, 230 N.C. 229, 233, 53 S.E.2d 84, 87 (1949); *see also In re Skinner*, 370 N.C. at 146, 804 S.E.2d at 462 (Morgan, J., dissenting) (citations omitted).

It is clear that the trial court misapprehended the law by rewriting the damages award for reasons other than awarding interest. Acting under this misapprehension of law, the trial court made various findings of fact

unsupported by the evidence, considered various Rule 59 grounds not argued by plaintiff to support its decision, and crafted a legally invalid remedy. For example, the trial court relied on its findings that "passion or prejudice" permeated the jury's initial damage award and subsequent decision to reduce damages. Passion and prejudice, however, are not an appropriate consideration under plaintiff's Rule 59(a)(7) motion.[7] Rule 59 confines a trial court's consideration to the Rule 59 grounds asserted by a plaintiff.[8] Moreover, the trial court deemed evidence of plaintiff's attempt to receive follow-up treatment as "uncontroverted" to support its conclusion that there was a "lack of evidence to support *any* mitigation finding at all." Throughout the almost two-month trial, however, the parties debated and discussed in depth whether plaintiff took appropriate mitigation actions after the surgery. During the trial and charge conference the mitigation issue was central and clearly not "uncontroverted." Thus, the proper remedy when the trial court proceeded under a misapprehension of law is for the appellate court to state the applicable law and remand the case to the trial court to determine the motion under the proper legal standard.[9]

II.

Nonetheless, if a new trial is warranted, the majority also errs by upholding with little analysis the remedy of a new trial solely on damages instead of on all issues. "It is settled beyond controversy that it is entirely discretionary with the [Trial] Court . . . whether it will grant a partial new trial." *Table Rock Lumber Co. v. Branch*, 158 N.C. 251, 253, 73 S.E. 164, 165 (1911). A trial court will typically grant a partial new trial "when the error, or reason for the new trial, is confined to one issue, which is entirely separable from the others and it is perfectly clear that there is no danger of complication." *Id.* at 253, 73 S.E. at 165. Importantly, however, "[w]here it appears that the verdict was the result of a compromise, such error taints the entire verdict and requires a new

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7. Passion and prejudice are a proper consideration under Rule 59(a)(6) and in crafting the remedy of the scope of a new trial. *See* discussion infra II.

8. If upon review the trial court determined of its own accord that different grounds warranted setting aside the verdict under Rule 59, it must have acted within ten days after its entry of judgment, which it did not do. Otherwise, the trial court is limited to the grounds specified by the moving party. *See* N.C.G.S. § 1A-1, Rule 59(d).

9. Because the trial court's findings of fact and conclusions of law appear to be tainted by its misapprehension of law, the case should be remanded to the trial court. Nonetheless, for the reasons stated herein and in the dissenting opinion at the Court of Appeals, I think many of the trial court's findings of fact are unsupported and its conclusions of law are in error.

trial as to all of the issues in the case." *Robertson v. Stanley*, 285 N.C. 561, 569, 206 S.E.2d 190, 195 (1974) (quoting 58 Am. Jur. 2d *New Trial* § 27, at 213 (1971) [hereinafter *New Trial*]).

"Courts are reluctant to grant a new trial as to damages alone unless it is clear that the error in assessing damages did not affect the entire verdict." *Id.* at 568, 206 S.E.2d at 195. Moreover, "[a] new trial as to damages alone should not be granted where there is ground for a strong suspicion that the jury awarded inadequate damages to the plaintiff as a result of a compromise involving the question of liability." *Id.* at 569, 206 S.E.2d at 196 (alteration in original) (quoting M.C. Dransfield, Annotation, *Propriety of Limiting to Issue of Damages Alone New Trial Granted on Ground of Inadequacy of Damages Awarded*, 29 A.L.R.2d 1199, § 10 (1953)).

This Court has previously recognized that a "grossly inadequate" award of damages may indicate "that the jury was actuated by bias or prejudice, or that the verdict was a compromise." *Id.* at 569, 206 S.E.2d at 195-96 (quoting *New Trial* § 27, at 213). "[W]here, in an action for personal injuries the severity of the injury was beyond contention, a verdict for a grossly inadequate sum was in itself almost a conclusive demonstration that it was the result, not of justifiable concession of views, but of improper compromise of the vital principles which should have controlled the decision." *Bartholomew & Co. v. Parrish*, 186 N.C. 81, 84, 118 S.E. 899, 900 (1923). In such a case "the court must set aside the verdict in its entirety and award a new trial on all issues." *Robertson*, 285 N.C. at 569, 206 S.E.2d at 196 (quoting *New Trial* § 27).

Here the jury was instructed on fifteen different theories of liability and multiple factors of mitigation. Though the jury found defendant negligent and initially awarded plaintiff damages totaling $512,161.00 (being comparable to the amount plaintiff submitted as her medical bills), the jury reduced plaintiff's damages to $1.00 due to her failure to mitigate. Such an award, depending on the theory of negligence, appears to be the exact type of "inadequate sum" of damages this Court has previously determined can indicate a compromise verdict. In addition, the jury found no liability against any other defendant, rejected plaintiff's claim that the surgeries were performed as part of a conspiracy between these parties, and found defendant Rosner not responsible for plaintiff's death. Given that plaintiff advanced fifteen different theories of negligence, including that defendant Rosner failed to properly inform plaintiff of the procedures and their risks and performed unnecessary surgeries, the jury's finding of negligence in conjunction with its $1.00 damage award may indicate various compromises.

Improper jury motive leading to an inadequate verdict appears to be the precise issue with which the trial court was concerned, evinced by its findings on three separate occasions that passion or prejudice permeated the jury award. Likewise, the majority opinion agrees the damage award was insufficient. It appears the trial court and majority acknowledge the presence of the precise factors indicating a compromise verdict, warranting a completely new trial.

Further, given this outcome, the jury may not have actually believed the theory on which it found defendant liable or concluded that its finding of negligence was more theoretical than practical, thereby leading jurors to issue a nominal damage award as the result of a compromise. Similarly, the compromise was perhaps to find negligence but award only $1.00 in damages. As such, the jury's verdict is tainted so that a new trial on damages only would not be proper. Such a finding supports a new trial on all issues; it is impossible to say the finding of liability is untainted, but the damages amount is not. *See Robertson*, 285 N.C. at 569, 206 S.E.2d at 196.

Nonetheless, the Court of Appeals creates a remedy of a new trial as to damages only. Then, at this Court, without analysis the majority grants the deference reserved for the trial court to the Court of Appeals' determination to create a new remedy. While the majority at this Court recognizes that a *trial court's* ability to set aside a judgment is reviewed for abuse of discretion, the majority now applies the same review to the Court of Appeals' decision to create its own remedy. The trial court, not the Court of Appeals, would be the proper court to determine whether plaintiff should receive a new trial and if so, on what issues. Nonetheless, this Court prefers to speculate as to what a fully informed trial court would do instead of simply allowing it to act.

The majority's decision further exacerbates the errors of the trial court and Court of Appeals by clearly invading the jury room, sifting through plaintiff's fifteen theories of negligence and award of damages, and speculating as to the jury's actual reasoning and conclusions. From the cold record, the majority makes these declarations: of the fifteen possible grounds for negligence, the jury found defendant liable on one particular ground, characterized by the majority as "perform[ing] unnecessary surgeries"; the majority's selected theory of negligence required damages for pain and suffering; the amount of damages awarded by the jury does not include any amount for pain and suffering; and the jury based its mitigation decision solely on plaintiff's failure to return specifically to Rosner. To reach these conclusions, the majority isolates several lines of testimony that occurred over an almost two-month trial.

Because the record does not indicate the theory on which the jury made its decision, our jurisprudence is clear that this Court should not substitute itself for the jury and "presume to know" the theory upon which the jury relied. *McGill v. French*, 333 N.C. 209, 215-16, 424 S.E.2d 108, 111-12 (1993) (restating the well-established "principle that a reviewing court cannot appropriately determine, absent clear showing of record, upon what basis a jury renders its verdict" (citations omitted)); *id.* at 216, 424 S.E.2d at 112 ("We therefore hold that the Court of Appeals erred in assuming that the particular act of negligence upon which the jury based its verdict was defendant's alleged failure to inform the plaintiff of his cancer.")

Therefore, a new trial on all issues is particularly appropriate in this case because a new jury will not know the theory of negligence on which the jury relied and which corresponding damages may be appropriate.

III.

When a trial court proceeds under a misapprehension of law, an appellate court should state the law and remand the case to the trial court for proper consideration. It is unclear whether, had the trial court correctly known the law, it would have awarded a new trial, and if so, whether it would limit a new trial solely to damages. Even given the majority's approach that a new trial is warranted, plaintiff should receive "a new trial [on] all of the issues." *Robertson*, 285 N.C. at 569, 206 S.E.2d at 195 (quoting *New Trial* § 27, at 213). As such, any review of costs would be premature at this time.

The Court of Appeals erred in crafting its own remedy, a new trial on damages only, and this Court errs by applying a deferential standard to that remedy. If a new trial were justified, the trial should be on all issues. Accordingly, I respectfully dissent.

LATONYA SILVER, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF BRIANNA SILVER, LARRY SILVER III, AND DOMINICK SILVER; BRENDA SLEDGE, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF ALICIA JONES; FELICIA SCOTT, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF JAMIER SCOTT; HALIFAX COUNTY BRANCH #5401, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; AND COALITION FOR EDUCATION AND ECONOMIC SECURITY

v.

THE HALIFAX COUNTY BOARD OF COMMISSIONERS

No. 338A17

Filed 21 December 2018

Schools and Education—county's method of sales tax distribution—Leandro challenge—State responsibility

The trial court did not err by granting a N.C. Civil Procedure Rule 12(b)(6) dismissal of a claim brought under *Leandro v. State*, 346 N.C. 336 (1997), where an action challenged a county's choice of method of distribution for local sales tax revenue to a tripartite school system. The claim was untenable because it assumed that a county board of commissioners had a constitutional duty to provide a sound basic education; county boards of commissioners had no such duty. The remedy for these harms rested with the State.

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. ___, 805 S.E.2d 320 (2017), affirming an order entered on 2 February 2016 by Judge W. Russell Duke, Jr. in Superior Court, Halifax County. Heard in the Supreme Court on 16 April 2018.

Mark Dorosin and Elizabeth Haddix for plaintiff-appellants.

Garris Neil Yarborough and M. Glynn Rollins, Jr. for defendant-appellee.

Jane R. Wettach for Children's Law Clinic, Duke University School of Law; Youth Justice Project of the Southern Coalition for Social Justice, by Peggy Nicholson and K. Ricky Watson, Jr., for Public Schools First NC; and Celia Pistolis, Aisha Forte, and Jennifer Story for Legal Aid of North Carolina, Inc. – Advocates for Children's Services, amici curiae.

Tin Fulton Walker & Owen, PLLC, by S. Luke Largess and Cheyenne N. Chambers, for North Carolina Advocates for Justice, amicus curiae.

Womble Bond Dickinson (US) LLP, by Beth Tyner Jones, Rebecca C. Fleishman, and Matthew Tilley, for North Carolina Association of County Commissioners, amicus curiae.

JACKSON, Justice.

In this case we consider whether plaintiffs have stated a claim for violations of their right to receive the sound basic education guaranteed by the North Carolina Constitution sufficient to survive defendant's motion 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 the State—and not a board of county commissioners—is solely responsible for guarding and preserving the right of every child in North Carolina to receive a sound basic education pursuant to the North Carolina Constitution, we affirm the decision of the Court of Appeals.

The case sub judice is related to, yet distinguishable from, this Court's landmark decision in *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997) (*Leandro I*). The plaintiffs in *Leandro I* were students, parents or their legal guardians, and local boards of education from five relatively low wealth counties.[1] One of the plaintiffs was Halifax County Public Schools, a local board of education which is one of the school systems relevant to this case but is not a party. The plaintiffs in *Leandro I* sued the State and the North Carolina State Board of Education alleging that their state constitutional rights relating to education were being violated. *Id.* at 342, 488 S.E.2d at 252. They sought declaratory and injunctive relief to secure their right to fundamental educational opportunities that were severely lacking allegedly due to inadequate funding from the State. *Id.* at 342, 488 S.E.2d at 252. In *Leandro I* we concluded that "Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools" and that this includes a right to a qualitatively adequate education.[2] *Id.* at

1. *Leandro I* also featured a number of plaintiff-intervenors, who were students and their parents or legal guardians from relatively large and wealthy counties and those counties' respective boards of education.

2. In so doing, we noted that a qualitative "sound basic education" is one that would provide students with at least:

> (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make

347, 488 S.E.2d at 255. We remanded the case to the trial court for a determination of whether the defendants in that case had violated their constitutional duty to provide every child an opportunity to receive a sound basic education, with instructions to the trial court to provide declaratory or other relief if it was found that they had violated this duty. *Id.* at 357-58, 488 S.E.2d at 261. Seven years later, the case returned to this Court in *Hoke County Board of Education v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004) (*Leandro II*). This Court reviewed, among other things, the trial court's order on remand, which found that the State had failed to meet its constitutional duties regarding education outlined in *Leandro I* by inefficiently allocating and spending funds for education and directed the State to remedy the deficiencies that caused this violation. *Id.* at 608-09, 647-48, 599 S.E.2d at 372-73, 396. We affirmed the trial court's order, which left to the State the "nuts and bolts" of educational resource expenditures as they relate to providing a sound basic education while generally instructing the State to "assume the responsibility for, and correct, those educational methods and practices that contribute to the failure to provide students with a constitutionally-conforming education." *Id.* at 609, 599 S.E.2d at 373.

According to the factual allegations in plaintiffs' complaint, which we take as true for the purpose of reviewing an order on a motion to dismiss pursuant to Rule 12(b)(6), *see Krawiec v. Manly*, 370 N.C. 602, 604, 811 S.E.2d 542, 545 (2018) (citing *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 442, 666 S.E.2d 107, 114 (2008)), plaintiffs are five children who live and attend school in Halifax County, their respective parents or legal guardians, and two interested organizations: the local branch of the National Association for the Advancement of Colored People and the Coalition for Education and Economic Security. Defendant is the Halifax County Board of Commissioners, which, plaintiffs allege, is required by the North Carolina statutes to provide funding for each of the three local boards of education in Halifax County and is authorized to maintain or supplement school programs, facilities, and equipment for the local school boards.

> informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

Leandro I, 346 N.C. at 347, 488 S.E.2d at 255 (citations omitted).

In contrast to most North Carolina counties that have just one local education area (LEA), Halifax County has three: Halifax County Public Schools (HCPS), Weldon City Schools (WCS), and Roanoke Rapids Graded School District (RRGSD). According to plaintiffs' complaint, in the 2014 to 2015 school year, the student populations of HCPS and WCS were overwhelmingly black, with HCPS's student population of 2988 schoolchildren 85% black and 4% white, and WCS's student population of 940 students 94% black and 4% white. At the same time, RRGSD's student population of 2929 schoolchildren was only 26% black and 65% white. Furthermore, the vast majority of students attending school in HCPS and WCS schools are considered "at risk." Our decision in *Leandro II* recognized that students may be considered "at risk" if, "due to circumstances such as an unstable home life, poor socio-economic background, and other factors, [they] either enter or continue in school from a disadvantaged standpoint, at least in relation to other students who are not burdened with such circumstances."[3] *Leandro II*, 358 N.C. at 632 n.13, 599 S.E.2d at 387 n.13.

The facts alleged in plaintiffs' complaint are, unfortunately, all too familiar to this Court, as they mirror those of the plaintiffs in *Leandro I*. Plaintiffs allege that defendant's continued support and maintenance of this tripartite school district system and its refusal to manage and distribute resources efficiently among the school districts has resulted in defendant's failure to provide the students of Halifax County an opportunity to receive a sound basic education. They compare defendant's "inputs" and "outputs"[4] in the HCPS and WCS districts with those in

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3. In expounding upon the definition of an "at risk" student in *Leandro II*, we noted that an "at risk" student generally

> holds or demonstrates one or more of the following characteristics: (1) member of low-income family; (2) participate in free or reduced-cost lunch programs; (3) have parents with a low-level education; (4) show limited proficiency in English; (5) are a member of a racial or ethnic minority group; (6) live in a home headed by a single parent or guardian.

358 N.C. at 636 n.16, 599 S.E.2d at 389 n.16.

4. In the *Leandro* cases we used these terms as shorthand for various actions the State takes and the results it achieves, in educational policy to help determine whether it was providing a sound basic education. The term "inputs" includes indicators like the amount of funding received and its allocation, educational programs and opportunities provided to students, teacher certification standards, and overall quality of administrators and teachers. *Leandro II*, 358 N.C. at 631-32, 599 S.E.2d at 386-87. The term "outputs" generally is considered to measure overall student performance, and includes indicators such as comparative standardized test score data, student graduation rates, employment potential, and post-secondary education success (or a lack of post-secondary education participation). *Id.* at 623, 599 S.E.2d at 381.

RRGSD to bolster their allegations. As to "inputs," plaintiffs state that HCPS and WCS school buildings and facilities are woefully inadequate, with crumbling infrastructure and regularly failing heating and cooling systems. Plaintiffs also include a report that students at Northwest High School in HCPS recently have had to walk through sewage to move between classes because of defective plumbing. In addition, HCPS and WCS school students frequently lack textbooks and other basic curricular materials, with teachers relying on donations from parents to purchase books and other basic classroom necessities. Meanwhile, plaintiffs point out that the facilities at RRGSD schools are well kept and regularly renovated, and students have access to Advanced Placement classes and many other curricular and extra-curricular activities that are not available to HCPS and WCS students. Plaintiffs argue that funding disparities make it extremely difficult for HCPS and WCS to attract and retain quality, or even fully licensed, teachers and administrators, with these schools commonly resorting to hiring teachers from the Teach for America program or teachers with little or no experience. The percentage of fully licensed teachers in these districts ranges from 63 to 89%. In contrast, 95 to 100% of the teachers in RRGSD schools are fully licensed.

Plaintiffs claim this disparity in inputs is largely attributable to the way defendant has structured its system of local sales tax distribution pertaining to education. Pursuant to legislation enacted by the General Assembly, each year defendant selects one of two methods by which local sales tax revenues are distributed within the county to provide additional funding to the local school districts. Defendant may use either the per capita method, in which local sales tax revenue is divided between defendant and all municipalities within the county on a per capita basis using the resident population of each, N.C.G.S. § 105-472(b)(1) (2017), or the ad valorem method, in which local sales tax revenue is divided between all "taxing entities" in the county, including municipalities and eligible LEAs, *id.* § 105-472(b)(2) (2017). Defendant routinely chooses to employ the ad valorem method, which plaintiffs allege netted RRGSD $4.5 million in local sales and use tax revenue and WCS $2.5 million in local sales and use tax revenue between 2006 and 2014. HCPS, which does not have a supplemental property tax and is therefore not a taxing entity, receives no money pursuant to the ad valorem method of distribution. Plaintiffs claim that defendant's continued use of the ad valorem method, as opposed to the per capita method, routinely leaves HCPS with fewer resources to increase "inputs" and exacerbates existing funding disparities, which in turn reduces the chance that students in HCPS schools will receive a sound basic education. Differing supplemental property tax rates similarly result in disparate funding between the three LEAs within the county.

Plaintiffs' complaint also alleges large disparities in "outputs." Plaintiffs point out that since 2002, the students in HCPS and WCS schools have scored anywhere from 15 to 30% lower than students in RRGSD schools on end-of-course tests and that a majority of students in HCPS and WCS schools score below grade level in standardized statewide end-of-grade exams. HCPS and WCS students consistently score 150 to 250 points lower than RRGSD students on the SAT college entrance exam. Students in HCPS and WCS schools are much more likely than students in RRGSD schools to be suspended, with HCPS having suspended a higher percentage of high school students than any other school district in the state during the 2013 to 2014 school year.

In August 2016, plaintiffs commenced this action alleging that defendant has violated plaintiffs' fundamental constitutional right to receive the sound basic education guaranteed in Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution. Plaintiffs requested that the trial court issue a declaratory judgment and use its equitable powers to order defendant to develop and implement a plan to cure the alleged violation. Defendant filed a motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. In February 2016, the trial court granted defendant's motion to dismiss, noting that no provision of the North Carolina Constitution affirmatively requires a board of county commissioners to implement and maintain a public education system in the county in which it sits, thereby absolving the board of any constitutional duty to provide its students the opportunity to receive a sound basic education. Plaintiffs appealed to the Court of Appeals, asserting that defendant is constitutionally responsible for securing a child's right to a sound basic education. After reviewing the plain language of our constitution and our decisions in the *Leandro* cases, the Court of Appeals affirmed the decision of the trial court in a divided decision, holding that the State, standing alone, has the obligation to provide a sound basic education to the children of North Carolina. *Silver v. Halifax Cty. Bd. of Comm'rs*, ___ N.C. App. ___, ___, 805 S.E.2d 320, 323 (2017). The Court of Appeals determined that plaintiffs' correct course of action would be to have their concerns addressed in the ongoing *Leandro* proceedings. *Id.* at ___, 805 S.E.2d at 329-330. Chief Judge McGee dissented, writing that she would hold that plaintiffs have properly stated a claim against defendant and that a board of county commissioners may be held responsible for ensuring that schoolchildren have the opportunity to receive a sound basic education. *Id.* at ___, 805 S.E.2d at 344 (McGee, C.J., dissenting). Chief Judge McGee reasoned that the responsibility for providing the right to a sound basic education is the result of the assignment of powers over

education to a local entity by the General Assembly pursuant to Article IX, Section 2(2). *Id.* at ___, 805 S.E.2d at 345 (McGee, C.J., dissenting). In October 2017, plaintiffs appealed to this Court as of right pursuant to N.C.G.S. § 7A-30(2) to obtain review of the Court of Appeals' determination that the trial court appropriately dismissed their complaint.

On appeal from an order dismissing a claim pursuant to Rule 12(b)(6), we conduct de novo review. *Krawiec*, 370 N.C. at 606, 811 S.E.2d at 546 (citing *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 8 (2015)). An action will be dismissed pursuant to Rule 12(b)(6) if the complaint "[f]ail[s] to state a claim upon which relief can be granted." N.C.G.S. § 1A-1, Rule (12)(b)(6). We have determined that a complaint fails to state a claim and will be dismissed 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." *Krawiec*, 370 N.C. at 606, 811 S.E.2d at 546 (quoting *Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)). In conducting our review of a complaint dismissed pursuant to Rule 12(b)(6), we take all of the factual allegations stated in plaintiffs' complaint as true. *Id.* at 604, 811 S.E.2d at 545 (citing *Ridgeway Brands*, 362 N.C. at 442, 666 S.E.2d at 114).

The trial court dismissed plaintiffs' constitutional claim for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) on the basis that plaintiffs could not have their constitutional rights enforced by defendant because defendant does not possess any constitutional duties relating to public education. Plaintiffs contend that, along with the State, a board of county commissioners is obliged to provide the opportunity for the children of North Carolina to receive a sound basic education. We disagree.

In analyzing defendant's constitutional duties with respect to providing a sound basic education, first we must carefully consider the pertinent language of the constitution itself. Section 15 of the North Carolina Declaration of Rights states: "The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15. The provision more relevant to the case sub judice, Article IX, Section 2, entitled "Uniform system of schools" states:

> (1) General and uniform system: term. — The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which

> shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.
>
> (2) Local responsibility. — The General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate. The governing boards of units of local government with financial responsibility for public education may use local revenues to add to or supplement any public school or post-secondary school program.

Id. art. IX, § 2. Acting together, these two sections of Article I and Article IX create a mandate that guarantees every child in the state the opportunity to receive a sound basic education. We interpret our constitution and our statutes in the same manner, meaning that if the language in the instrument is clear and unambiguous on its face, we do not search for meaning elsewhere. *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478-79 (1989) (citing *Elliott v. State Bd. of Equalization*, 203 N.C. 749, 753, 166 S.E. 918, 920-21 (1932)).

As we read these provisions of our constitution, it is clear that no express provision requires boards of county commissioners to provide for or preserve any rights relating to education. Section 2(1) of Article IX requires the General Assembly to create and maintain a system of free public schools. N.C. Const. art. IX, § 2(1) ("The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools . . . ."). The constitution also notes expressly that units of local government, such as county boards of commissioners, may bear the burden for some of the financial needs of local education by using local revenues if the General Assembly so allows. *Id.* art. IX, § 2(2) ("The General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate."). Indeed, the General Assembly has chosen to enact many statutes making county boards of commissioners responsible for certain costs associated with LEA operations. *See*, *e.g.*, N.C.G.S. § 115C-408(b) (2017) ("[T]he facilities requirements for a public education system will be met by county governments."); *id.* §§ 115C-521(b), -524(b) (2017) (requiring boards of commissioners to provide funds for the erection of "school buildings equipped with suitable school furniture and apparatus" and to ensure that these buildings are in "good repair" and "at all times in proper condition for use"); *id.* § 115C-522(c) (2017) (making it the combined duty of boards of county commissioners and local school boards "to provide suitable supplies for the school buildings . . . . includ[ing]

. . . proper window shades, blackboards, reference books, library equipment, maps, and equipment for teaching the sciences" as well as "provide every school with a good supply of water"). Furthermore, the legislature gives boards of county commissioners the option to supplement monies for public education with certain taxes if they choose to do so. *Id.* § 105-464 (2017) (affording "the counties and municipalities of this State with opportunity to obtain an added source of revenue . . . by providing all counties of the State with authority to levy a one percent (1%) sales and use tax"); *id.* § 115C-501(a) (2017) (granting local taxing authorities the "authority to ascertain the will of the voters as to whether there shall be levied and collected a special tax in the several local school administrative units, districts, and other school areas . . . to supplement the funds from State and county allotments"); *id.* § 115C-511(a) (2017) ("If a local school administrative unit or district has voted a tax to operate schools of a higher standard than that provided by State and county support," the board of county commissioners is authorized to levy a tax on all property located in the LEA to supplement the local current expense fund.).

Plaintiffs assert that Article IX, Section 2(2) and the statutes enacted pursuant to this constitutional provision make local entities responsible for providing a sound basic education. We disagree. As we noted in *Leandro I*, boards of county commissioners have a long history of involvement in local education, and this notion is ingrained in our State's educational structure:

> The idea that counties are to participate in funding their local school districts has a long history. In 1890, for example, Chief Justice Merriman wrote for this Court that: "the funds necessary for the support of public schools—the public school system—are not derived exclusively from the State. The Constitution plainly contemplates and intends that the several counties, as such, shall bear a material part of the burden of supplying such funds."

Leandro I, 346 N.C. at 349, 488 S.E.2d at 256 (quoting *City of Greensboro v. Hodgin*, 106 N.C. 182, 187-88, 11 S.E. 586, 588 (1890)). While the framers of our state constitution may have intended that Article IX, Section 2(2) *allow* for supplementing of school funding by boards of county commissioners, it clearly does not *require* the General Assembly to do so. The language utilized obviously is precatory, not mandatory. In examining the two pertinent constitutional provisions, we note the importance of the framers' choice of "shall" in subsection (1) and "may" in subsection (2). "As used in statutes, the word 'shall' is generally imperative or mandatory." *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757

(1979) (citing *Black's Law Dictionary* 1541 (4th rev. ed. 1968)). In contrast, "may" is generally intended to convey that the power granted can be exercised in the actor's discretion, but the actor need not exercise that discretion at all.[5] *In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978) ("Ordinarily when the word 'may' is used in a statute, it will be construed as permissive and not mandatory." (first citing *Felton v. Felton*, 213 N.C. 194, 195 S.E. 533 (1938); and then citing *Rector v. Rector*, 186 N.C. 618, 120 S.E. 195 (1923))). If we assume, *arguendo*, that the General Assembly declined to exercise its Article IX, Section 2(2) discretion and assign financial responsibilities to the local boards of county commissioners or allow them to levy taxes for education, boards of county commissioners could not exercise any authority over local education. It is inapposite then to suggest, as plaintiffs have, that boards of county commissioners have some inherent constitutional duty to provide a sound basic education, much less any other constitutional power related to education. If they did possess such inherent powers, then a situation like the one described above—in which the General Assembly has granted no financial responsibility to local units of government—would leave a board of county commissioners in the impossible situation of perpetually violating the constitution by not providing a sound basic education while lacking the means to do so.

Justice Story's ideas of constitutional construction from his seminal opinion in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), provide a useful analog. In *Hunter's Lessee* the United States Supreme Court was tasked with, *inter alia*, deciding whether it could hear a case on direct appeal from a state court without the case first passing through the lower federal courts. *Id.* at 323-24. The Court determined that it could. Recognizing that the Constitution stated that Congress "shall" (i.e., must) create a Supreme Court but merely "may" (i.e., can) create inferior courts, *id.* at 328, the Supreme Court reasoned that inferior courts need not be created at all. If Congress did not create inferior

5. We do recognize that this Court occasionally reads the word "may" to carry the same meaning as "shall" when such an interpretation "will best express the legislative intent" and "it is employed in a statute to delegate a power, the exercise of which is important for the protection of public or private interests." *Puckett v. Sellars*, 235 N.C. 264, 268, 69 S.E.2d 497, 500 (1952); *see also Johnston v. Pate*, 95 N.C. 68, 71 (1886) (observing that "[t]he term 'may' is often construed as mandatory when the statute is intended to give relief" or "when a statute directs the doing of a thing for the sake of justice or the public good"). Here we see no reason to define "may" in the context of Article IX, Section 2(2) to be mandatory, as the provision was not intended to provide any party with relief or protect public or private rights or interests. Indeed, the purpose of the provision is to promote efficiency, as it gives the General Assembly a mechanism to supplement the costs and financial administration of the education system that it is required to set up and maintain.

courts, the Supreme Court, whose "judicial power (which includes appellate power) shall extend to all cases," *id.* at 338, would naturally be able to hear cases on appeal directly from the states because the vested federal judicial power over the Constitution and laws of the United States would have to be exercised in some way and arise from somewhere, *id.* at 338-39. "Any other construction, upon this supposition," Justice Story wrote, "would involve this strange contradiction, that a discretionary power vested in congress, and which they might rightfully omit to exercise, would defeat the absolute injunctions of the constitution in relation to the whole appellate power." *Id.* at 340. The same general reasoning may be applied to the case sub judice, as the General Assembly may refuse to grant any financial responsibility to local entities, thereby making it impossible for said local entities to carry out any education related duties, much less provide a sound basic education. This leaves the State, and the State alone, with the power to create and maintain a system of public education, which includes effectuating the right to a sound basic education. Just as "congress may lawfully omit to establish inferior courts, it might follow, that in some of the enumerated cases the judicial power could nowhere exist," *id.* at 330, the General Assembly may lawfully refuse to grant power concerning education to local governments, which, if plaintiffs' claims were correct, would create a situation in which a local government entity would have a constitutional duty to act without the means to do so. We cannot read our constitution to permit such a contradiction.

It has been suggested by both plaintiffs and the Court of Appeals dissent that the constitutional duty to provide a sound basic education is vested in or delegated to a unit of local government when the General Assembly enacts a law giving it financial responsibility concerning public education. This reasoning has been foreclosed by our decision in *Leandro II*. There we affirmed the order of the trial court which found that the State, "and by the State we mean the legislative and executive branches which are constitutionally responsible for public education," was not providing a sound basic education to Hoke County students because it failed to ensure that available resources were being allocated appropriately. *Leandro II*, 358 N.C. at 635, 599 S.E.2d at 389. The State contended that it could not be exclusively responsible for providing the opportunity for a sound basic education because the Hoke County Board of Education was at least in part responsible for this failure to properly allocate resources and provide a sound basic education. *Id.* at 635, 599 S.E.2d at 389. We concluded otherwise, noting that the State was responsible for providing a sound basic education and "the trial court's

ruling simply placed responsibility for the school board's actions on the entity—the State—that created the school board and that authorized the school board to act on the State's behalf." *Id.* at 635, 599 S.E.2d at 389.

The interrelationship between the State and local school boards discussed in *Leandro II* is comparable to that between the State and a county board of commissioners and is useful to our analysis in this case. In *Moore v. Board of Education*, 212 N.C. 499, 193 S.E. 732 (1937), this Court noted that local school boards are agencies of the State, with the General Assembly having close to plenary power over them. *Id.* at 502, 193 S.E. at 733-34 (stating that local governmental organizations, including school boards, "are intended to be instrumentalities and agencies employed to aid in the administration of the government" and "are the creatures of the legislative will and subject to its control, and such agencies can only exercise such powers as may be conferred upon them and in the way and manner prescribed by law"). Like local school boards, counties and their respective boards of county commissioners also are "creatures of the General Assembly and serve as agents and instrumentalities of State government." *Stephenson v. Bartlett*, 355 N.C. 354, 364, 562 S.E.2d 377, 385 (2002). "[A] county's 'powers . . . both express and implied, are conferred by statutes, enacted from time to time by the General Assembly.' " *Lanvale Props., LLC v. County of Cabarrus*, 366 N.C. 142, 150, 731 S.E.2d 800, 807 (2012) (ellipsis in original) (quoting *Martin v. Board of Comm'rs of Wake Cty.*, 208 N.C. 354, 365, 180 S.E. 777, 783 (1935); *id.* at 150, 731 S.E.2d at 807 (stating that a county is "an instrumentality of the State, by means of which the State performs certain of its governmental functions within its territorial limits" (quoting *Martin*, 208 N.C. at 365, 180 S.E. at 783)). If, according to *Leandro II*, the General Assembly may not delegate or shift some of its responsibility to provide an opportunity for a sound basic education to a local school board, an agency of the State, then it follows that the General Assembly also may not pass this same responsibility on to a county board of commissioners, also an agency of the State. The trial court's order at issue in *Leandro II* found "that the *State bore ultimate responsibility* for the actions and/or inactions of the local school board, and that it was the State that must act to correct those actions and/or inactions of the school board that fail to provide a *Leandro*-conforming educational opportunity," and we upheld this determination. 358 N.C. at 635, 599 S.E.2d at 389 (emphasis added). Following this reasoning, any complications born of the incompetence or obstinance of a county board of county commissioners relating to the finances of local education are the

"ultimate responsibility" of the State, which must step in and ameliorate the errors.[6]

Plaintiffs have expressed concern that a determination that only the State is responsible for providing children the opportunity to receive a sound basic education will give local governments the ability to disregard their obligations relating to education by allowing them to refuse to provide funds for, among other things, books, equipment, school transportation, and maintenance or construction of school facilities. In effect, plaintiffs say county governments would thus be allowed to abandon their fiscal responsibility regarding education with impunity and pass their alleged constitutional duties along to the State. This is not the case. Plaintiffs' line of reasoning is arguably sound only if one presupposes that counties have such constitutional duties in the first place, and we have determined that they do not. Furthermore, irrespective of a county's constitutional powers relating to education, no entity is free to ignore the mandates of the General Assembly. Nothing in this opinion should be read to suggest that a county board of commissioners, or

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6. Defendant argues that our decision in *King v. Beaufort County Board of Education*, 364 N.C. 368, 704 S.E.2d 259 (2010), is irreconcilable with our holding today. In *King* we held that a student who is suspended and denied access to alternative education must be given a reason why he or she is not allowed to participate in an alternative education program. *Id.* at 370, 704 S.E.2d at 260-61. Plaintiffs assert that because the local school board in *King* was the only proper defendant in the litigation, a local entity may be responsible for providing a sound basic education to students. We disagree, as *King* does not stand for such a broad proposition. Notwithstanding our decision in *Leandro II*, in which we noted that the State may not delegate its overall responsibility of providing a sound basic education to local school boards, *King* is not controlling here and may be distinguished from the *Leandro* decisions and the present case.

King is, primarily, a decision regarding school discipline, based upon statutes enacted by the General Assembly which require LEAs to offer at least one alternative education program and create strategies for assigning long-term suspended students to it when feasible and appropriate. *King* clearly expressed that there is no fundamental right to an alternative education. 364 N.C. at 372, 704 S.E.2d at 261 ("In acknowledging a statutory right to alternative education, we stress that a fundamental right to alternative education does not exist under the state constitution."). The State, in its discretion and outside the *Leandro* mandate that requires it to provide every child an opportunity for a sound basic education, has chosen to provide for the continued schooling of children who have misbehaved and been removed from the schoolhouse. *King* was not concerned with the local board of education providing a sound basic education to its students but rather with how the statutorily created right to receive an alternative education was to be preserved. As such, we held that "*insofar as the General Assembly has provided a statutory right* to alternative education, a suspended student excluded from alternative education has a state constitutional right to know the reason for her exclusion." *Id.* at 372, 704 S.E.2d at 261 (emphasis added).

any other local entity with duties imposed by General Assembly enactments, may ignore statutory requirements laid out by the legislature. Furthermore, to the extent that a county, as an agency of the State, hinders the opportunity for children to receive a sound basic education, it is the State's constitutional burden to take corrective action.

It is important to note that the legislature has provided statutory relief from inadequate funding in an LEA if a local board of education determines that the funds appropriated to it by the county board of commissioners are "not sufficient to support a system of free public schools." N.C.G.S. § 115C-431 (2017) (titled "Procedure for resolution of dispute between board of education and board of county commissioners."). This process involves the chairs of both the local board of education and the board of county commissioners jointly meeting with a mediator to "make a good-faith attempt to resolve the differences that have arisen between them," but if they cannot and a subsequent attempt at mediation fails, the local board of education may file an action in superior court where a jury may decide the appropriate budget for the school year. *Id.* § 115C-431(a)-(c). Plaintiffs note that there is no similar statutory action against boards of county commissioners available to parents or students seeking to vindicate their right to a sound basic education. If a local school board chooses not to pursue a section 115C-431 action, plaintiffs contend that relief from the courts is the only manner by which they may vindicate their right to a sound basic education as it pertains to county funding of local schools. Again, plaintiffs' claim is untenable because it assumes that a county board of commissioners has some constitutional duty to provide a sound basic education in the first instance. As we concluded above, county boards of commissioners have no such duty, so plaintiffs are precluded from asserting constitutional claims against them concerning this specific constitutional right.

If a section 115C-431 course of action is deficient, as plaintiffs have suggested, parents and students are still free to assert a child's constitutional right to receive a sound basic education directly against the State. The Court of Appeals suggested this very remedy, opining that the correct avenue for relief in this case would be for plaintiffs to raise the issues alleged in their complaint with the superior court overseeing the ongoing *Leandro* litigation, *Silver*, ___ N.C. App. at ___, 805 S.E.2d at 329-30, but plaintiffs contend that this, too, is inadequate. Plaintiffs maintain that this Court's decisions in the *Leandro* cases are concerned with the scope of the right to a sound basic education and whether the amount and spending of resources provided by the State properly guarantee this right. Plaintiffs further claim that intervention in

the *Leandro* case is procedurally impractical because that litigation has been in a remedial phase for nearly fifteen years and no substantive rulings have issued in *Leandro* aside from a decision pertaining to pre-kindergarten programs in 2011. Regardless of the feasibility of intervention in the *Leandro* litigation, plaintiffs have not advanced any reason—and we can find none—why they cannot bring an action directly against the State in order to cure the alleged constitutional violations.

In *Leandro II* we noted that "[t]he children of North Carolina are our state's most valuable renewable resource. If inordinate numbers of [students] are wrongfully being denied their constitutional right to the opportunity for a sound basic education, our state courts cannot risk further and continued damage because the perfect civil action has proved elusive." *Leandro II*, 358 N.C. at 616, 599 S.E.2d at 377. This Court's statement in *Leandro II* remains true today. However, here, we are not confronted by a civil action that is merely imperfect, but rather we have been presented with an action that must fail because plaintiffs simply cannot obtain their preferred remedy against this particular defendant on the basis of the claim that they have attempted to assert in this case. The allegations in plaintiffs' complaint, if true, are precisely the type of harm *Leandro I* and its progeny are intended to address. In keeping with *Leandro*, however, the duty to remedy these harms rests with the State, and the State alone. Accordingly, we affirm the decision of the Court of Appeals that affirmed the trial court's order dismissing the action for failure to state a claim upon which relief can be granted.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
BOBBY JOHNSON

No. 57PA17

Filed 21 December 2018

1. Confessions and Incriminating Statements—questioning before Miranda warnings—Miranda and voluntariness inquiries

Where defendant voluntarily met with detectives at the police station and was questioned for just under five hours before being placed under arrest and *Mirandized*, the Court of Appeals erred by condensing the *Miranda* and voluntariness inquiries into one in its opinion concluding that defendant's inculpatory statements to law enforcement were involuntary.

2. Appeal and Error—failure to preserve argument for appeal

Where defendant voluntarily met with detectives at the police station and was questioned for just under five hours before being placed under arrest and *Mirandized*, the trial's court's determination that the waiver forms introduced into evidence by the State "accurately reflect[ed] the required *Miranda* warnings" was supported by competent evidence in the record and not challenged by defendant. Defendant did not preserve the argument that officers employed the "question first, warn later" technique to obtain his confession in violation of *Miranda* and *Seibert*.

3. Confessions and Incriminating Statements—voluntariness—findings and conclusion supported

Where defendant voluntarily met with detectives at the police station and was questioned for just under five hours before being placed under arrest and *Mirandized*, the trial court's conclusion that defendant's inculpatory statements were voluntarily made was adequately supported by its findings of fact, and those findings were supported by competent evidence in the record.

Justice HUDSON concurring in result.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 795 S.E.2d 625 (2017), finding no prejudicial error after appeal from a judgment entered on 6 October 2015 by Judge Eric L. Levinson in Superior Court, Mecklenburg County. On 3 May 2017, the Supreme Court allowed

defendant's conditional petition for discretionary review as to an additional issue. Heard in the Supreme Court on 8 January 2018.

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

Marilyn G. Ozer for defendant-appellant/appellee.

BEASLEY, Justice.

The Court of Appeals concluded that defendant's inculpatory statements to law enforcement were given under the influence of fear or hope caused by the interrogating officers' statements and actions and were therefore involuntarily made. *State v. Johnson*, ___ N.C. App. ___, ___, 795 S.E.2d 625, 639-40 (2017). The unanimous Court of Appeals panel held that the confession should have been suppressed but concluded the error was harmless beyond a reasonable doubt due to the overwhelming evidence of defendant's guilt. *Id.* at ___, 795 S.E.2d at 641. For the reasons stated below, we uphold the trial court's conclusion that, under the totality of the circumstances, defendant's inculpatory statements were voluntary. Therefore, we modify and affirm the decision of the Court of Appeals.

Background

In the early morning hours of 2 May 2007, three men robbed a Charlotte motel where the victim, Anita Jean Rychlik, worked as manager and her husband worked as a security guard. After pistol whipping and robbing the security guard in the parking lot, two of the men entered the victim's room, where the victim was shot once in the back of her neck and killed. The men escaped, and no one was charged in the murder until October 2011. DNA evidence collected from beneath the victim's fingernails and analyzed in 2009 indicated defendant was the likely contributor.

Defendant voluntarily met with detectives on 24 October 2011 at the police station, where he was questioned in an interview room for just under five hours before being placed under arrest and warned of his rights as required by *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). After being advised of his rights, defendant signed a written waiver of those rights and made inculpatory statements. Defendant was indicted on 7 November 2011 for first-degree murder for the killing of Rychlik.

Defendant was tried before Judge Eric L. Levinson at the 28 September 2015 criminal session of Superior Court, Mecklenburg County. On 6 October 2015, a jury found defendant guilty of first-degree murder under the felony murder rule with armed robbery as the underlying felony. That same day, the trial court sentenced defendant to life imprisonment without parole.

Defendant made a number of pretrial motions, including a motion to suppress statements he made to law enforcement while being interrogated on 24 October 2011. Defendant argued that he was subjected to custodial interrogation before being informed of his rights as required by *Miranda*, and that his inculpatory statements were made in response to improper statements by detectives inducing a hope that his confession would benefit him. The trial court denied the motion to suppress, concluding that "[b]ased on the totality of the circumstances during the entirety of the interview, the statements made by Defendant were voluntary."

Defendant appealed his conviction to the Court of Appeals, arguing that the trial court's findings of fact "seem[ed] to intentionally downplay the influence of hope and fear" during his interrogation and were insufficient to support its conclusion that the *Miranda* warnings in this case were effective under *Missouri v. Seibert*, 542 U.S. 600, 159 L. Ed. 2d 643 (2004). The Court of Appeals panel determined that defendant was subject to custodial interrogation before being *Mirandized* and then analyzed whether the entirety of the interrogation, from the time defendant first should have been advised of his rights under *Miranda* until the time defendant made inculpatory statements, rendered those statements involuntary. *Johnson*, ___ N.C. App. at ___, 795 S.E.2d at 638-39.

The Court of Appeals concluded that the detectives used the "question first, warn later" technique held invalid in *Seibert*, but that defendant did not make inculpatory statements prior to being advised of his rights as required by *Miranda*. *Id.* at ___, 795 S.E.2d at 637-38. Because of that distinction, the Court of Appeals did not determine whether the postwarning statement should have been suppressed under *Miranda* and *Seibert*, and instead analyzed the overall voluntariness of the statements. *Id.* at ___, 795 S.E.2d at 637-38. The Court of Appeals held that the circumstances under which defendant made inculpatory statements were at least as coercive as those at issue in *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975), and therefore, any statements given were involuntary and inadmissible. *Johnson*, ___ N.C. App. at ___, 795 S.E.2d at 638. Despite its conclusion that the statements should have been suppressed, the panel determined that admission of defendant's statements was harmless beyond a reasonable doubt due to the overwhelming additional evidence of defendant's guilt, including DNA evidence,

eyewitness testimony, and accomplice testimony. *Id.* at ___, 795 S.E.2d at 640-41. This Court allowed both the State's and defendant's petitions for discretionary review on 3 May 2017.

Analysis

I. – Standard of Review

We evaluate a trial court's denial of a motion to suppress evidence to determine "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994)). If the trial court's findings of fact are supported by competent evidence, they "are conclusive on appeal, . . . even if the evidence is conflicting." *State v. Hammonds*, 370 N.C. 158, 161, 804 S.E.2d 438, 441 (2017) (quoting *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001)). Conclusions of law, however, "are fully reviewable on appeal" and "must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *Id.* at 161, 804 S.E.2d at 441 (first citing *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992); then quoting *Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826).

Determinations regarding the voluntariness of a defendant's waiver of his *Miranda* rights or the voluntariness of incriminating statements made during the course of interrogation are conclusions of law, which we review de novo. *State v. Knight*, 369 N.C. 640, 646, 799 S.E.2d 603, 608 (2017) (citation omitted); *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994) (citation omitted).

II. – Voluntariness and *Miranda*

[1] At common law a confession obtained through inducements, promises, or threats of violence lacked the presumption of reliability ordinarily afforded such statements, and therefore, was not admissible at trial. *State v. Roberts*, 12 N.C. (1 Dev.) 259, 260 (1827) (per curiam) (declining to allow admission of a confession when "the defendant ha[d] been influenced by any threat or promise"); *cf. Hopt v. Utah*, 110 U.S. 574, 585, 28 L. Ed. 262, 267 (1884) (holding a confession admissible when not made as a result of inducements, threats, or promises preying on the "fears or hopes of the accused"). In short, "coerced confessions are inherently untrustworthy." *Dickerson v. United States*, 530 U.S. 428, 433, 147 L. Ed. 2d 405, 412 (2000) (citations omitted).

Compliance with *Miranda* is a threshold requirement for admissibility of such statements when made as a result of custodial interrogation

and does not abrogate the need for confessions to be obtained in compliance with traditional notions of due process under both the federal and state constitutions. *Seibert*, 542 U.S. at 617 n.8, 159 L. Ed. 2d at 658 n.8 (plurality opinion) (declining to "assess the actual voluntariness of the statement" where *Miranda* warnings were inadequate); *New York v. Quarles*, 467 U.S. 649, 655 n.5, 81 L. Ed. 2d 550, 556 n.5 (1984) (noting that "failure to provide *Miranda* warnings in and of itself does not render a confession involuntary" and suggesting the defendant was "free on remand to argue that his statement was coerced under traditional due process standards"). " '[T]he mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion' as to any subsequent, warned statement." *United States v. Mashburn*, 406 F.3d 303, 307 (4th Cir. 2005) (quoting *Oregon v. Elstad*, 470 U.S. 298, 314, 84 L. Ed. 2d 222, 235 (1985)). And conversely, compliance with *Miranda* does not necessarily raise a presumption of voluntariness. Consequently, even when a defendant's *Miranda* rights are respected, and even when those rights are voluntarily, knowingly, and intelligently waived, the confession itself must also be voluntary under traditional notions of due process. "If, looking to the totality of the circumstances, the confession is 'the product of an essentially free and unconstrained choice by its maker,' then 'he has willed to confess [and] it may be used against him;' where, however 'his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.' " *Hardy*, 339 N.C. at 222, 451 S.E.2d at 608 (alteration in original) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26, 36 L. Ed. 2d 854, 862 (1973)).

Whether the defendant's rights under *Miranda* and its progeny have been respected is a factor to be considered when assessing the overall voluntariness of a defendant's confession. *See*, *e.g.*, *id.* at 222, 451 S.E.2d at 608 (listing compliance with *Miranda* as a factor to be considered in the voluntariness inquiry). Consequently, assessing the admissibility of a statement given in response to police questioning requires an assessment of both compliance with *Miranda* and the overall voluntariness of the statement. We agree with the State that the Court of Appeals erred by compressing these steps to analyze voluntariness alone. *Johnson*, ___ N.C. App. at ___, 795 S.E.2d at 634. Compliance with *Miranda* is a factor to be considered when evaluating voluntariness in light of the totality of the circumstances under which the statement was given. Whether the State has complied with *Miranda* necessarily involves a determination whether the person being interviewed was subjected to custodial interrogation, which is itself a totality of the circumstances analysis. While these two analyses will require the Court to examine interrelated

and overlapping facts, one is not a replacement for the other. Likewise, determining whether a defendant has voluntarily waived his rights under *Miranda* does not abrogate the need to evaluate the voluntariness of the statement itself.

III. – Compliance with *Miranda* in light of *Seibert*

[2] "*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' " *Oregon v. Mathiason*, 429 U.S. 492, 495, 50 L. Ed. 2d 714, 719 (1977) (per curiam). There is no question that defendant was read the *Miranda* warnings when he was formally placed under arrest and that he signed a form acknowledging his waiver of those rights. The parties disagree, however, as to whether those warnings, when given, were sufficient to comply with *Miranda* in light of the United States Supreme Court's decision in *Seibert*, 542 U.S. at 600, 159 L. Ed. 2d at 643. Defendant relies on *Seibert* to argue that the officers' use of the "question first, warn later" method of interrogation violated *Miranda*. The State argues that there is no evidence that officers intentionally used the "question first, warn later" technique at issue in *Seibert*, and therefore, this case is distinguishable and should be analyzed instead under the rationale of *Oregon v. Elstad*, 470 U.S. 298, 84 L. Ed. 2d 222 (1985). We do not find the reasoning of *Elstad* distinguishable from *Seibert* in this way. Rather, the two cases stand for the same proposition: *Miranda* warnings must be given in a manner that meaningfully apprises the interviewee of his choice to give an admissible statement or stop talking before he is taken into custody and questioned.

In *Seibert*, the officer testified that he purposefully did not place the defendant under arrest until after he had questioned her for some time and she had fully confessed. *Seibert*, 542 U.S. at 604-07, 159 L. Ed. 2d at 650-51. By doing so, he was able to secure a confession without apprising the defendant of her constitutional rights as required by *Miranda*. *Id.* at 604-07, 159 L. Ed. 2d at 651. He then gave the obligatory warnings, confronted her with her prewarning statements, and repeated the questions to confirm what had already been said. *Id.* at 605, 159 L. Ed. 2d at 650-51. According to the Court, the manifest purpose of this interrogation technique was to obtain "a confession the suspect would not make if he understood his rights at the outset," thereby intentionally circumventing *Miranda* and undermining the purposes it sought to serve—combatting interrogation tactics designed to trick, pressure, or coerce a suspect into incriminating himself without knowing or understanding he had the right not to do so. *Id.* at 613, 159 L. Ed. 2d at 655. The Court explained that the practice of administering *Miranda* warnings

in the midst of coordinated and continuing interrogation undermines the defendant's ability to knowingly and intelligently waive the right to remain silent by placing him in a state of confusion as to why his rights are being discussed *after* he has been interrogated. *Id.* at 613-14, 159 L. Ed. 2d at 656. Doing so is "likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.' " *Id.* at 613-14, 159 L. Ed. 2d at 656 (alteration in original) (quoting *Moran v. Burbine*, 475 U.S. 412, 424, 89 L. Ed. 410, 422 (1986)).

The prewarning statement at issue in *Elstad*, on the other hand, was not made in a station house interrogation but rather in the defendant's home where officers had come to execute an arrest warrant. *Id.* at 300-01, 84 L. Ed. 2d at 226-27. The officers allowed the defendant to get dressed before placing him under arrest and taking him to the sheriff's department for interrogation, where the defendant was read the *Miranda* warnings before being questioned. *Id.* at 300-01, 84 L. Ed. 2d at 226-27. The defendant's initial statements were made in casual conversation with an officer in the defendant's own home, while his subsequent statements were made after being transported to the police station in a patrol car and placed in an interrogation room for questioning. The Court concluded that, under such circumstances, "a subsequent administration of *Miranda* warnings . . . should suffice to remove the conditions that precluded admission of the earlier statement," *id.* at 314, 84 L. Ed. 2d at 235; those "conditions" being his lack of information essential to understanding the nature of his rights and the consequences of abandoning them. Consequently, under both *Elstad* and *Seibert*, the question for a reviewing court remains whether, under the totality of the circumstances, the warnings so given could function effectively to apprise the suspect that he had a real choice to either give an admissible statement or stop talking.

The Court of Appeals here "agree[d] that the detectives in the present case used the same objectionable technique considered in *Seibert*," but held that because defendant "did not confess until after he was given his *Miranda* warnings," the court needed only to determine whether his statements were involuntary. *Johnson*, ___ N.C. App. at ___, 795 S.E.2d at 637-38. This was error. When a defendant asserts that his or her *Miranda* rights have been violated as a result of successive rounds of custodial interrogation, some portion of which was unwarned, the question for the court is whether the warnings effectively apprised him of his rights and whether he made a voluntary, knowing, and intelligent waiver of his right to remain silent. Whether a defendant made prewarning

inculpatory statements may be a factor that affects that analysis, but it does not change the nature of the question to be asked.

While defendant has argued vigorously on appeal that his *Miranda* rights were violated by the officers' use of the "question first" technique, he did not make that argument to the trial court. He did not assert to the trial court that his postwarning statements suffered from the same constitutional infirmity as any prewarning statements, because there were no such inadmissible prewarning statements upon which he could base such an argument. Rather, he argued that the totality of his interaction with officers was involuntary because of the substance of his unwarned conversations with officers that morning. Although his motion to suppress includes an assertion that the officers "initially . . . did not ascertain that he knowingly and voluntarily waived his rights to remain silent," he did not argue that the waiver of his rights under *Miranda* in the afternoon was not voluntary, knowing, and intelligent, nor that he did not understand his right to remain silent at the time he was *Mirandized*; only that officers should have obtained the waiver earlier in the day.[1] In fact, he conceded to the trial court that "the technical requirements of Miranda may have been met," but contended that his statement should have been suppressed nonetheless because it was involuntary.

The trial court found as fact that the waiver forms introduced into evidence by the State "accurately reflect[ed] the required *Miranda* warnings." This determination is supported by competent evidence in the record and has not been challenged by defendant. Consequently, it is binding on appeal. Having made an appropriate waiver of his rights under *Miranda*, the finding supports the trial court's conclusion that "[t]he requirements of *Miranda* were satisfied." We therefore proceed to defendant's claim that his statements were involuntary.

IV. – Voluntariness

[3] Although defendant does not argue that his postwarning statements failed to comply with *Miranda*, he does argue that they were

1. Because defendant did not seek to suppress any statements made to officers during the first several hours of his interrogation, before he was formally arrested and *Mirandized*, and in light of defendant's concession that "the technical requirements of *Miranda* may have been met," we do not find it necessary to determine whether he was "in custody" for purposes of *Miranda* before he was formally arrested. This position, taken at the hearing on the motion to suppress, appears to conflict with the motion itself which stated that "[u]se of Defendant's statement would be in violation of Fifth, Sixth and Fourteenth Amendment rights . . . under case law of the United States Supreme Court, *Miranda v. Arizona*, and its progeny."

involuntarily procured as a result of the statements made by officers during the first "round" of interrogation before he was *Mirandized*. Defendant contends that the officers' statements improperly induced hope that his confession would benefit him. His motion to suppress cites *State v. Pruitt* for the proposition that "a confession obtained by the slightest emotions of hope or fear ought to be rejected." 286 N.C. at 455, 212 S.E.2d at 101. The State argues that both defendant's and the Court of Appeals' reliance on *Pruitt* is misplaced because, in the State's view, the "*per se*" voluntariness analysis in that case and its predecessors has been circumscribed by our more recent decisions that favor a totality of the circumstances analysis of the voluntariness of a confession. The Court of Appeals quoted *Pruitt* extensively and ultimately determined that "the circumstances in the present case were at least as coercive as those in *Pruitt*" and therefore held "that Defendant's inculpatory statements 'were made under the influence of fear or hope, or both, growing out of the language and acts of those who held him in custody.' " *Johnson*, ___ N.C. App. at ___, 795 S.E.2d at 639-40 (quoting *Pruitt*, 286 N.C. at 458, 212 S.E.2d at 103). We hold that the trial court's conclusion that defendant's inculpatory statements were voluntarily made was adequately supported by its findings of fact and that those findings are supported by competent evidence in the record. We therefore modify and affirm the decision of the Court of Appeals.

We assess the voluntariness of a confession by determining whether, under the "totality of the circumstances, the confession is 'the product of an essentially free and unconstrained choice by its maker,' " in which case it is admissible against him, or conversely, whether " 'his will has been overborne and his capacity for self-determination critically impaired,' " in which case " 'the use of his confession offends due process.' " *Hardy*, 339 N.C. at 222, 451 S.E.2d at 608 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26, 36 L. Ed. 2d 854, 862 (1973)). In addition to considering whether the defendant's rights under *Miranda* have been heeded, when conducting this review of the totality of the circumstances, the Court should also consider: (1) circumstances under which the interrogation was conducted, for example the location, the presence or absence of restraints, and the suspect's opportunity to communicate with family or an attorney; (2) treatment of the suspect, for example the duration of the session or consecutive sessions, availability of food and drink, opportunity to take breaks or use restroom facilities, and the use of actual physical violence or psychologically strenuous interrogation tactics; (3) appearance and demeanor of the officers, for example whether they were uniformed, whether weapons were displayed, and whether they used raised voices or made shows of violence;

(4) statements made by the officers, including threats or promises or attempts to coerce a confession through trickery or deception; and (5) characteristics of the defendant himself, including his age, mental condition, familiarity with the criminal justice system, and demeanor during questioning.[2] None of these factors standing alone will necessarily be dispositive, *State v. Kemmerlin*, 356 N.C. 446, 458, 573 S.E.2d 870, 881 (2002) (citing *State v. Barlow*, 330 N.C. 133, 141, 409 S.E.2d 906, 911 (1991)), and the court is certainly free to look to a host of other facts and circumstances surrounding the act of confessing to determine whether, under the totality of the circumstances, the defendant was truly capable of making, and did in fact make, a free and rational decision to confess his guilt.

In this case the trial court's findings of fact indicate that defendant came to the police department headquarters on his own without police escort, was not shackled or handcuffed,[3] and retained possession of his personal cell phone while inside the interview room. Defendant was placed in an interview room with two plainclothes police officers on the second floor of a secure law enforcement facility. At one point, his cell phone rang and it appears from the record that officers would have allowed him to answer had he chosen to do so. Officers made no threats of physical violence but did interrogate defendant rigorously and raised their voices. Defendant was told, contradictorily and repeatedly, that officers both could not promise him anything and that the district

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2. *See*, *e.g.*, *State v. Kemmerlin*, 356 N.C. 446, 458, 573 S.E.2d 870, 881 (2002) (citing, *inter alia*, *State v. Hyde*, 352 N.C. 37, 45, 530 S.E.2d 281, 288 (2000), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001)) (listing factors, including "whether defendant was in custody, whether her *Miranda* rights were violated, whether she was held incommunicado, whether there were threats of violence, whether promises were made to obtain the confession, the age and mental condition of defendant, and whether defendant had been deprived of food," as well as the "defendant's familiarity with the criminal justice system, length of interrogation, and amount of time without sleep"); *Hardy*, 339 N.C. at 221-22, 451 S.E.2d at 607-08 (listing same factors and additionally considering the environment and duration of the interview; demeanor and characteristics of the interviewee; officers' civilian dress, lack of weapons, and demeanor; and subjective belief of the defendant, including whether he asked to leave, requested an attorney, felt he was free to leave, and believed what officers were telling him); *State v. Jackson*, 308 N.C. 549, 573-74, 304 S.E.2d 134, 147-48 (1983) (finding the defendant's statement voluntary even though officers fabricated evidence because the defendant: was not in custody; was *Mirandized*; was not threatened, touched, or intimidated; was driven by officers to his chosen destination at the conclusion of the first interview; and had extensive experience with interrogation), *overruled on other grounds as stated in State v. Abbott*, 320 N.C. 475, 481, 358 S.E.2d 365, 369 (1987).

3. The Court of Appeals recited as fact that defendant was made to shackle himself to the floor of the interrogation room after he was placed under arrest, four and one-half hours after questioning began. Defendant has not challenged the trial court's finding that he was not shackled or handcuffed and that finding is therefore binding on appeal.

attorney would "work with him" and would "go easier on him" if he cooperated and gave them truthful information. After a lengthy interrogation, officers asked whether defendant believed he would be able to go home that day and defendant responded, "No." The following conversation ensued:

> Officer 1: Then you're under arrest for murder.
>
> Officer 2: If you don't believe you can get up and walk out of here, then I have no choice. You just told me you believe you're going to jail.
>
> Officer 1: Did you just say that, yes or no?
>
> Defendant: Yes, sir.
>
> Officer 1: Then I'm going to have to place you under arrest and then I've got some stuff to do before I continue. Because to be voluntary, you've got to believe you can walk out of here.
>
> . . . .
>
> Officer 1: If you feel like you can leave, then we're good. But if not, then we'll have to do something different. Do you think you can get up and walk out of here any time?
>
> Defendant: Not at any time, only after you free me to go.
>
> Officer 2: That's different, Bobby. Do you think you can walk out of here right now?
>
> Defendant: Yes.

The unwarned portion of the interrogation lasted about five hours. When defendant was formally arrested, officers *Mirandized* him and secured a written waiver of his rights. Questioning continued for another four hours. During the unwarned portion of the interrogation defendant was given coffee and cigarettes and was offered food. He had access to the restroom if needed and was offered a wastebasket when he began to feel ill. Defendant was, at times, left alone in the interview room. There was no guard or police officer stationed at the door. Defendant was in his mid-thirties, had obtained his GED, and was articulate, intelligent,

literate, and knowledgeable about the criminal justice system and its processes. As the trial court found, defendant at times appeared eager to assist the officers in their investigation and offered to help, offered to wear a wire, and offered to do whatever else he could to help with the investigation.

The trial court concluded as a matter of law that, "[b]ased on the totality of the circumstances during the entirety of the interview, the statements made by Defendant were voluntary," and that "[t]he confession was not obtained as a result of hope or fear instilled by the detectives." Defendant argues that the trial court's findings of fact failed to disclose material circumstances regarding the giving of his confession and therefore do not support the trial court's conclusion of law. Defendant has challenged five of the trial court's findings of fact:

> 5 The Defendant was not told he was under arrest[.]
>
> 19[ ] The Defendant was emotional at times[.]
>
> 20 The Defendant cried at times[.]
>
> 21 The defendant expressed concern with his ability to "keep food down[.]"
>
> 26[ ] While there were no specific promises or threats made by law enforcement, the detectives conducting the interview did represent to the Defendant that the District Attorney "might look favorably" at the Defendant if he made a confession[.]

Defendant asserts that finding of fact 5 is "at best an incomplete finding," as he was told he would be arrested if he did not state that he was there voluntarily. While we agree that a more detailed finding may have preserved for the record a more nuanced understanding of the exchanges that took place between defendant and the interviewing officers, there is competent evidence in the record to support the finding as written. Consequently, the finding is conclusive on appeal.

Defendant similarly asserts that findings of fact 19, 20 and 21 "downplay" the actual circumstances of the encounter. Again, while it may be true that a more detailed set of findings would have more thoroughly described defendant's physical and emotional state, the findings as written are not erroneous. Instead, these findings are supported by the evidence in the record and it is not the duty of this Court to reweigh the evidence presented to the trial court. Consequently, we are also bound by these findings.

Finally, defendant challenges finding of fact 26 as inaccurate. Defendant argues that detectives threatened him when they told him that they had sufficient evidence to convict him of capital murder and that he would "wear" the whole charge himself unless he provided them the names of his accomplices. However, we have held that informing a defendant of the charge he is facing does not constitute a threat. *See State v. Richardson*, 316 N.C. 594, 602, 342 S.E.2d 823, 829-30 (1986). We find sufficient evidence in the record to support finding of fact 26 as written, and we are consequently bound by it for purposes of appellate review.

In addition to challenging several of the trial court's findings of fact, defendant also argues that his statements were involuntary as a result of statements made by officers before he was *Mirandized* that "improperly induced hope that his confession would benefit him." Defendant's arguments incorporate the division of the interrogation into "rounds" as in the United State Supreme Court's analysis in *Seibert*, 542 U.S. at 615, 159 L. Ed. 2d at 658, and defendant asks that this Court evaluate the voluntariness of the statement he gave after receiving the *Miranda* warnings in the second "round" of questioning through the lens of the statements by officers in the first "round." To do as defendant asks is unnecessary given the trial court's totality of the circumstances analysis which requires that the entire encounter be evaluated to determine whether defendant freely and voluntarily chose to make a confession. The question is not simply whether the officers made a promise or made a threat, no matter when such statements were made during the encounter, but whether any such statements made by the officers resulted in defendant's will being overborne such that his capacity for self-determination was so impaired that the giving of his confession cannot be thought to be voluntary.

Defendant did not argue to the trial court that officers made specific promises to him or threatened him. He simply argued that their statements "improperly induced hope that his confession would benefit him." We note that the presiding judge watched the entirety of the interrogation interview and concluded that defendant's statements were voluntarily made. The trial court had the benefit of observing the testifying witnesses and heard extensive arguments from counsel. The trial court's findings of fact are supported by sufficient competent evidence and support the conclusion that, under the totality of the circumstances, defendant was not coerced or induced through hope or fear into giving his confession and that his confession was in fact voluntarily given.

V. – Conclusion

We hold that the Court of Appeals erred in condensing the *Miranda* and voluntariness inquiries into one. We also hold that defendant did not preserve the argument that officers employed the "question first, warn later" technique to obtain his confession in violation of *Miranda* and *Seibert*. The trial court's conclusion that the requirements of *Miranda* were met is adequately supported by its findings of fact, as is its conclusion that defendant's statements to officers were voluntarily made. We therefore modify and affirm the decision of the Court of Appeals.

MODIFIED AND AFFIRMED.

Justice HUDSON concurring in result.

I concur in the result reached by the majority. Here the Court of Appeals determined that although defendant's constitutional rights were violated by the trial court's failure to suppress his inculpatory statements, this error was harmless beyond a reasonable doubt due to the overwhelming evidence of defendant's guilt. *State v. Johnson*, ___ N.C. App. ___, ___, 795 S.E.2d 625, 640-41 (2017); *see also State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988) ("Significantly, this Court has held that the presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." (citing *State v. Brown*, 306 N.C. 151, 164, 293 S.E.2d 569, 578, *cert. denied*, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982))). Specifically, the Court of Appeals stated:

> [W]e hold that the overwhelming evidence of Defendant's guilt of first-degree murder, based upon the evidence that Anita was murdered in the course of a robbery in which Defendant played an essential part, renders this error harmless beyond a reasonable doubt.
>
> Both Josh and Tony, whose testimony Defendant did not move to suppress, identified Defendant as the third man involved in the robbery and shooting, and both stated Defendant was wearing a mask that covered his face. They both testified that Defendant and Tony entered the motel while Josh remained outside, and both claimed Defendant was carrying a gun. Brandy testified that there were two younger men without their faces covered, and an older, larger man whose face was covered by a mask. Brandy testified it was the older, larger man who held the

> gun, and who entered the motel with one of the younger men. Most importantly, Defendant's DNA was recovered from under Anita's fingernails. Although Defendant's admission of participation in the crime, which we have held was involuntary, clearly prejudiced Defendant, in light of the overwhelming evidence presented pointing to Defendant as one of the three men involved in the robbery and murder, we hold the prejudice to Defendant was harmless beyond a reasonable doubt. We reach this holding on these particular facts, and because the jury was instructed on acting in concert and felony murder based upon killing in the course of a robbery. The State did not have to prove that Defendant shot Anita, only that he was one of the three men involved in the robberies and murder. The evidence that Defendant was one of the three men involved was overwhelming, and the State has shown beyond a reasonable doubt that Defendant would have been convicted even had his motion to suppress his inculpatory statements been granted.

Johnson, ___ N.C. App. at ___, 795 S.E.2d at 640-41 (footnote omitted). In my opinion, the Court of Appeals properly concluded that there was overwhelming evidence of defendant's guilt of felony murder, particularly in light of the evidence of defendant's DNA recovered from under the victim's fingernails.

Accordingly, this Court's analysis and determination regarding defendant's constitutional rights is unnecessary, in my view. *See James v. Bartlett*, 359 N.C. 260, 266, 607 S.E.2d 638, 642 (2005) ("However, appellate courts must 'avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds.' " (quoting *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (per curiam))); *see*, *e.g.*, *State v. Powell*, 340 N.C. 674, 686, 459 S.E.2d 219, 224 (1995) ("Assuming *arguendo* that the trial court erred by admitting the statements defendant made after [the police officer] destroyed the [*Miranda*] waiver form, we hold that the error is harmless beyond a reasonable doubt." (citing N.C.G.S. § 15A-1443(b) (1988))), *cert. denied*, 516 U.S. 1060, 116 S. Ct. 739, 133 L. Ed. 2d 688 (1996). Because I conclude that any error by the trial court was harmless beyond a reasonable doubt, I would affirm the Court of Appeals on that basis alone. Therefore, I respectfully concur in the result.

STATE OF NORTH CAROLINA
v.
ANGELA MARIE RANKIN

No. 23A18

Filed 21 December 2018

Indictment and Information—felony littering—unauthorized persons and locations

The indictment charging defendant with felony littering was facially invalid because it failed to allege an essential element of the statutory crime—that defendant was an unauthorized person who deposited refuse on property not designated for such activity. Facts satisfying N.C.G.S § 14-399(a)(1) needed to be alleged because the statement of the offense of littering was not complete unless it excluded authorized locations and persons from its definition.

Chief Justice MARTIN dissenting.

Justice NEWBY 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. ___, 809 S.E.2d 358 (2018), vacating defendant's conviction upon appeal from a judgment entered on 6 July 2016 by Judge Michael D. Duncan in Superior Court, Guilford County. Heard in the Supreme Court on 27 August 2018.

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

Sarah Holladay for defendant-appellee.

BEASLEY, Justice.

In this case we consider whether the Court of Appeals erred in vacating defendant's conviction under N.C.G.S § 14-399(a) for felony littering upon concluding that the indictment failed to allege an essential element of the statutory crime and was fatally defective, thus depriving the trial court of jurisdiction over the accused. Because we conclude that the indictment was facially invalid, we affirm the decision of the Court of Appeals.

On 27 April 2014, defendant Angela Rankin located a large metal tank containing fuel oil near a residential driveway on North Elam Avenue in Greensboro, North Carolina. Defendant wanted to take the tank to sell it as scrap metal. When she tried to lift the tank into her vehicle, she discovered that the oil inside made it too heavy to maneuver. So that the tank "wouldn't be as heavy," defendant drained the fuel oil onto the ground and then left the scene with the metal tank. The tank was reported stolen to the City of Greensboro Police Department, and an investigation revealed that defendant had committed the theft.

On 21 July 2014, defendant was indicted for felony littering of hazardous waste, misdemeanor larceny, and misdemeanor conspiracy to commit larceny. On 5 July 2016, a jury trial was held in Superior Court, Guilford County. Defendant moved to dismiss all charges at the close of the evidence, and the trial court dismissed the conspiracy charge. The jury found defendant guilty of felony littering of hazardous waste and not guilty of misdemeanor larceny. The trial court sentenced defendant to five to fifteen months of imprisonment, suspended the sentence, and placed her on supervised probation for eighteen months.

Defendant appealed her conviction to the Court of Appeals, arguing that the trial court lacked jurisdiction because the indictment failed to allege an essential element of the crime of felony littering of hazardous waste. The Court of Appeals majority agreed and vacated the conviction. *State v. Rankin*, ___ N.C. App. ___, ___, 809 S.E.2d 358, 365 (2018). One judge dissented, asserting that the indictment was facially valid because the statutory language omitted from the indictment is an affirmative defense, not an essential element of the crime. *Id.* at ___, 809 S.E.2d at 368 (Berger, J., dissenting). The State filed a notice of appeal with this Court based on the issues raised in the dissenting opinion.

"[A] valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Campbell*, 368 N.C. 83, 86, 772 S.E.2d 440, 443 (2015) (quoting *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981)). A valid indictment, among other things, serves to "identify the offense" being charged with certainty, to "enable the accused to prepare for trial," and to "enable the court, upon conviction, to pronounce the sentence." *State v. Saults*, 294 N.C. 722, 726, 242 S.E.2d 801, 805 (1978).

To be sufficient, an indictment must include, *inter alia*, "[a] plain and concise factual statement" asserting "facts supporting every element of a criminal offense and the defendant's commission thereof." N.C.G.S. § 15A-924(a)(5) (2017). If the indictment fails to state an essential

element of the offense, any resulting conviction must be vacated. *See, e.g.*, *Campbell*, 368 N.C. at 86, 772 S.E.2d at 443; *see also State v. Wagner*, 356 N.C. 599, 601, 572 S.E.2d 777, 779 (2002) (per curiam). The law disfavors application of rigid and technical rules to indictments; so long as an indictment adequately expresses the charge against the defendant, it will not be quashed. *See Sturdivant*, 304 N.C. at 311, 283 S.E.2d at 731. For example, in *State v. Mostafavi* the defendant argued that the indictment charging him with obtaining property by false pretenses omitted an essential element of the crime because it failed to allege the precise amount of money the defendant received when he pawned the property obtained. 370 N.C. 681, 683, 811 S.E.2d 138, 140 (2018). This Court held that the indictment was facially valid because it clearly identified "the conduct which [was] the subject of the accusation" by alleging that the defendant received United States currency by pawning stolen property as if it were his own. *Id.* at 687, 811 S.E.2d at 142 (quoting N.C.G.S. § 15A-924(a)(5) (2017)).

But an indictment will be quashed "when an indispensable allegation of the charge is omitted." *State v. Russell*, 282 N.C. 240, 245, 192 S.E.2d 294, 297 (1972) (citations omitted). For example, in *State v. Murrell* the defendant challenged an indictment charging him with robbery with a dangerous weapon, arguing that an essential element of the crime—presence of a dangerous weapon—was not alleged. 370 N.C. 187, 190-91, 804 S.E.2d 504, 506-07 (2017). We noted that "the possession, use, or threatened use of firearms, or other dangerous weapon, implement, or means" was an essential element of the offense. *Id.* at 194, 804 S.E.2d at 509 (footnote omitted). Furthermore, this Court found the indictment facially invalid, observing that "an allegation that it 'reasonably appear[ed] . . . that a dangerous weapon was in the defendant's possession' is simply not equivalent to an allegation that defendant actually possessed a weapon." *Id.* at 196, 804 S.E.2d at 510 (alterations in original).

Likewise, when an indictment charges a defendant with a statutory offense, the document must allege all the essential elements of the offense. *Id.* at 193, 804 S.E.2d at 508 (citations omitted). If the words of a statute do not "set forth all the essential elements of the specified act intended to be punished, such elements must be charged in the bill [of indictment]." *State v. Greer*, 238 N.C. 325, 329, 77 S.E.2d 917, 920 (1953) (quoting *State v. Cole*, 202 N.C. 592, 597, 163 S.E. 594, 597 (1932)); *see also*, *e.g.*, *State v. Hunter*, 299 N.C. 29, 41, 261 S.E.2d 189, 197 (1980) (stating that although an indictment need not track the language of the statute completely, an indictment charging the violation of a statute in general terms only can be insufficient to confer jurisdiction on the trial

court); *State v. Cook*, 272 N.C. 728, 158 S.E.2d 820 (1968) (holding that the language of a warrant for driving while license revoked, which referred to a statutory provision with intent to charge the offense therein, was facially invalid for failing to allege an essential element: that the defendant drove on a public highway).

The indictment in this case charged that defendant:

> unlawfully, willfully and feloniously did intentionally and recklessly spill and dispose of litter on property not owned by the defendant, the property owned and controlled by the City of Greensboro and not into a litter receptacle as defined in General Statute 14-399(A)(2). The litter discarded was hazardous waste.

The statute at issue here states:

> (a) No person, including any firm, organization, private corporation, or governing body, agents or employees of any municipal corporation shall intentionally or recklessly throw, scatter, spill or place or intentionally or recklessly cause to be blown, scattered, spilled, thrown or placed or otherwise dispose of any litter upon any public property or private property not owned by the person within this State or in the waters of this State including any public highway, public park, lake, river, ocean, beach, campground, forestland, recreational area, trailer park, highway, road, street or alley except:
>
> > (1) When the property is designated by the State or political subdivision thereof for the disposal of garbage and refuse, and the person is authorized to use the property for this purpose; or
> >
> > (2) Into a litter receptacle in a manner that the litter will be prevented from being carried away or deposited by the elements upon any part of the private or public property or waters.

N.C.G.S § 14-399(a) (2017 & Supp. 2018). The indictment indisputably failed to allege facts satisfying subdivision (a)(1). The ultimate question before us is whether such facts are required; that is, whether subdivision (a)(1) sets out an affirmative defense or an essential element of felony littering. The former need not be alleged in a valid indictment, while the latter must be. Because the language of the statute does not explicitly resolve this issue, we turn to the well-established tenets of statutory interpretation.

The goal of statutory interpretation is to determine the meaning that the legislature intended upon the statute's enactment. *See State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 276-77 (2005) (citations omitted). Therefore, we must construe the statute while mindful of the criminal conduct that the legislature intends to prohibit. *In re Banks*, 295 N.C. 236, 244 S.E.2d 386 (1978). "The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *State v. Langley*, ___ N.C. ___, ___, 817 S.E.2d 191, 196 (2018) (quoting *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016)). "The Court will not adopt an interpretation which result[s] in injustice when the statute may reasonably be otherwise consistently construed with the intent of the act." *Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. 482, 494, 467 S.E.2d 34, 41 (1996) (quoting *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989)).

When the General Assembly uses an "unambiguous word without providing an explicit statutory definition, that word will be accorded its plain meaning." *Fidelity Bank v. N.C. Dep't of Revenue*, 370 N.C. 10, 19, 803 S.E.2d 142, 149 (2017) (citations omitted). However, if a literal interpretation of a word or phrase's plain meaning will lead to "absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control." *Beck*, 359 N.C. at 614, 614 S.E.2d at 277 (quoting *Mazda Motors of Am., Inc. v. Sw. Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979)). "Parts of the same statute dealing with the same subject matter must be considered and interpreted as a whole." *State ex rel. Comm'r of Ins. v. N.C. Auto. Rate Admin. Office*, 294 N.C. 60, 66, 241 S.E.2d 324, 328 (1978) (citations omitted).

An indictment need not include affirmative defenses to statutory crimes in order to be sufficient. *See Sturdivant*, 304 N.C. at 310, 283 S.E.2d at 731 ("[A]n indictment need not negate a defense to the stated crime; rather, it is left to the defendant to show his defenses at trial."). The characteristics of an affirmative defense are further defined in *State v. Sanders*, in which we stated that "[w]hen [a] defendant relies upon some independent, distinct, substantive matter of exemption, immunity or defense, *beyond the essentials of the legal definition of the offense itself*, the onus of proof as to such matter is upon the defendant." 280 N.C. 81, 85, 185 S.E.2d 158, 161 (1971) (emphasis added) (quoting *State v. Johnson*, 229 N.C. 701, 706, 51 S.E.2d 186, 190 (1949)). Furthermore, "[a]llegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage" and thus

should not be included in an indictment. *State v. Birdsong*, 325 N.C. 418, 422, 384 S.E.2d 5, 7 (1989) (quoting *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972)).

Whether an exception to a statutorily defined crime is an essential element of that crime or an affirmative defense to it depends on whether the statement of the offense is complete and definite without inclusion of the language at issue. *See State v. Dobbins*, 277 N.C. 484, 502, 178 S.E.2d 449, 460 (1971) (citations omitted). The criminal conduct that the statute seeks to prohibit here is the depositing of litter in unauthorized locations by unauthorized persons. N.C.G.S. § 14-399(a) (prohibiting persons and entities from intentionally or recklessly throwing, scattering, or spilling any litter upon any public or private property within this state). Therefore, in addition to the required language of subdivision (a), the offense of littering is not complete unless it excludes authorized locations and persons from its definition. *See Dobbins*, 277 N.C. at 502, 178 S.E.2d at 460. Subdivision (a)(1) does just that. Therefore, we hold that to be valid, the indictment charging felony littering must allege that the accused is an unauthorized person who deposited refuse on property not designated for such activity.

In the dissent's view, this Court should categorize subdivision (a)(1) as either an exception or qualification without regard to whether (a)(1) is a part of the complete legal definition of littering. This is because, according to the dissent, N.C.G.S. § 14-399(a) "creates criminal liability to redress the societal ill of littering." Using this standard, the dissent concludes that subsection (a) of N.C.G.S. § 14-399 contains a complete and definite description of littering, and the only matter left to decide is what kind of proviso subdivision (a)(1) is as these are described in *State v. Norman*, 13 N.C. (2 Dev.) 222, 226 (1829). *Norman* described two kinds of provisos, one "which withdraws the case provided for from the operation of the act" and "the other adding a qualification, whereby a case is brought within that operation." *Id.* at 226.

This view is problematic for two reasons. First, it contradicts well-established binding precedent from this Court holding that the complete and definite description of a crime is one in which each essential element necessary to constitute that crime is included. *Johnson*, 229 N.C. at 706, 51 S.E.2d at 190 (observing that the State carries the burden of establishing the "essentials of the legal definition of the offense itself"); *State v. Edwards*, 190 N.C. 322, 324, 130 S.E. 10, 11 (1925) ("[I]n indictments on a statute the essential words descriptive of the offense or their just equivalent must be given . . . " (quoting *State v. Mooney*, 173 N.C. 798, 800, 92 S.E. 610, 611 (1917))); *see also* N.C.G.S. § 15A-924(a)(5) ("A

criminal pleading must contain . . . facts supporting every element of a criminal offense."). Furthermore, framing the issue in this narrow manner—whether subdivision (a)(1) is an exception or qualification—impermissibly limits the scope of the statutory interpretation and construction in which this Court was prompted to engage by the Court of Appeals' dissent: whether (a)(1) is an essential element or an exception to the crime of littering.

Even if we considered subdivision (a)(1) to be a proviso, that would not end our inquiry into whether it is an essential element of littering. In *State v. Connor* we observed that a proviso can be so "mixed up with the description of the offense" that it comprises an essential part of the statement of the crime. 142 N.C. 700, 704, 55 S.E. 787, 789 (1906). We hold that subdivision (a)(1) is so intertwined with the description of the offense of littering that it forms an essential element of the crime. As discussed further below, to hold otherwise would result in an absurdity. Likewise, concluding that subdivision (a)(1) is an exception, meaning it "withdraws the case provided for from the operation of the act," *Norman*, 13 N.C. (2 Dev) at 226, would necessitate the conclusion that the authorized persons described in (a)(1) are engaging in a form of "authorized littering" which by statutory definition is legally impossible because littering is the depositing of litter in unauthorized locations by unauthorized persons. Subdivision (a)(1) is a part of the definition of littering in that it describes the opposite of littering: authorized persons depositing refuse in authorized locations. In sum, subsection (a) describes what littering is, while subdivision (a)(1) describes what it is not. Finally, subdivision (a)(1) could not be a qualification, because it does not bring a case within the operation of the act.

Additionally, in *Connor*, immediately after stating the test for when a proviso may be omitted from an indictment, this Court emphasized:

> The test here suggested, however, is not universally sufficient, and a careful examination of the principle will disclose that the rule and its application depends not so much on the placing of the qualifying words, or whether they are preceded by the terms, "provided" or "except;" but rather on the nature, meaning and purpose of the words themselves.
>
> And if these words, though in the form of a proviso or an exception, are in fact, and by correct interpretation, but a part of the definition and description of the offense, they must be negatived in the bill of indictment.

> In such case, this is necessary, in order to make a complete statement of the crime for which defendant is prosecuted.

142 N.C. at 702, 55 S.E. at 788. In other words, the Court's primary task is to interpret the statutory language—its nature, meaning and purpose—to decide whether subdivision (a)(1) is an essential element of the crime of littering. No formulaic rule statement can replace the holistic inquiry required by statutory interpretation and construction.

The Court of Appeals dissent proffers that the language of the statute preceding the word "except" is the complete legal definition of the crime because that language essentially encompasses the literal meaning of the phrase "to litter"—"to scatter about carelessly"—and criminalizes that act while withdrawing persons authorized by subdivision (a)(1) from criminal liability for littering. *Rankin*, ___ N.C. App. at ___, 809 S.E.2d at 366 (quoting *Litter*, *Webster's New World College Dictionary* (5th ed. 2014)). Nonetheless, the plain meaning of a phrase will apply only if an unambiguous term is actually *used* and not defined in the statute. *See Fidelity Bank*, 370 N.C. at 19, 803 S.E.2d at 149 ("In the event that the General Assembly *uses* an unambiguous word without providing an explicit statutory definition, that word will be accorded its plain meaning." (emphasis added)) "To litter" does not appear in this statute, and while the language of the statute may encompass the literal meaning of the phrase "to litter," the legal definition extends beyond that phrase as evidenced by the surrounding language.[1] *See* N.C.G.S. § 14-399(a) (prohibiting intentional or reckless throwing, spilling, and placing, in addition to carelessly scattering, litter); *see also N.C. Auto. Rate Admin. Office*, 294 N.C. at 66, 241 S.E.2d at 328 (instructing that related parts of a statute must be interpreted as a whole).

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1. While the phrase 'to litter' does not appear in this statute, the word 'litter' is statutorily defined:

> any garbage, rubbish, trash, refuse, can, bottle, box, container, wrapper, paper, paper product, tire, appliance, mechanical equipment or part, building or construction material, tool, machinery, wood, motor vehicle or motor vehicle part, vessel, aircraft, farm machinery or equipment, sludge from a waste treatment facility, water supply treatment plant, or air pollution control facility, dead animal, or discarded material in any form resulting from domestic, industrial, commercial, mining, agricultural, or governmental operations. While being used for or distributed in accordance with their intended uses, "litter" does not include political pamphlets, handbills, religious tracts, newspapers, and other similar printed materials the unsolicited distribution of which is protected by the Constitution of the United States or the Constitution of North Carolina.

N.C.G.S. § 14-399(i)(4) (2017 & Supp. 2018).

Moreover, N.C.G.S. § 14-399(a) must be read to incorporate subdivision (a)(1) as part of the legal definition of the crime to prevent absurd results. As noted by the Court of Appeals majority, "a trash collector disposing of waste in a city dump could be charged with littering and then have the burden of showing that his actions fell within an 'exception' to the littering statute." *Rankin*, ___ N.C. App. at ___, 809 S.E.2d at 364-65 (majority opinion). If the General Assembly wanted to enable a trash collector to be criminally charged for doing his or her job and forced to demonstrate his or her innocence by proving an affirmative defense at trial, it could have indicated as much in the statute.[2] Construing this statute accordingly and applying widely accepted principles of statutory interpretation, while avoiding absurd results, compels the conclusion that the crime of littering has not occurred at all if the actor is a waste management professional disposing of garbage at a landfill.[3] *See State v. Jones*, 367 N.C. 299, 306, 758 S.E.2d 345, 350 (2014) (applying the tenet that if "a literal interpretation of the language of a statute will lead to absurd results . . . the reason and purpose of the law shall control and the strict letter thereof shall be disregarded" (quoting *Beck*, 359 N.C. at 614, 614 S.E.2d at 277)).

The dissent opines that the absurdity doctrine is erroneously applied in our analysis here because it "applies to the act of *interpreting* a statute—to determining the statute's meaning" whereas this dispute

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2. The Court of Appeals also discussed *State v. Hinkle*, 189 N.C. App. 762, 659 S.E.2d 34 (2008), wherein the Court of Appeals held that subdivision (a)(2) of N.C.G.S. § 14-399(a) constituted an essential element of littering. In that case the Court of Appeals applied the absurdity doctrine, opining that "[w]ithout the 'except . . . [i]nto a litter receptacle' language, placing a broken rubber band into a trash can at our Court would be littering." *Hinkle*, 189 N.C. App. at 769, 659 S.E.2d at 38 (second and third alterations in original). It is significant that in the ten years since *Hinkle* was decided, the legislature has not revised N.C.G.S. § 14-399 to contradict this holding. In *Rankin*, the Court of Appeals concluded that "[b]ecause subsections (a)(1) and (a)(2) serve identical purposes in this statute, it would be illogical to suggest that one is an essential element but the other is not." *Rankin*, ___ N.C. App. at ___, 809 S.E.2d at 363.

3. By way of analogy, the crime of assault on a female requires that the victim be a female and the accused a male who is at least eighteen years of age. N.C.G.S. § 14-33(c)(2) (2017 & Supp. 2018); *State v. Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 370 (1988) ("The elements of assault on a female are (1) an assault, (2) upon a female person, (3) by a male person (4) who is at least eighteen years old."). Therefore, the crime has not occurred if the victim is not a female, or if the accused is under eighteen or is not a male. Likewise here, the crime of littering has not occurred if the accused is a sanitation worker disposing of waste at an authorized location. Just as it would be absurd to assert that a female charged with assault on a female must plead her gender as an affirmative defensive, it is equally unfair to burden a sanitation worker with the task of establishing his or her authorization to dispose of waste.

"is about how to *classify* the proviso in [subdivision] (a)(1), not how to interpret it." However, as previously discussed, classifying the language in subdivision (a)(1) as an essential element or an exception to the crime of littering *is* a matter of statutory interpretation. The role of the absurdity doctrine in this process is to provide a means to test the implications of a proposed interpretation of the statute against legislative intent. We must consider the possible results of our interpretation to determine whether that interpretation aligns with the intent of the legislature as evidenced by the history, context, goals, and spirit of the law.

We applied the absurdity doctrine thusly in *State v. Jones* and concluded that a strict construction of the statute would have allowed "individuals to escape criminal liability [for identity theft] simply by stating or signing a name that differ[ed] from the cardholder's name," a result we determined could not have been within the intent of the legislature when adopting the statute criminalizing identity fraud. 367 N.C. at 306, 758 S.E.2d at 350 (citing *Beck*, 359 N.C. at 614, 614 S.E.2d at 277). Likewise, if we *interpret* subdivision (a)(1) to be an exception to, rather than an essential element of, littering, an absurdity will result. Exposing a faulty interpretation of the statute, far from distorting the issue, is a necessary analytical exercise in resolving this case.

We conclude that subdivision (a)(1), which requires that the accused be an unauthorized person depositing refuse on land not designated by the State for such use, is an essential element of the crime of felony littering, however, we acknowledge the legislature's power to determine otherwise.[4] The State has conceded that the indictment upon which defendant was convicted failed to allege the portion of the definition

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4. It is notable that the General Assembly has, in other circumstances, expressly treated certain facts as constituting affirmative defenses. *See*, *e.g.*, N.C.G.S. § 15A-905(c) (2017) (describing the procedure required to give notice when the accused anticipates raising any one of various affirmative defenses: alibi, duress, entrapment, insanity, mental infirmity, diminished capacity, self-defense, accident, automatism, involuntary intoxication, or voluntary intoxication). In the context of criminal littering statutes, several legislatures in other states have created clear distinctions between an affirmative defense to the crime of littering and essential elements of the crime. *See*, *e.g.*, Cal. Penal Code § 374(a) (West 2018) ("Littering means the willful or negligent throwing, dropping, placing, depositing, or sweeping, or causing any such acts, of any waste matter on land or water *in other than appropriate storage containers or areas designated for such purposes*." (emphasis added)); Colo. Rev. Stat. Ann. § 18-4-511(2)(a) (West 2018) ("It shall be an affirmative defense [to littering] that: Such property is an area designated by law for the disposal of such material and the person is authorized by the proper public authority to so use the property . . . . "); Fla. Stat. § 403.413(6)(h) (2018) ("[T]he state does not have the burden of proving that the person did not have the right or authority to dump the litter. The defendant has the burden of proving that he or she had authority to dump the litter . . . ").

of littering contained in subdivision (a)(1). To sufficiently give notice to a defendant and allow her to prepare a defense, an indictment must include "[a] plain and concise factual statement" that "asserts facts supporting every element of a criminal offense and the defendant's commission thereof." N.C.G.S. § 15A-924(a)(5). The indictment in this case failed to allege each element of the crime of littering, thereby depriving defendant of sufficient notice. Because the indictment failed to sufficiently allege all indispensable, essential elements of the offense, it was facially invalid and the trial court had no jurisdiction to enter a conviction on the charge against defendant. Accordingly, we affirm the Court of Appeals' decision to vacate defendant's conviction for felony littering of hazardous waste.

A significant portion of the dissenting opinion is devoted to the idea that the Criminal Procedure Act that took effect in July 1975 abrogated the common law rule that a defective indictment deprives a criminal court of jurisdiction. Not only is discussion of this issue outside the scope of review applicable to this case, but statutory interpretation reveals that the legislature intentionally left the common law remedy for invalid indictments intact when it enacted comprehensive revisions to the Criminal Procedure Act.

This case is before this Court based on a dissent in the Court of Appeals. *See* N.C.G.S. § 7A-30(2) (2017). Thus, the scope of review is "limited to those questions on which there was division in the intermediate appellate court," *C.C. Walker Grading & Hauling, Inc. v. S.R.F. Mgmt. Corp.*, 311 N.C. 170, 175, 316 S.E.2d 298, 301 (1984) (discussing N.C. R. App. P. 16 (1984)), and this Court's review is "properly limited to the single issue addressed in the [Court of Appeals] dissent," *Blumenthal v. Lynch*, 315 N.C. 571, 577, 340 S.E.2d 358, 361 (1986). In their briefs to this Court, respectively, neither party asked this Court to address the remedy flowing from an invalid indictment, and had they attempted to do so, their effort would likely have been rejected. *Id.* at 577-78, 340 S.E.2d at 361-62 ("[W]e strongly disapprove of and discourage attempts by appellate counsel to bring additional issues before this Court without its appropriate order allowing counsel's motion to allow review of additional issues."). Absent exceptional circumstances,[5] it is vital that we adhere to the procedural rules as they are enforced against litigants

5. "Where "issues of importance which are frequently presented to state agencies and the courts require a decision in the public interest," this Court will invoke Rule 2 of the North Carolina Rules of Appellate Procedure to address those issues. *Blumenthal*, 315 N.C. at 578, 340 S.E.2d at 362. However, whether the Criminal Procedure Act abrogated the common law remedy for invalid indictments is not a question frequently presented to state agencies or courts, so the invocation of Rule 2 would be inappropriate in this case.

by this Court. Moreover, deciding this issue in the procedural context of this case deprives both parties of their opportunity to be heard with respect to this issue. Nonetheless, given that the dissent here has discussed the effect of the Criminal Procedure Act on the common law remedy for invalid indictments, we will briefly address the issue.

In the absence of a contrary decision by the General Assembly, the common law remains in effect in North Carolina. N.C.G.S. § 4-1. Whether a particular statute supplants a common law remedy is a question of statutory interpretation. *See, e.g.*, *Quick v. United Benefit Life Ins. Co.*, 287 N.C. 47, 54-56, 213 S.E.2d 563, 568-69 (1975) (applying tenets of statutory interpretation to determine whether N.C.G.S. § 31A-15 supplanted the common law principle prohibiting a person from profiting from his or her wrongdoing); *Orange County. v. Heath*, 282 N.C. 292, 296-97, 192 S.E.2d 308, 310-11 (1972) (using principles of statutory interpretation to determine whether N.C.G.S. § 1A-1, Rule 65 abrogated the common law rule of governmental immunity for municipalities). Therefore, the previously stated rules that guide statutory interpretation are applicable, as well as rules relating to statutory abrogation of common law.

In determining legislative intent, we must consider the history of the statute and the reason for its enactment. *See Black v. Littlejohn*, 312 N.C. 626, 630, 325 S.E.2d 469, 473 (1985). "It is always presumed that the legislature acted with care and deliberation and with full knowledge of prior and existing law." *State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970). Furthermore, in the quest to interpret a statute, courts will not presume that the legislature intended to repeal a law by implication. *Id.* at 658, 174 S.E.2d at 604.

The dissent explores the history and context behind the enactment of the Criminal Procedure Act, including an in-depth report prepared for the legislature by a special committee proceeding adoption of the Act. *Legislative Program and Report to the General Assembly of North Carolina by the Criminal Code Commission* (1973). The documented history of the purpose and function of indictments along with the legislature's efforts to assess the impact of the previous enactment of the criminal code provide ample evidence that the legislature was well aware of the common law remedy for invalid indictments. Still, there are no provisions that contradict or abrogate this remedy. The absence of such provisions demonstrates that the General Assembly did not intend to change the common law discussed in the dissent.

The provisions related to indictments in the Act, codified in the North Carolina General Statutes at chapter 15A, evidence the legislature's

intent to preserve the common law rule that an indictment is required to invoke the court's jurisdiction in felony cases. Article 32 mandates that for felony charges "prosecutions originating in the superior court *must* be upon pleadings. " N.C.G.S. § 15A-642(a) (emphasis added), and that the appropriate pleading for a felony charge is an indictment. N.C.G.S. § 15A-923(a). Further, the remedy for a facially invalid indictment is thus: "Upon motion of a defendant under G.S. 15A-952(b) the court *must* dismiss the charges contained in a pleading which fails to charge the defendant with a crime[6] in a manner required by subsection (a) . . . " N.C.G.S. § 15A-924(e) (emphasis added). In other words, pursuant to the Act, the court cannot continue criminal prosecution if the indictment fails to charge the defendant with a crime. These provisions represent the statutory adoption of the common law rule that a valid indictment is required for a court to retain jurisdiction to prosecute a felony charge, as well as the common law remedy for lack of jurisdiction—dismissal.

Any assertion that the legislature implicitly abrogated the common law rule by enacting the Criminal Procedure Act would be unjustified in light of the legislature's initial comprehensive reform of the Act and the detailed commentary included with the codified statutes. The Criminal Code Commission's proposal emerged after a total of thirty-eight meeting days, in which it "carefully considered the best of North Carolina practice" before submitting final recommendations. *Legislative Program and Report to the General Assembly of North Carolina by the Criminal Code Commission* at i-ii (1973).

The General Assembly acknowledged and approved of the common law remedy for invalid indictments with the enactment of the revised Criminal Procedure Act. The official commentary accompanying N.C.G.S. § 15A-924 states in part: "The pleading rule, requiring factual (but not evidentiary) allegations to support each element, is in accord with our traditional ideas and provides a concise statutory statement." N.C.G.S. § 15A-924 official cmt. (citing *Greer*, 238 N.C. 325, 77 S.E.2d 917). In *Greer* we held that an indictment is facially invalid when it omits any essential elements of the crime to be charged. *Id.* As a result of

6. Although the dissent interprets N.C.G.S. § 15A-954(a) to preclude trial judges from dismissing fatally defective indictments on their own motion, nothing in the statutory language limits their authority to situations in which the defendant makes a dismissal motion. In addition, the fact that the General Assembly has adopted short form indictments for certain offenses does not undercut the validity of the common law rule, given that the same lack of jurisdiction exists when an indictment fails to comply with the statutory requirements for such pleadings.

the defective indictment, the Court in *Greer* applied the common law remedy for defective indictments. *Id.* The official commentary referencing *Greer* demonstrates that the legislature explicitly endorsed the common law rules for indictments as stated in that case, including the common law remedy for invalid indictments. *See Greer*, 238 N.C. at 332, 77 S.E.2d at 922. Furthermore, in the decades since the enactment of the revised Criminal Procedure Act, the common law remedy for invalid indictments has been applied time and again by the appellate courts. *See*, *e.g.*, *State v. Simpson*, 302 N.C. 613, 616, 276 S.E.2d 361, 363 (1981) ("[A] valid bill of indictment is essential to the jurisdiction of the court to try defendant for a felony."); *State v. Mostafavi*, 370 N.C. 681, 684, 811 S.E.2d 138, 141 (2017) (observing that "a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony" (quoting *Sturdivant*, 304 N.C. at 308, 283 S.E.2d at 729)). The General Assembly, no doubt aware of this practice, has never acted to abrogate this common law rule, although it does retain the right to do so for policy-related reasons. There is no unsettled question of whether the common law remedy for invalid indictments was abrogated by the Criminal Procedure Act.

We conclude that subdivision (a)(1), which requires that the accused be an unauthorized person depositing refuse on land not designated by the State for such use, is an essential element of the crime of felony littering. Accordingly, we affirm the holding of the Court of Appeals.

AFFIRMED.

Chief Justice MARTIN dissenting.

I write separately to discuss the significant failings of the jurisdictional approach the majority uses to evaluate the sufficiency of criminal indictments. Taking my cue from *United States v. Cotton*, 535 U.S. 625, 122 S. Ct. 1781 (2002), the time has come to reconsider this antiquated approach to flawed indictments in light of the extensive statutory, constitutional, and conceptual changes in criminal procedure during the twentieth century. Moreover, the General Assembly may wish to consider revisions to our criminal code to lessen the detrimental impact of the common law jurisdictional approach on the administration of justice in North Carolina.

In addition to my concerns about the common law jurisdictional rule, I also write separately because the majority creates (under the guise of interpretation) its own criminal offense and fails to grapple

with or apply our precedents on the classification of criminal statutory provisos. And, in so doing, the majority creates significant uncertainty by failing to establish a discernible method to assist lower courts and prosecutors in distinguishing between elements and defenses.

I

A valid indictment must comply with requirements of form and substance, *see* N.C.G.S. §§ 15A-644(a), -924(a) (2017), including the statutory requirement that an indictment contain facts supporting every element of the charged offense, *id.* § 15A-924(a)(5).

The State indicted defendant for felony littering under N.C.G.S. § 14-399.In relevant part, that statute provides:

> (a) No person . . . shall intentionally or recklessly throw, scatter, spill or place . . . or otherwise dispose of any litter upon any public property or private property not owned by the person within this State or in the waters of this State . . . except:
>
> (1) When the property is designated by the State or political subdivision thereof for the disposal of garbage and refuse, and the person is authorized to use the property for this purpose . . . .
>
> . . . .
>
> (e) Any person who violates subsection (a) of this section in an amount exceeding 500 pounds or in any quantity for commercial purposes, or who discards litter that is a hazardous waste . . . is guilty of a Class I felony.

Id. § 14-399 (2017). According to the majority, the merits of this case hinge on whether the proviso in subdivision (a)(1) is an element of felony littering or an affirmative defense.

In deciding this issue, we are confronted with a two-part inquiry. First, the Court must ask whether, omitting the proviso, the primary provision in the statute states a "complete and definite" description of the crime. *State v. Dobbins*, 277 N.C. 484, 502, 178 S.E.2d 449, 460 (1971) (quoting *State v. Connor*, 142 N.C. 700, 701, 55 S.E. 787, 788 (1906)). If it does not, then any proviso that completes the description must be included in the indictment. *See id.* (quoting *Connor*, 142 N.C. at 701, 55 S.E. at 788). Alternatively, if the primary provision *does* state a complete and definite description of the crime, then our next task is to classify the proviso as either an exception or a qualification. *Connor*, 142 N.C.

at 701-02, 55 S.E. at 788-89; *see also State v. Norman*, 13 N.C. (2 Dev.) 222, 226 (1829) (describing the two kinds of provisos). This distinction—used by this Court since at least 1829—is fairly straightforward: exceptions remove certain cases from the operation of the statute, while qualifications bring a case within the operation of the statute. *Norman*, 13 N.C. (2 Dev.) at 226. An exception does not need to be negated in the indictment; the onus is on the defendant to raise the exception as a defense. *Id.* But if the proviso is a qualification, "the indictment must bring the case within the proviso." *Id.*

In *State v. Moore*, for example, this Court considered an indictment for the illegal sale of intoxicating liquors. The relevant statute provided "[t]hat it shall be unlawful for any person . . . *other than druggists and medical depositaries [sic] duly licensed thereto*, to engage in the business of selling, exchanging, bartering, giving away for the purpose of direct or indirect gain, or otherwise handling spirituous, vinous or malt liquors." 166 N.C. 284, 285-86, 81 S.E. 294, 295 (1914) (emphasis added) (quoting Act of Mar. 3, 1913, ch. 44, sec. 1, 1913 N.C. Pub. [Sess.] Laws 76, 76-77). The defendant challenged the sufficiency of the charging warrant[1] because it failed to allege that he was not a druggist or a medical depository. *Id.* at 286, 81 S.E. at 295. But this Court rejected that challenge because "the exception in the statute is no part of the definition or description of the offense, but simply withdraws certain persons from its operation." *Id.* at 288, 81 S.E. at 296.

Before we determine whether the primary provision of the statute states a "complete and definite" description of a crime, we must bear in mind the respective roles of the legislative and judicial branches. The General Assembly, as the lawmaking arm of the people, has the power to define criminal activity. *See* N.C. Const. art. II, § 1; *State v. Hill*, 272 N.C. 439, 443, 158 S.E.2d 329, 332 (1968) ("It is the General Assembly which is to define crimes and ordain their punishment." (quoting *State v. Whitehurst*, 212 N.C. 300, 303, 193 S.E. 657, 660 (1937))). The courts, on the other hand, have the power to interpret the laws passed by the General Assembly and to determine whether these laws, either facially or as applied, violate the constitution. *See* N.C. Const. art. IV, § 1; *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 6-7 (1787).

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1. The defendant was charged by use of a warrant rather than an indictment because the charged crime was a misdemeanor. *See Moore*, 166 N.C. at 286, 81 S.E. at 295. This distinction does not affect the analysis of whether a proviso is an exception or a qualification for the purpose of a charging instrument, though. *See id.* at 288-89, 81 S.E. at 296 (stating that "[c]riminal accusations, *whether in the form of warrants or indictments*, must" meet certain requirements (emphasis added)).

Here, the statute's primary provision states that "[n]o person . . . shall intentionally or recklessly throw, scatter, spill or place . . . any litter upon any public property or private property not owned by the person." N.C.G.S. § 14-399(a). This provision creates criminal liability to redress the societal ill of littering. It defines the required culpability—intent or recklessness. It is, therefore, a complete and definite statement of a crime: no person may intentionally or recklessly throw or spill litter on any public property or on private property that he or she does not own.

But the majority today usurps the role of the General Assembly by summarily declaring—as part of a so-called "holistic inquiry"—that the crime of littering "is not complete unless it excludes authorized locations and persons from its definition." In other words, the majority declares that the crime of littering must, by definition, be committed without privilege or consent to be a crime. But this conclusion not only arrogates to this Court a power that is properly left in the General Assembly's hands; it also causes the majority's reasoning to collapse under the weight of past precedent. This Court has, on more than one occasion, stated that

> [t]hough the general rule is, that a proviso contained in the same section of the law . . . in which the defence is defined, must be negatived [in the indictment], yet where the charge itself is of such a nature that the formal statement of it is equivalent in meaning to such negative averment, *there is no reason for adhering to the rule*, and such a case constitutes an exception to it.

State v. Sturdivant, 304 N.C. 293, 310, 283 S.E.2d 719, 730-31 (1981) (ellipsis in original) (emphasis added) (quoting *State v. Bryant*, 111 N.C. 693, 694, 16 S.E. 326, 326 (1892)). Stated differently, if the crime, by its very nature, must be committed without privilege or consent, then the indictment does not need to negate privilege or consent. It follows that if the majority's characterization of the crime of littering is correct—that a person can litter only if he or she does so without privilege or consent—then it is unnecessary to specifically assert the lack of privilege or consent in the indictment.

Because subsection (a) is a complete and definite description of the crime, the appropriate next step for this Court is to determine whether subdivision (a)(1) is an exception or a qualification to subsection (a). And, when analyzed under our long-standing precedent, subdivision (a)(1) is unquestionably an exception.

Once again, this analysis is straightforward: does the proviso subtract from the crime described in subsection (a), or does it bring

additional cases within its operation? *See Norman*, 13 N.C. (2 Dev.) at 226. Subsection (a) prohibits disposing of litter on public property or private property belonging to another person. N.C.G.S. § 14-399(a). But subdivision (a)(1) allows disposal of litter on land "designated . . . for the disposal of garbage and refuse" by persons "authorized to use the property for [that] purpose." *Id.* § 14-399(a)(1). This proviso removes a specific act (disposing of litter on land designated for that purpose) committed by a specific class of persons (persons authorized to use that land) from the general definition in subsection (a). It is therefore an "exception in the statute [that] is no part of the definition or description of the offense." *Moore*, 166 N.C. at 288, 81 S.E. at 296. Accordingly, subdivision (a)(1) need not be alleged in the indictment.

By contrast, subsection (e) provides a qualification. For the conduct described in subsection (a) to be a felony, the litter must be hazardous waste, litter "in an amount exceeding 500 pounds," or litter "in any quantity for commercial purposes." N.C.G.S. § 14-399(e). This proviso qualifies the offense described in subsection (a), and an indictment that tracks only the language of subsection (a) would not support a conviction for felony littering. Thus, a felony littering indictment must include the qualification in subsection (e). In this case, the indictment did so, asserting that "[t]he litter discarded was hazardous waste," which "br[ought] the case within the proviso." *Norman*, 13 N.C. (2 Dev.) at 226.

The majority opinion objects to the classification of subdivision (a)(1) as an exception, raising the Court of Appeals' example of a sanitation worker being "criminally charged for doing his or her job" to show how this classification might lead to absurd results. The majority then purports to apply the absurdity doctrine to justify its construction of the littering statute to avoid this hypothetical injustice. But, contrary to the majority's theoretical musings, the ability to conjure up absurd hypothetical scenarios should not change the way that we classify subdivision (a)(1). This principle is easily demonstrated by *State v. Sturdivant*, in which the defendant was indicted for, among other things, kidnapping under N.C.G.S. § 14-39, which prohibited a person from "confin[ing], restrain[ing], or remov[ing] 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." N.C.G.S. § 14-39(a) (1981); *see Sturdivant*, 304 N.C. at 309, 283 S.E.2d at 730. In *Sturdivant*, this Court considered, among other issues, whether an indictment "was fatally defective under" the kidnapping statute "because it failed to allege specifically that the kidnapping was effected *without the victim's consent*." 304 N.C. at 308,

283 S.E.2d at 730. Because "the crime of kidnapping cannot be committed if one consents to the act," this Court determined that consent was a defense that did not need to be negated in the indictment. *Id.* at 310, 283 S.E.2d at 731.

Had this majority decided *Sturdivant*, it would have reached the opposite result. After all, under *Sturdivant*'s reasoning, an innocent school bus driver may be arrested and forced to stand trial for multiple kidnapping charges "for doing his or her job." This would never happen, of course—because no judge or magistrate would issue the arrest warrant, *see* N.C.G.S. § 15A-304(b)(1) (Supp. 2018), no prosecutor would pursue the charges, and no grand jury would indict the bus driver.[2]

In any event, the majority has misapplied the absurdity doctrine. Under that doctrine, "where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (quoting *Mazda Motors of Am., Inc. v. Sw. Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979)); *see also State v. Jones*, 367 N.C. 299, 306, 758 S.E.2d 345, 350 (2014) (applying the absurdity doctrine). The absurdity doctrine, in other words, applies to the act of *interpreting* a statute—to determining the statute's meaning.

The absurdity doctrine does not apply here, however, because this is not a dispute about the statute's meaning. *This* dispute is about how to *classify* the proviso in subdivision (a)(1), not how to interpret it. It is about whether the proviso is an element, not about what the proviso means. So the absurdity doctrine should have no place in our analysis especially when, as here, the hypothetical injustices conjured up by the majority are factually unrelated to this defendant's crime.

In the course of its improper use of the absurdity canon, moreover, the majority has distorted the issue in this case. We are not being asked to decide whether it would be legally proper for a prosecutor or a grand jury to *charge* someone (for example, a sanitation worker) who clearly falls under the auspices of subdivision (a)(1) with a crime. We are being

2. This outlandish illustration highlights the *real* absurdity in this case: the majority's lack of confidence in the men and women serving as grand jurors in our criminal justice system. Despite the majority's dystopian predictions, I find it hard to imagine that a grand jury anywhere in our State would indict hapless bus drivers, sanitation workers, or other hard-working citizens for simply doing their jobs.

asked to decide whether an indictment of a defendant who clearly did *not* fall within the auspices of subdivision (a)(1) needs to include facts that support that self-evident contention. These two issues are not the same at all, but the majority has unhelpfully blended them together.

For all of these reasons, the majority has erred by failing to apply the only correct test to the question at hand—namely, whether subdivision (a)(1) amounts to an exception or a qualification under *Norman* and related cases. It is clear, once one applies the exception-versus-qualification paradigm correctly, that subdivision (a)(1) is an exception, and that the indictment here thus did not have to plead any facts to support it. By not applying this paradigm at all, and by reaching a result contrary to the one reached by its proper application, the majority has erred. Furthermore, by abandoning textual analysis in favor of a nebulous "holistic inquiry," the majority leaves trial courts and prosecutors in the untenable position of having to guess how the Supreme Court will ultimately define a criminal offense.

II

Moving beyond the majority's error on the merits, this Court should reconsider whether vacating the judgment is the appropriate remedy when, as here, defendant failed to object to the indictment at the trial court stage. The Supreme Court of the United States, addressing a similar question in *United States v. Cotton*, concluded that a defective indictment did not deprive a court of jurisdiction. 535 U.S. at 631, 122 S. Ct. at 1785 (stating that "[i]nsofar as [*Ex parte Bain*, 121 U.S. 1, 7 S. Ct. 781 (1887)] held that a defective indictment deprives a court of jurisdiction, *Bain* is overruled"). In light of the many changes to our state's criminal procedure during the twentieth century, a reassessment of this common law jurisdictional rule is long overdue.[3]

In *Cotton*, the Supreme Court reevaluated its own long-standing rule that a flawed indictment deprives a criminal court of jurisdiction over a case. That jurisdictional rule emerged at the federal level in 1887 in *Ex parte Bain*, a case in which the Supreme Court concluded that an amendment to an indictment "was improper and that therefore 'the jurisdiction of the offence [was] gone, and the court [had] no right to proceed any further in the progress of the case for want of an indictment.' " *Id.* at 629, 122 S. Ct. at 1784 (alterations in original) (quoting *Bain*, 121 U.S. at 13, 7 S. Ct. at 788).

3. Given the significant import of this question of law to North Carolina criminal procedure, this Court should request supplemental briefing. So, to be clear, I am not suggesting that we rule on this question without input from the parties.

Reevaluating the rule's propriety more than a century later, the Supreme Court reasoned that

> *Bain*'s elastic concept of jurisdiction is not what the term "jurisdiction" means today, *i.e.*, "the courts' statutory or constitutional *power* to adjudicate the case." This latter concept of subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court. In contrast, the grand jury right can be waived.

Id. at 630, 122 S. Ct. at 1785 (citations omitted) (first quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89. 118 S. Ct. 1003, 1010 (1998); then citing *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S. Ct. 42, 43 (1908); and then citing Fed. R. Crim. P. 7(b) and *Smith v. United States*, 360 U.S. 1, 6, 79 S. Ct. 991, 995 (1959)). After cataloguing other cases that departed from the *Bain* rule throughout the twentieth century, the Court overruled the holding in *Bain* that "a defective indictment deprives a court of jurisdiction." *Id.* at 630-31, 122 S. Ct. at 1785.

Our State adopted a number of significant changes to our criminal procedure laws during the twentieth century. In 1950, the voters approved a constitutional amendment permitting criminal defendants to waive their right to indictment in most cases.[4] *State v. Thomas*, 236 N.C. 454, 457, 73 S.E.2d 283, 285 (1952); *see also* N.C. Const. art. I, § 22 ("[A]ny person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases."). Twenty-four years later, our General Assembly enacted the Criminal Procedure Act, bringing sweeping changes to our rules of criminal procedure. *See generally* Act of Apr. 11, 1974, ch. 1286, 1973 N.C. Sess. Laws (2d Sess. 1974) 490. But in the forty-four years since passage of the Criminal Procedure Act, this Court has never squarely considered whether the statute abrogated the common law rule that a defective indictment deprives a criminal court of jurisdiction. Instead,

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4. At least one commentator has argued that the rule permitting waiver of indictments at the federal level is unconstitutional. *See generally* Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 Minn. L. Rev. 398, 430-48 (2006) (describing the friction between the United States Constitution and reformers' desire to circumvent the grand jury requirement). Whatever constitutional deficiencies may or may not plague the federal rule permitting waiver, the adoption of a constitutional amendment in our state removes any such questions concerning waiver.

the majority opinion today once again carries forward this relic of the code pleading era.

A

At our founding, many of our laws were derived from the British common law. *See State v. Owen*, 5 N.C. (1 Mur.) 452, 462 (1810) ("[I]t might be asked what the common law of England was when it was adopted by this country, for such as it was, it must be observed."). All of our constitutions have adopted elements of Magna Carta and the English Declaration of Rights. *See* John V. Orth, *The Past is Never Dead: Magna Carta in North Carolina*, 94 N.C. L. Rev. 1635, 1637-38 (2016); John V. Orth, *The Strange Career of the Common Law in North Carolina*, 36 Adel. L. Rev. 23, 23-24 (2015) [hereinafter Orth, *Career of the Common Law*]. And by statute, the General Assembly "re-adopted the colonial legislation and received 'such Parts of the Common Law, as were heretofore in Force and Use within this Territory'." Orth, *Career of the Common Law* at 24 (quoting Act of 1778, ch. 5, sec. 2, 24 *State Records of North Carolina* 162, 162 (photo. reprint 1994) (Walter Clark ed., 1905)); *see also* N.C.G.S. § 4-1 (2017). Indictments were no exception; some of our earliest cases on indictments drew their rules from English common law. *See*, *e.g.*, *State v. Trexler*, 4 N.C. (Car. L. Rep.) 188, 192-93 (1815); *State v. Adams*, 1 N.C. (Mart.) 56, 58 (1793).

The common law imposed rigid technical requirements on indictments. For example, at common law, an indictment alleging homicide "occasioned by a wound" had to describe the dimensions of the wound "where they [we]re capable of description." *Owen*, 5 N.C. (1 Mur.) at 461. An indictment that failed to comply with these requirements also failed to confer on the court the power to proceed to judgment on the charge. *See*, *e.g.*, *Owen*, 5 N.C. (1 Mur.) at 464 (quashing an indictment that did not describe the mortal wound).

At least as early as 1810, our courts questioned the usefulness of imposing such high standards on indictments. As the Court stated in *Owen*:

> [T]here is, in the ancient reasoning on this branch of the law, a degree of metaphysical and frivolous subtilty strongly characteristic of the age in which it was introduced, when at the revival of letters the first efforts of learning were laborious and rude, and scarcely a ray of common sense penetrated the clouds of pedantry. Were a system now to be established, it is probable that much of the jargon of the law would be exploded, and that no

> objection would prevail against an indictment, or any other instrument, which conveyed to the mind, in an intelligible form, its intended impression. But we must follow in the footsteps of those who have preceded us until the Legislature think fit to interfere; though we have no wish to extend the particularity further.

Id. at 458; *see also id.* at 461 ("HENDERSON, J., observed, that if the Court were now about to decide on the propriety of requiring the dimensions of any wound charged in an indictment to be mortal, to be set out, he should be clearly of opinion that it was unnecessary."); *id.* at 463 ("All modern writers agree that the dimensions of the wound must be stated—not for any good reason, he admitted, but it was not for the Court to legislate, but to decide, as they had sworn to do, according to the law.").

In 1811, the General Assembly enacted a statute intended to alleviate some of these technical requirements—likely as a response to *Owen*. *State v. Hunt*, 357 N.C. 257, 268, 582 S.E.2d 593, 600-01 (2003) (citing *State v. Moses*, 13 N.C. (2 Dev.) 452, 463 (1830)). Still in effect today, that enactment provided that an indictment "is sufficient . . . if it expresses the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment." *Id.* at 268, 582 S.E.2d at 601 (alteration in original) (quoting N.C.G.S. § 15-153 (2001)).

Throughout the nineteenth and twentieth centuries, our legislature took further steps to simplify indictments. In 1887, the General Assembly alleviated some of the technical burdens of pleading by permitting short-form indictments for murder. That statute, now codified at N.C.G.S. § 15-144, declares an indictment for murder sufficient if it "allege[s] that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder" the named victim. N.C.G.S. § 15-144 (2017); *see also Hunt*, 357 N.C. at 268-69, 582 S.E.2d at 601 (quoting N.C.G.S. § 15-144 (2001)). When the General Assembly separated murder into two degrees in 1893, it reasserted this desire to simplify murder indictments, declaring that "[n]othing contained in the statute law dividing murder into degrees shall be construed to require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree." N.C.G.S. § 15-172 (2017); *see also Hunt*, 357 N.C. at 269, 582 S.E.2d at 601 (quoting N.C.G.S.

§ 15-172 (2001)). The practical consequence of these statutes is that an indictment need not allege all essential elements of first-degree murder to sustain a guilty verdict for first-degree murder. *Compare* N.C.G.S. § 14-17(a) (2017) ("A murder which shall be perpetrated by means of a nuclear, biological, or chemical weapon of mass destruction . . . , poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree . . . .") *with id.* § 15-144 (permitting an indictment to omit certain elements of first-degree murder as long as it "allege[s] that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder" the named victim).

Our courts joined the General Assembly in its push toward simplifying the standard for indictments. *See State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953). For indictments not alleging homicide, the rule that emerged was that the indictment must allege all of the essential elements of the charged offense. *E.g.*, *id.*; *State v. Morgan*, 226 N.C. 414, 415, 38 S.E.2d 166, 167 (1946); *State v. Johnson*, 188 N.C. 591, 593, 125 S.E. 183, 184 (1924). This rule ensured that indictments provided criminal defendants with due process by identifying the crime charged, enabling defendants to prepare for trial, and protecting them from double jeopardy. *See State v. Coker*, 312 N.C. 432, 434-35, 323 S.E.2d 343, 346 (1984) (first citing *State v. Squire*, 292 N.C. 494, 506, 234 S.E.2d 563, 570 (1977); and then citing *State v. Russell*, 282 N.C. 240, 243-44, 192 S.E.2d 294, 296 (1972)).

Nevertheless, our criminal law and procedure became "hopelessly outdated," requiring a significant overhaul from the legislature. *See Legislative Program and Report to the General Assembly of North Carolina by the Criminal Code Commission*, at i (1973). In 1974, the General Assembly enacted a comprehensive reform of our criminal procedure, codified now at Chapter 15A of our General Statutes. Ch. 1286, 1973 N.C. Sess. Laws (2d Sess. 1974) 490. The General Assembly intended these enactments to "mak[e] the law more understandable and improv[e] the administration of justice." *State v. Freeman*, 314 N.C. 432, 436, 333 S.E.2d 743, 746 (1985). As part of this sweeping reform, the General Assembly enacted statutory standards for indictments. N.C.G.S. § 15A-924(a). These standards included a restatement of the common law rule that the indictment contain facts supporting each essential element of the charged offense. *Id.* § 15A-924(a)(5) (requiring that each

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 or defendants of the conduct which is the subject of the accusation").

Despite its comprehensive nature, though, the Criminal Procedure Act did not directly address whether indictments that do not meet the Act's statutory standards fail to confer jurisdiction on the court; there is no single provision that explicitly adopts or rejects the common law jurisdictional rule. Compounding this omission is a dearth of cases analyzing whether the Criminal Procedure Act carried forward or abrogated the common law jurisdictional rule. Instead, our cases have reflexively incorporated the common law remedy of arresting judgment on indictments that fail to meet the standards set forth in N.C.G.S. § 15A-924(a). For example, in *State v. Simpson*, 302 N.C. 613, 276 S.E.2d 361 (1981), this Court arrested a judgment based on an indictment that failed to name or identify the defendant in violation of section 15A-924(a)(1). For the rule that a flawed indictment deprived our courts of jurisdiction, *Simpson* relied on *State v. Crabtree*, 286 N.C. 541, 212 S.E.2d 103 (1975). *See Simpson*, 302 N.C. at 616, 276 S.E.2d at 363. But this Court decided *Crabtree* on 12 March 1975—before the effective date of the Criminal Procedure Act. Ch. 1286, sec. 31, 1973 N.C. Sess. Laws (2d Sess. 1974) at 557 (declaring the effective date of the act as 1 July 1975). In contrast, the facts in *Simpson* occurred on 3 July 1979. 302 N.C. at 614, 276 S.E.2d at 362. While the Criminal Procedure Act did not apply to the defendant in *Crabtree*, it *did* apply in *Simpson*. So instead of summarily relying on this common law rule, this Court arguably could have analyzed the Criminal Procedure Act to determine whether the common law rule articulated in *Crabtree* still applied. But it did not.

The cases relied upon by today's majority trace their lineage back to this faulty origin. The majority draws today's rule from *State v. Campbell*, 368 N.C. 83, 86, 772 S.E.2d 440, 443 (2015), in a quote which finds its origins in *Sturdivant*, 304 N.C. at 308, 283 S.E.2d at 729. *Sturdivant*, in turn, drew its rule directly from *Simpson* and *Crabtree*.[5] *See Sturdivant*, 304 N.C. at 308, 283 S.E.2d at 729. Today, the majority perpetuates this obsolescent rule by adding another link to this flawed chain.

5. The majority also relies on *State v. Wagner*, 356 N.C. 599, 601, 572 S.E.2d 777, 779 (2002) (per curiam). *Wagner* cites directly to *State v. Vestal*, 281 N.C. 517, 520, 189 S.E.2d 152, 155 (1972), another case that predates the Criminal Procedure Act.

Nearly half a century after the passage of the Criminal Procedure Act, this Court continues to apply the common law rule requiring that convictions based on flawed indictments be vacated without determining whether the Criminal Procedure Act abrogated that common law rule. *E.g.*, *State v. Langley*, ___ N.C. ___, ___, 817 S.E.2d 191, 195 (2018) (relying on the common law rule articulated in *State v. McBane*, 276 N.C. 60, 65, 170 S.E.2d 913, 916 (1969)); *State v. McGaha*, 306 N.C. 699, 702-03, 295 S.E.2d 449, 451 (1982) (relying on the common law rule articulated in *State v. Benton*, 275 N.C. 378, 381-82, 167 S.E.2d 775, 777-78 (1969), and *State v. Coppedge*, 244 N.C. 590, 591, 94 S.E.2d 569, 570 (1956)); *cf. State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000) (relying on the common law rule articulated in *McGaha* and *State v. Sellers*, 273 N.C. 641, 645, 161 S.E.2d 15, 18 (1968)). Admittedly, at this juncture, the doctrine of stare decisis may justify this unwillingness to consider this question; however, the failings of the common law jurisdictional rule seem to invite legislative reexamination of this question.

B

A thorough analysis of the Criminal Procedure Act reveals significant evidence that the Act should have displaced the common law jurisdictional rule. "When the General Assembly as the policy making agency of our government legislates with respect to the subject matter of any common law rule, the statute supplants the common law and becomes the law of the State." *News & Observer Publ'g Co. v. State ex rel. Starling*, 312 N.C. 276, 281, 322 S.E.2d 133, 137 (1984) (citing *McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956)).

The Criminal Procedure Act was a comprehensive overhaul of the rules of criminal procedure in our state. As with all aspects of criminal procedure, the Act thoroughly addresses indictments and other charging instruments, including the form of these documents, the methods of challenging their sufficiency, and the available remedies in the event that these instruments are flawed. Article 49 covers pleadings and joinder in criminal cases. N.C.G.S. ch. 15A, art. 49 (2017). This article provides for the use of pleadings in felony cases, *see id.* § 15A-923 (2017), and establishes clear expectations about the substance of indictments, *see id.* § 15A-924. But nothing in Chapter 15A, Article 49 indicates that the requirements of section 15A-924(a) are essential to the jurisdiction of the court.

The majority asserts that the General Assembly "explicitly endorsed" the common law jurisdictional rule by citing to *State v. Greer* in the official commentary to section 15A-924. *See* N.C.G.S. § 15A-924 official

cmt. (2017). But the official commentary cites *Greer* only for the proposition that "[t]he pleading rule, requiring factual (but not evidentiary) allegations to support each element, is in accord with traditional ideas." *Id.* (citing *Greer*, 238 N.C. 325, 77 S.E.2d 917). Far from "explicitly endors[ing]" the common law jurisdictional rule, the commentary cites *Greer* to clarify the rule that an indictment include "[a] plain and concise factual statement in each count which . . . asserts facts supporting every element of a criminal offense." *Id.* § 15A-924(a)(5). At best, the commentary is silent on the common law jurisdictional rule.

In fact, the Criminal Procedure Act provides a separate article solely for jurisdictional rules—Article 2, entitled "Jurisdiction." Article 2 is reserved entirely for future codification. N.C.G.S. ch. 15A, art. 2 (2017). And the official commentary to Article 3 ("Venue") indicates that criminal jurisdiction is presently governed by Chapter 7A of our General Statutes. *Id.*, ch. 15A, art. 3 official cmt. (2017) (noting that Article 2 is vacant and that "jurisdiction of courts is still primarily covered in Chapter 7A of the General Statutes"). No provision of Chapter 7A mandates that flawed indictments have the effect of depriving the trial court of jurisdiction. *See*, *e.g.*, *id.* § 7A-271 (2017) (setting the boundaries of the superior court's jurisdiction). Our General Statutes thus comprehensively provide for criminal pleadings and criminal jurisdiction—the two subjects of the common law jurisdictional rule. And nowhere has the General Assembly demonstrated any intent to adopt the common law rule. The omission from Articles 2 and 49 of Chapter 15A and from Chapter 7A of any jurisdictional rules concerning indictments therefore indicates that the Criminal Procedure Act probably abrogated the common law jurisdictional rule.

In addition, the statutes establishing remedies for flawed pleadings are not conceptually compatible with a jurisdictional rule for indictments. For example, the Act requires dismissal of charges in a pleading that fails to comply with the requirements of subsection (a). *Id.* § 15A-924(e). But, as the majority aptly highlights, the statute permits this remedy only "[u]pon motion of a defendant." This does not fit within our typical conception of subject-matter jurisdiction. Contrast this with our rules of civil procedure, which require the court to dismiss an action that has jurisdictional defects—even *on its own motion*. *See* N.C. R. Civ. P. 12(h)(3); *accord* Fed. R. Civ. P. 12(h)(3). Similarly, section 15A-955 allows the court to dismiss a case for certain procedural flaws in the grand jury proceedings. But the court may do so only "on motion of the defendant." N.C.G.S. § 15A-955 (2017).

In only one instance does the court have the power to assess, on its own, the validity of the indictment under the current statutory framework. Under Article 29 of the Criminal Procedure Act (entitled "First Appearance Before District Court Judge"), the district court judge is required to examine the charging instrument "and determine whether each charge against the defendant charges a criminal offense within the original jurisdiction of the superior court." *Id.* § 15A-604(a) (2017). But even if the judge finds the charging instrument flawed, he or she is not required to dismiss the charge. *Id.* § 15A-604(b) (2017); *see also* N.C. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the action." (emphasis added)).

The conclusion that the Criminal Procedure Act supplants the common law rule receives further support from provisions regarding motions and appeals. If in fact the General Assembly had intended to leave the common law rule in place, many of these provisions are redundant. "[A] statute should not be interpreted in a manner which would render any of its words superfluous." *State v. Coffey*, 336 N.C. 412, 417, 444 S.E.2d 431, 434 (1994) (first citing *In re Watson*, 273 N.C. 629, 634, 161 S.E.2d 1, 6-7 (1968); and then citing *State v. Cloninger*, 83 N.C. App. 529, 531, 350 S.E.2d 895, 897 (1986)). "We construe each word of a statute to have meaning, where reasonable and consistent with the entire statute, because '[i]t is always presumed that the legislature acted with care and deliberation . . . .' " *Id.* at 418, 444 S.E.2d at 434 (alterations in original) (quoting *State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970)).

When one applies this principle of statutory construction to the Criminal Procedure Act, it becomes even more apparent that the General Assembly did not intend to carry forward the common law jurisdictional rule. Many provisions within the Criminal Procedure Act separate the concepts of jurisdictional flaws and failure to plead—sometimes even in the same sentence. For example, one provision states that "[m]otions concerning jurisdiction of the court *or the failure of the pleading to charge an offense* may be made at any time." N.C.G.S. § 15A-952(d) (2017) (emphasis added). Another provision requires the court to dismiss the charges on motion of the defendant if it finds that "[t]he court has no jurisdiction of the offense charged" or "[t]he pleading fails to charge an offense." *Id.* § 15A-954(a)(8), (10) (2017). And the Act automatically preserves for appeal any errors based upon "[l]ack of jurisdiction of the trial court over the offense of which the defendant was convicted," or if "[t]he pleading fails to state essential elements of an alleged violation, as required by G.S. 15A-924(a)(5)." *Id.* § 15A-1446(d)(1), (4) (2017). If

the General Assembly had intended for the failure to "assert[ ] facts supporting every element of a criminal offense" to deprive the trial court of jurisdiction, as it did under the common law, then these provisions are plainly superfluous.

The Criminal Procedure Act comprehensively overhauled every aspect of our criminal procedure, including indictments and other charging instruments. But nothing in the Act indicates that the failure to comply with the requirements of section 15A-924(a) would flatly deprive the trial court of jurisdiction to hear the case. "The Criminal Procedure Act was 'designed to remove from our law unnecessary technicalities which tend to obstruct justice.' " *Jones*, 367 N.C. at 313, 758 S.E.2d at 354 (Martin, J., concurring in part and dissenting in part) (quoting *Freeman*, 314 N.C. at 436, 333 S.E.2d at 746). By carrying over the common law rules of indictments, this Court has "engraft[ed] additional unnecessary burdens upon the due administration of justice." *Freeman*, 314 N.C. at 436, 333 S.E.2d at 746.

C

In addition to undermining a fundamental purpose of the Criminal Procedure Act, the jurisdictional rule flips the entire purpose of grand jury indictments on its head. By treating section 15A-924(a) as a jurisdictional barrier to criminal prosecution in all cases *except* those charging homicide and certain sex offenses, this Court has given greater protections to littering defendants than to capital defendants.[6]

The technicalities imposed on indictments—and the remedies for the failure to comply with them—emerged in England at a time "when the punishment of crime was so severe as in many cases to shock the moral sense of lawyers, judges and the people generally." *Greer*, 238 N.C. at 327, 77 S.E.2d at 919; Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 Fla. St. U. L. Rev. 1, 6-7 (1997) (noting that defendants accused by early iterations of the grand jury "were tried by ordeal, which forced the suspects to prove their innocence by overcoming the laws of nature"—a process that was "punishing, if not actually fatal"); *see generally* George J. Edwards, Jr., *The Grand Jury: An Essay* 4-9 (1906) (discussing the various modes of trial and punishment in use when early iterations of

6. Admittedly, the General Assembly relaxed the requirements for a murder indictment, relative to most other felonies, in the nineteenth century. *See* N.C.G.S. § 15-144. But as this section discusses, while the original motivation for the common law jurisdictional rule was to protect defendants in capital cases, it now protects everyone *but* defendants in capital cases.

the grand jury emerged in England). Around the time of the American Founding, the English criminal code—later dubbed the "bloody code"—contained approximately 200 capital offenses. Phil Handler, *Forging the Agenda: The 1819 Select Committee on the Criminal Laws Revisited*, 25 J. Legal Hist. 249, 249 (2004). Many of these capital crimes are treated as low-level felonies today. *Compare id.* at 251-52 (discussing the sharp increase in executions for forgery in the eighteenth and nineteenth centuries) *with* N.C.G.S. § 14-119(a) (2017) (classifying forgery generally as a Class I felony).

Grand jury indictments thus arose to protect the *lives* of defendants. As Blackstone stated:

> [F]or so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any *capital offence*, unless by the unanimous voice of twenty-four of his equals and neighbors: that is, by twelve at least of the grand jury, in the first place, assenting to the accusation; and afterwards, by the whole petit jury, of twelve more, finding him guilty upon his trial.

4 William Blackstone, Commentaries *306 (emphasis added); *see also* John Somers, *The Security of Englishmen's Lives* 4 (London, Effingham Wilson 1821) (1681) ("For this purpose it is made a fundamental in our government, that, unless it be by parliament, no man's *life* should be touched for any crime whatsoever, save by the judgment of at least twenty-four men . . . ." (emphasis added)).

Because we adopted the English common law at the founding, North Carolina's criminal law in some ways reflected the draconian bloody code. The case of *State v. Norman* discussed above for its distinction between elements and exceptions in indictments, was a prosecution for bigamy in which the defendant had been sentenced to death. *See* 13 N.C. (2 Dev.) at 227. And other eighteenth and nineteenth century cases reveal a number of capital sentences for stealing horses. *See, e.g.*, *State v. Coulter*, 2 N.C. (1 Hayw.) 3, 3 (1791).

In time, the number of capital offenses in our state decreased. With the adoption of the Constitution of 1868, our state limited capital punishment to convictions for murder, arson, burglary, and rape. N.C. Const. of 1868, art. XI, § 2 ("The object of punishments, being not only to satisfy justice, but also to reform the offender, and thus prevent crime, murder, arson, burglary, and rape, and these only, may be punishable with death, if the General Assembly shall so enact."). Today, murder is the only crime punishable by death in our state. *See* N.C.G.S. § 14-17 (2017).

And yet, murder is one of only a handful of crimes for which the General Assembly has permitted short-form indictments. *Id.* § 15-144.

Viewed through this lens, the folly of continued application of the common law jurisdictional rule reveals itself. A defendant convicted of first-degree murder and sentenced to die has no recourse where his indictment fails to "assert[ ] facts supporting every element of" capital murder. But a defendant convicted of felony littering and sentenced to a suspended prison sentence and 18 months of probation may appeal the indictment, overturn her conviction, and receive a new trial without ever raising the issue at the trial court.

That runs counter to the purpose and history of grand jury indictments. And it incentivizes conduct at trial that may undermine the proper administration of justice. After all, by continuing to apply this common law rule, we are giving a defendant with a defective indictment a reason to "sandbag." *See Wainwright v. Sykes*, 433 U.S. 72, 89, 97 S. Ct. 2497, 2508 (1977). Fully informed of the charges against him, the defendant may proceed to trial hoping for a favorable verdict. If he is found guilty, he may then challenge the indictment on appeal for failing to assert facts supporting an element of the crime. If he is successful, he receives a new trial and a second bite at the apple, even if the facts omitted from the indictment had been uncontestably proven at trial by the prosecution.

This case provides a clear illustration of how the administration of justice can be undermined by operation of the common law jurisdictional rule. Defendant's indictment for felony littering alleges that she "unlawfully, willfully and feloniously did intentionally and recklessly spill and dispose of litter on property not owned by the defendant, the property owned and controlled by the City of Greensboro and not into a litter receptacle . . . . The litter discarded was hazardous waste." This indictment identified the crime charged, enabled defendant to prepare for trial, and protected her from double jeopardy, thereby satisfying constitutional due process requirements. *Cf. Coker*, 312 N.C. at 434-35, 323 S.E.2d at 346. Neither defendant nor her attorney challenged the pleading during the two-year period between her indictment and her conviction. And, after her conviction, defendant's initial proposed issues on appeal related to the sufficiency of the evidence—not to the sufficiency of the indictment.

Notably, defendant ultimately raised only one issue on appeal to the Court of Appeals: that the indictment failed to allege that the property where she littered was not "designated . . . for the disposal of garbage and refuse." N.C.G.S. § 14-399(a)(1). Defendant did not raise this issue at

the trial court, and for good reason. Assuming arguendo that this provision is an essential element of felony littering, its omission did not prejudice her case in any way. The evidence presented at trial showed that she dumped heating fuel in the grass at 709 Elam Avenue in Greensboro and into the street. Defendant could not plausibly argue that the prosecution failed to establish that the land on which she poured heating oil was not publicly designated for that purpose. Had the State been compelled to issue a superseding indictment, its issuance would have had no effect whatsoever on defendant's ability to defend herself or on the trial court proceedings as a whole. The whole exercise would have been nonsensical.

Nevertheless, defendant appealed the omission. And today, defendant succeeds in dumping fuel oil in someone else's yard without consequence, not for the sake of justice, but only because of the rigid technical rules of a bygone era.

III

While the common law jurisdictional rule is outdated, imprudent, and unnecessary, indictment by grand jury still plays a critical role in protecting individual liberty. The grand jury has long been considered "one of the greatest safeguards of the freedom of the citizen." *State v. Barker*, 107 N.C. 913, 919, 12 S.E. 115, 117 (1890); *see also In re Russo*, 53 F.R.D. 564, 568 (C.D. Cal. 1971) (referring to the grand jury as "a bulwark against . . . oppression and despotism"); *but see generally* Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 Am. Crim. L. Rev. 701 (1972) (explaining that "the grand jury's history evidences the vulnerability of that institution to pressure, abuse and manipulation by determined partisans" and exploring famous examples). I do not suggest that the grand jury's role as a protective shield has diminished. But the common law jurisdictional rule, when compared to other approaches, imposes substantial burdens on the judicial system without appreciably advancing those celebrated protections. By discarding the common law jurisdictional rule in favor of plain error review, this Court can protect judicial economy and improve the administration of justice while still safeguarding the rights of criminal defendants.

This Court first adopted the plain error rule in *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). In *Odom*, this Court accepted the federal courts' definition of plain error as "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *Id.* (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (emphasis omitted)). "Our decisions have

recognized plain error only 'in truly exceptional cases' when 'absent the error the jury probably would have reached a different verdict.' " *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)). Presently, this Court invokes the plain error rule to review jury instructions and evidentiary issues. *Id.*

In *Cotton*, the United States Supreme Court, after rejecting the federal common law jurisdictional rule, applied plain error review to the challenged indictment. 535 U.S. at 631, 122 S. Ct. at 1785. The federal plain error test allows appellate courts to correct "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights[,]' . . . but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.' " *Id.* at 631-32, 122 S. Ct. at 1785 (quoting *Johnson v. United States*, 520 U.S. 461, 467, 117 S. Ct. 1544, 1549 (1997) (first and third brackets in original)). Observing the " 'overwhelming' and 'essentially uncontroverted' " evidence in the record of the element of the offense that was omitted from the indictment, *id.* at 633, 122 S. Ct. at 1786 (quoting *Johnson*, 520 U.S. at 470, 117 S. Ct. at 1550), the Court held that the failure to include the element in the indictment "did not seriously affect the fairness, integrity, or public reputation of judicial proceedings," *id.* at 632-33, 122 S. Ct. at 1786.

In the sixteen years since the Supreme Court decided *Cotton*, "a growing list of states has flatly rejected earlier rulings characterizing the failure to allege all material elements as a jurisdictional defect." *State v. Duncan*, 505 S.W.3d 480, 489 n.10 (Tenn. 2016) (citing Wayne LaFave et al., 5 Crim. Proc. § 19.2(e) (4th ed. 2015)); *see also Ex parte Seymour*, 946 So. 2d 536, 538 (Ala. 2006) (listing states that reject the common law jurisdictional rule). Many of these states apply plain error review (or some minor variation) when a defendant challenges a defective indictment without objecting before the trial court. *E.g.*, *State v. Maldonado*, 223 Ariz. 309, 313, 223 P.3d 653, 657 (2010) (en banc) (applying a "fundamental error" standard); *State v. Ortiz*, 162 N.H. 585, 590, 34 A.3d 599, 604 (2011) (explaining that the failure to object to the indictment before the trial court "confines our review to plain error"); *State v. Schrempp*, 2016 S.D. 79, ¶ 13, 887 N.W.2d 744, 748 (2016) (stating that the court "can only review for plain error" when the defendant fails to raise a timely objection to the indictment). And in at least one state retaining the jurisdictional rule, "defects 'which are tardily challenged are liberally construed in favor of validity.' " *State v. Jones*, 140 Idaho 755, 759, 101 P.3d 699, 703 (2004) (quoting *State v. Cahoon*, 116 Idaho 399, 400, 775 P.2d 1241, 1242 (1989)).

Applying our own plain error rule in cases in which the defendant failed to object to a defective indictment at trial would lead to better outcomes by properly aligning defendants' incentives with the aims of justice. After all, one serious threat to the "fairness, integrity, and public reputation of judicial proceedings" arises when defendants, despite "overwhelming and uncontroverted evidence," avoid punishment for crimes because of "error[s] that w[ere] never objected to at trial." *Cotton*, 535 U.S. at 634, 122 S. Ct. at 1787 (citing *Johnson*, 520 U.S. at 470, 117 S. Ct. at 1550).

But our state has seen this unpalatable scenario play out repeatedly through the application of the common law jurisdictional rule. For example, in *State v. Murrell*, this Court affirmed a Court of Appeals decision to vacate a conviction for robbery with a dangerous weapon. 370 N.C. 187, 197, 804 S.E.2d 504, 511 (2017). In *Murrell*, the defendant robbed a bank by handing the teller a note demanding cash and informing the teller that he was armed. *Id.* at 188, 804 S.E.2d at 505. After his arrest, the defendant admitted to the robbery and told police that he had a weapon in his possession during the robbery. *Id.* at 190, 804 S.E.2d at 506. The indictment charging the defendant with robbery with a dangerous weapon alleged that he committed the robbery "by way of it reasonably appearing to the victim . . . that a dangerous weapon was in the defendant's possession." *Id.* The defendant was convicted, and he appealed his conviction on the grounds that the indictment was defective—an issue he failed to raise before the trial court. *See id.* The Court of Appeals arrested the judgment, holding that the indictment "failed to name any dangerous weapon that defendant allegedly employed." *Id.* at 191, 804 S.E.2d at 507. This Court affirmed that holding. *Id.* at 197, 804 S.E.2d at 511. Thus, despite the threatening note and the defendant's admission to having a pistol at the time of the robbery, the defendant's armed robbery conviction was vacated.

Murrell is hardly an outlier. Indeed, there is no shortage of convictions in North Carolina that were vacated due to a technical deficiency in an indictment that was not challenged before conviction and that had no bearing on the fairness, integrity, or public reputation of judicial proceedings. *See*, *e.g.*, *State v. Randall*, 228 N.C. App. 282, 748 S.E.2d 775, 2013 WL 3356878 (2013) (unpublished) (vacating a conviction for being a registered sex offender unlawfully on the premises of an elementary school because the indictment failed to specify what his previous offense was or indicate that it involved a victim under the age of sixteen); *State v. Harris*, 219 N.C. App. 590, 597, 724 S.E.2d 633, 638-39 (2012) (same). In *State v. Wynn*, the Court of Appeals vacated a conviction for trafficking

in cocaine by sale. 204 N.C. App. 371, 696 S.E.2d 203, 2010 WL 2163766, at *3 (2010) (unpublished). Evidence presented to the trial court in that case showed that, through video and audio surveillance, police witnessed the defendant selling cocaine to a confidential informant. *Id.* at *1. Almost immediately after the sale, police surrounded the defendant and searched his vehicle. *Id.* Inside the vehicle, police found cocaine, crack cocaine, cash, digital scales with white powder residue, and a cell phone. *Id.* At trial, the defendant did not object to the sufficiency of the indictment, choosing instead to raise that issue for the first time when appealing his conviction. *Id.* at *2. Despite the overwhelming evidence of the sale presented at trial, the Court of Appeals vacated the defendant's conviction for trafficking in cocaine by sale because the indictment failed to allege "the name of the individual to whom Defendant allegedly sold the cocaine," even though the State knew the name of that person. *Id.* at *3; *see also State v. Calvino*, 179 N.C. App. 219, 221-22, 632 S.E.2d 839, 842 (2006) (vacating a conviction for sale and delivery of cocaine on similar grounds).

These decisions clearly illustrate the shortcomings of the common law jurisdictional rule. Compared with alternative approaches to reviewing flawed indictments, as utilized in federal court and the courts of other states, the common law jurisdictional rule unnecessarily hinders the proper administration of justice. This Court can—and should—reconsider its rigid adherence to this archaic rule. Alternatively, I respectfully request that the General Assembly reexamine a rule that perpetuates misaligned incentives and undermines the criminal justice system.

* * *

In summary, the majority opinion misconstrues and mischaracterizes N.C.G.S. § 14-399 to discover an essential element of littering that the text of the statute does not contain to correct an injustice that does not exist. In so doing, the majority engages in an amorphous "holistic inquiry" instead of providing lower courts and practitioners with a meaningful standard for distinguishing elements from affirmative defenses. More fundamentally, the Court misses an opportunity to reevaluate an obsolete rule that detrimentally impacts the administration of justice in our State. I therefore respectfully dissent.

Justice NEWBY joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
TERRY JEROME WILSON

No. 295PA17

Filed 21 December 2018

Search and Seizure—SWAT perimeter—defendant walking through—heavy object in pocket

The search and seizure of defendant did not violate the Fourth Amendment where a SWAT team was conducting a sweep of a house in a dangerous area; defendant walked through the perimeter of SWAT officers stationed around the house, stating that he was going to get his moped; and defendant had a heavy object in his pocket that appeared to an officer to be a firearm. The rule in *Michigan v. Summers*, 452 U.S. 692 (1981), justified the seizure because defendant, who was within the immediate vicinity of the premises to be searched and present during the execution of a search warrant, qualified as an occupant under *Summers* because he posed a real threat to the safe and efficient completion of the search. Further, the search and seizure were supported by individualized suspicion under *Terry v. Ohio*, 392 U.S. 1 (1968).

Justice HUDSON concurring in part and concurring in the result in part.

Justices BEASLEY and MORGAN join in this concurring opinion.

Justice BEASLEY concurring in the result only.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 698 (2017), reversing and vacating a judgment entered on 13 April 2016 and reversing an order denying defendant's motion to suppress entered on 4 May 2016, both by Judge John O. Craig, III in Superior Court, Forsyth County. Heard in the Supreme Court on 27 August 2018.

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

Glenn Gerding, Appellate Defender, and Sterling Rozear, Assistant Appellate Defender, for defendant-appellee.

MARTIN, Chief Justice.

A SWAT team was sweeping a house so that the police could execute a search warrant. Several police officers were positioned around the house to create a perimeter securing the scene. Defendant penetrated this SWAT perimeter, stating that he was going to get his moped. In so doing, he passed Officer Christian, who was stationed at the perimeter near the street. Defendant then kept going, moving up the driveway and toward the house to be searched. Officer Ayers, who was stationed near the house, confronted defendant. After a brief interaction, Officer Ayers searched defendant based on his suspicion that defendant was armed. Officer Ayers found a firearm in defendant's pocket. Defendant, who had previously been convicted of a felony, was arrested and charged with being a felon in possession of a firearm. Before trial, defendant moved to suppress evidence of the firearm on the grounds that the search violated, *inter alia*, his Fourth Amendment right under the United States Constitution "to be secure . . . against unreasonable searches and seizures." U.S. Const. amend. IV. The trial court found that Officer Ayers "had a reasonable and articulable suspicion that the Defendant might have been armed and presently dangerous" and denied defendant's motion. Defendant then pleaded guilty, while reserving his right to appeal the denial of his motion to suppress.

Defendant appealed. The Court of Appeals held that the search was invalid because the trial court's order did not show that the search was supported by reasonable suspicion. *State v. Wilson*, ___ N.C. App. ___, 803 S.E.2d 698, 2017 WL 3480940, at *6 (Aug. 15, 2017) (unpublished). The State petitioned this Court for review, arguing that the Court of Appeals' reliance on the individualized suspicion standard was inconsistent with the decision of the Supreme Court of the United States in *Michigan v. Summers*, 452 U.S. 692, 101 S. Ct. 2587 (1981), and that Officer Ayers nevertheless reasonably suspected that Defendant was armed. We allowed the State's petition for review of this issue.

We hold that the rule in *Michigan v. Summers* justifies the seizure here because defendant, who passed one officer, stated he was going to get his moped, and continued toward the premises being searched, posed a real threat to the safe and efficient completion of the search. *See Bailey v. United States*, 568 U.S. 186, 200-01, 133 S. Ct. 1031, 1041-42 (2013) (citing *Summers*, 452 U.S. at 702-03, 101 S. Ct. at 2594). We also hold that both the search and seizure of defendant were supported by individualized suspicion and thus did not violate the Fourth Amendment. *See Terry v. Ohio*, 392 U.S. 1, 28, 88 S. Ct. 1868, 1883 (1968). We therefore reverse the decision of the Court of Appeals.

The following facts are not in dispute. At around 11:00 p.m. on 21 March 2014, officers of the Winston-Salem Police Department executed a search warrant for the premises at 2300 North Glenn Avenue. This address was a residential lot with a driveway that was about eighty feet long leading to a house and another building. While the initial sweep was being conducted by a SWAT team, several uniformed officers maintained a perimeter at the edge of the property to protect the SWAT team from outside interference. The officers maintaining the perimeter wore uniforms that clearly identified them as police officers, as well as safety equipment such as Kevlar vests and ballistic helmets. In its findings of fact, the trial court stated that the police presence at 2300 North Glenn Avenue that night was such that it would be clear to any passerby that police were engaged in an operation and intended to exclude the general public from the property. Officers Ayers and Christian were among the uniformed officers maintaining the perimeter during the search. Officer Ayers knew the area to be dangerous, having previously responded to discharges of firearms, narcotics activity, and a shooting at the location of the search.

Defendant walked onto the premises while the SWAT team was still actively securing the house. Officer Christian was standing near where the driveway connected to the street, and Officer Ayers was standing farther up the driveway, a few feet from the house. Officer Ayers saw defendant walk past Officer Christian and heard defendant say something about wanting to get his moped. Officer Ayers walked toward defendant and noticed a heavy object in defendant's pocket. Applying his training and expertise, Officer Ayers believed that the object was a firearm based on its size, shape, and apparent weight. Officer Ayers asked defendant if he was carrying any weapons, and defendant said that he was not. Officer Ayers then told defendant that he was going to frisk him for weapons and instructed defendant to turn around. When defendant turned around, Officer Ayers saw the grip of a handgun protruding from defendant's pocket. At this point, Officer Ayers seized the weapon and detained defendant. Defendant was ultimately charged with, and pleaded guilty to, possession of a firearm by a felon.

In its argument to this Court, the State asks us to apply the categorical rule from *Michigan v. Summers* to the facts of this case.[1] In

1. We disagree with the concurring justice's contention that the State waived merits review of the very issue—applicability of the *Summers* rule—that we accepted for discretionary review. The record shows that the trial judge considered whether the police had the authority to stop a person to protect the integrity of a scene during the execution of a search warrant. This inquiry is substantially equivalent to considering whether the

Summers, the Supreme Court of the United States reasoned that "for Fourth Amendment purposes, . . . a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Summers*, 452 U.S. at 705, 101 S. Ct. at 2595. The Supreme Court justified this rule, at least in part, on the basis that "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Id.* at 702-03, 101 S. Ct. at 2594 (citing 2 Wayne R. LaFave, *Search and Seizure* § 4.9, at 150-51 (1978)). The Court has further emphasized three governmental interests that, when taken together, "justify the detention of an occupant who is on the premises during the execution of a search warrant: officer safety, facilitating the completion of the search, and preventing flight." *Bailey*, 568 U.S. at 194, 133 S. Ct. at 1038 (citing *Summers*, 452 U.S. at 702-03, 101 S. Ct. at 2594). The Court has stated that "[a]n officer's authority to detain incident to a search is categorical; it does not depend on the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.' " *Muehler v. Mena*, 544 U.S. 93, 98, 125 S. Ct. 1465, 1470 (2005) (quoting *Summers*, 452 U.S. at 705 n.19, 101 S. Ct. at 2595 n.19).

The Supreme Court has further defined the category covered by the *Summers* rule on two occasions. First, in *Muehler v. Mena*, the plaintiff, suing several police officers, challenged both the use of handcuffs incident to a *Summers* seizure and the two- to three-hour duration of the seizure. *See id.* at 95-96, 125 S. Ct. at 1468-69. In finding the use of handcuffs permissible, the Court again recognized the need for police executing a search warrant to "routinely exercise unquestioned command of the situation." *Id.* at 99, 125 S. Ct. at 1470 (quoting *Summers*, 452 U.S. at 703, 101 S. Ct. at 2594). The Court also held that the seizure was permissible

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Summers rule applies, so the trial judge appears to have determined (and we agree) that the *Summers* grounds for relief "were . . . apparent from context" and were thus preserved for appellate review. N.C. R. App. P. 10(a)(1). Furthermore, the State was the appellee at the Court of Appeals and the *Summers* rule is an alternate basis in law supporting upholding the trial court's decision. Our rules allow an appellee to argue a preserved alternate basis in law on appeal and that is what the State in fact did at the Court of Appeals. *See* N.C. R. App. P. 10(c). Put simply, given that the State prevailed before the trial court and was the appellee before the Court of Appeals, "[t]he question for review is whether the ruling of the trial court was correct" rather than "whether the reason given therefor is sound or tenable." *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 6 41, 650 (citing *State v. Blackwell*, 246 N.C. 642, 644, 90 S.E.2d 867, 869 (1957)), *cert. denied*, 484 U.S. 916, 108 S. Ct. 267, 98 L. Ed. 2d 224 (1987). As a result, the State can raise the *Summers* issue here as the appellant challenging the Court of Appeals decision.

during the entirety of the execution of the search warrant. *See id.* at 100, 125 S. Ct. at 1471 (holding that "the 2- to 3-hour detention in handcuffs . . . [did] not outweigh the government's continuing safety interests").

Second, in *Bailey v. United States*, the Supreme Court was confronted with a defendant who was arrested almost one mile away from the location being searched. *See* 568 U.S. at 194, 133 S. Ct. at 1038. The Court clarified that "[t]he categorical authority to detain incident to the execution of a search warrant must be limited to the immediate vicinity of the premises to be searched." 568 U.S. at 199, 133 S. Ct. at 1041. Ultimately, the Court held that the seizure in *Bailey* was unlawful because the defendant "was detained at a point beyond any reasonable understanding of the immediate vicinity of the premises in question." *Id.* at 201, 133 S. Ct. at 1042. But the Court has identified several factors that courts can consider "to determine whether an occupant was detained within the immediate vicinity of the premises to be searched, including the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location, and other relevant factors." *Id.*

Based on this doctrinal trilogy, we can identify three parts of the *Summers* rule: "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain [(1)] the occupants," *Summers*, 452 U.S. at 705, 101 S. Ct. at 2595, (2) who are "within the immediate vicinity of the premises to be searched," *Bailey*, 568 U.S. at 201, 133 S. Ct. at 1042, and (3) who are present "during the execution of a search warrant," *id.* at 194, 133 S. Ct. at 1038 (citing *Summers*, 452 U.S. at 702-03, 101 S. Ct. at 2594); *see also Muehler*, 544 U.S. at 102, 125 S. Ct. at 1472 (holding that "the officers' detention of Mena in handcuffs during the execution of the search warrant was reasonable and did not violate the Fourth Amendment"). These three parts roughly correspond to the "who," "where," and "when" of a lawful suspicionless seizure incident to the execution of a search warrant.

As we have discussed, the Supreme Court has already provided clear guidance as to the second and third parts of the *Summers* rule. And the application of that guidance to this case is straightforward. No one disputes that defendant was seized during the execution of a search warrant. It is also evident that defendant was seized within the immediate vicinity of the premises being searched. Defendant walked past Officer Christian, who was standing close to where the driveway connected to the street, and proceeded toward Officer Ayers, who was standing near the house being searched. When Officer Ayers stopped him, defendant was well within the lawful limits of the property containing the

house being searched. And, had he not been stopped by police, defendant could easily have accessed the house. Thus the spatial requirements of the *Summers* rule were met here. *See Bailey*, 568 U.S. at 201, 133 S. Ct. at 1042.

As to the remaining part of our formulation of the *Summers* rule, we acknowledge that the Supreme Court has not directly resolved the issue of who qualifies as an "occupant" for the purposes of the *Summers* rule. Nevertheless, using the Supreme Court's reasoning that developed through the trilogy of *Summers* cases as our guidepost, we will now attempt to determine the "proper limit [that] accords with the rationale of the [*Summers*] rule." *Id.*

In *Bailey*, the Supreme Court recognized that the search of a residence "has a spatial dimension" and that the *Summers* rule must be limited "to the area in which an occupant poses a real threat to the safe and efficient execution of a search warrant." *Id.* Notably, this does not confine the *Summers* rule to the premises identified in the search warrant, but extends that rule to the immediate vicinity of those premises. *Id.* The reasoning in *Bailey* comports with the justification in *Summers* because someone who is sufficiently close to the premises being searched *could* pose just as real a threat to officer safety and to the efficacy of the search as someone who is within the premises. Applying the Supreme Court's reasoning in *Bailey* as to the spatial dimension of a search, we believe that a person is an occupant for the purposes of the *Summers* rule if he "poses a real threat to the safe and efficient execution of a search warrant." *Id.*

We believe defendant posed a real threat to the safe and efficient execution of the search warrant in this case. He approached the house being swept, announced his intent to retrieve his moped from the premises, and appeared to be armed. It was obvious that defendant posed a threat to the safe completion of the search. Defendant argues that he was not an *occupant* of the premises being searched in the ordinary sense of the word. Given defendant's actions here, however, it was apparent to Officer Ayers that defendant was attempting to enter the area being searched—or, stated another way, defendant would have *occupied* the area being searched if he had not been restrained. This understanding of occupancy is necessary given the Supreme Court's recognition that officers may constitutionally mitigate the risk of someone entering the premises during a search "by taking routine precautions, for instance by erecting barricades or posting someone on the perimeter or at the door." *Id.* at 195, 133 S. Ct. at 1039. Indeed, if such precautionary measures did not carry with them some categorical authority for police to detain

individuals who attempt to circumvent them, it is not clear how officers could practically "search without fear that occupants, who are on the premises and able to observe the course of the search, [would] become disruptive, dangerous, or otherwise frustrate the search." *Id.* at 195, 133 S. Ct. at 1038.

Defendant's own actions here caused him to satisfy the first part, the "who," of the *Summers* rule. As we have discussed, the second and third parts of the *Summers* rule, the "where" and "when," are also satisfied. The *Summers* rule, therefore, justified the seizure of defendant here.

But, because the Supreme Court has only used the *Summers* rule to justify *detentions* incident to the execution of search warrants, *see*, *e.g.*, *Bailey*, 568 U.S. at 194, 133 S. Ct. at 1038; *Muehler*, 544 U.S. at 98, 125 S. Ct. at 1470, we must determine separately whether the search of defendant's person was justified. In *Terry v. Ohio*, the Supreme Court determined that a brief stop and frisk did not violate a defendant's Fourth Amendment rights when "a reasonably prudent man would have been warranted in believing [the defendant] was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior." 392 U.S. at 28, 88 S. Ct. at 1883. In other words, an officer may constitutionally conduct what has come to be called a *Terry* stop if that officer can "reasonably . . . conclude in light of his experience that criminal activity may be afoot." *Id.* at 30, 88 S. Ct. at 1884. "The reasonable suspicion standard is a 'less demanding standard than probable cause' and 'a considerably less [demanding standard] than preponderance of the evidence.' " *State v. Bullock*, 370 N.C. 256, 258, 805 S.E.2d 671, 674 (2017) (alteration in original) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673, 675-76 (2000)). To meet this standard, an officer "must be able to point to specific and articulable facts" and to "rational inferences from those facts" justifying the search or seizure at issue. *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880. "To determine whether reasonable suspicion exists, courts must look at 'the totality of the circumstances' as 'viewed from the standpoint of an objectively reasonable police officer.' " *State v. Johnson*, 370 N.C. 32, 34-35, 803 S.E.2d 137, 139 (2017) (citation omitted) (first quoting *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 695 (1981); and then quoting *Ornelas v. United States*, 517 U.S. 690, 696, 116 S. Ct. 1657, 1661-62 (1996)).

"When reviewing a ruling on a motion to suppress, we analyze whether the trial court's 'underlying findings of fact are supported by competent evidence . . . and whether those factual findings in turn support the [trial court's] ultimate conclusions of law.' " *Bullock*, 370 N.C.

at 258, 805 S.E.2d at 674 (alterations in original) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)).

Here, Officer Ayers was the sole witness who testified at the suppression hearing, and the facts that he testified to were uncontested. Based on that testimony, the trial court found that the police were conducting a search at a location where there had been numerous reports of gun violence and were openly maintaining a perimeter to prevent public access to the property in question during the search. Defendant then approached the premises during the search, passing one officer in a manner that "was very unusual for a member of the general public." Officer Ayers approached defendant and observed that defendant had something in his pocket. Based on the size, weight, and shape of the object, Officer Ayers believed that the object was a gun or other weapon. Defendant told Officer Ayers that he was there to get his moped and that he was not armed. The trial court concluded that "a reasonable and prudent police officer would find [defendant's behavior] unusual" and that, based on the totality of these circumstances, Officer Ayers "had a reasonable and articulable suspicion that the Defendant might have been armed and presently dangerous."

We find no error in the trial court's reasoning. Defendant breached a police perimeter during an active SWAT team sweep. Based on his training, experience, and observations, it was reasonable for Officer Ayers to suspect that defendant was armed. Defendant then appeared to lie about being armed. Given the circumstances of the ongoing search and defendant's actions, it was reasonable to suspect that defendant was there to attack police officers on the premises or otherwise violently interfere with the execution of the search warrant. Because any such violence would constitute criminal activity, Officer Ayers had reasonable suspicion, based on these circumstances, that criminal activity was afoot. *See Terry*, 392 U.S. at 30, 88 S. Ct. at 1884. Thus, the trial court correctly denied defendant's motion to suppress.

In this case, the Court of Appeals erred by focusing solely on one finding of fact instead of the totality of the circumstances, as *Terry* requires. *See Johnson*, 370 N.C. at 34-35, 803 S.E.2d at 139. The Court of Appeals correctly stated that " 'unusual' behavior does not necessarily equal behavior leading a reasonable officer to believe criminal activity was afoot." *Wilson*, 2017 WL 3480940, at *5. This reasoning, though, does not take into account the *particular* unusual behavior at issue here and the totality of the circumstances surrounding it. These circumstances include police officers having responded to shootings at and near the house in the past, Officer Ayers' observation that defendant was likely

armed, and defendant's apparent lie about possessing a weapon.[2] Combining these circumstances with defendant's unusual choice to cross a police perimeter to purportedly retrieve his moped during an active SWAT team sweep, there were more than enough facts to establish a reasonable suspicion that criminal activity may have been afoot. *See Terry*, 392 U.S. at 30, 88 S. Ct. at 1884. The warrantless detention and search of defendant therefore did not violate the Fourth Amendment.

For the reasons stated above, we reverse the decision of the Court of Appeals.

REVERSED.

Justice HUDSON, concurring in part and concurring in the result in part.

Although I agree with the majority's decision that defendant's seizure was justified here because the circumstances constituted reasonable suspicion that criminal activity was afoot under the United States Supreme Court's decision in *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884, 20 L. Ed. 2d 889, 911 (1968), and that our granting of discretionary review allowed the State to argue whether *Michigan v. Summers*, 452 U.S. 692, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981), applies, I disagree with the majority on four specific points. First, the majority need not have applied *Summers* when the constitutionality of the seizure and subsequent search is wholly resolved by *Terry*. Second, the trial court's colloquy with defendant's counsel during the hearing on defendant's motion to dismiss did not preserve the *Summers* issue for our review, because the interchange was not "substantially equivalent" to a *Summers* analysis. Third, the "*Summers* grounds for relief" were not "apparent from the context" at the trial court, and therefore, the *Summers* issue was not adequately preserved for review pursuant to Rule 10(a)(1) of our Rules of Appellate Procedure. *See* N.C. R. App. P. 10(a)(1). Finally, in my view our decision in *State v. Austin* does not stand for the principle that the State, as an appellee before the Court of Appeals, can bring an unpreserved constitutional issue for the first time on appeal. 320 N.C. 276, 357 S.E. 2d 641, *cert. denied*, 484 U.S. 916, 108 S. Ct. 267, 98 L. Ed. 2d 224 (1987).

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2. The fact that defendant was actually lying is not relevant to a finding of reasonable suspicion because the lie was not confirmed until after the search. However, the fact that Officer Ayers had a reasonable suspicion that defendant was armed means that he also had a reasonable suspicion that defendant was lying when defendant said that he was not armed.

Concerning the application of *Summers* to the facts of this case, I fully agree with Justice Beasley's concurring opinion that "[b]ecause the instant case is fully resolved by application of the familiar and well-settled *Terry* standard, I would not extend the *Summers* rule to justify the search of defendant." In its opinion, the majority also concluded that *Terry* justified both the seizure and the search of defendant. Therefore, it was unnecessary to apply *Summers* to the facts here.

With regard to preservation, we have long held that "[c]onstitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Davis*, 364 N.C. 297, 301, 698 S.E. 2d 65, 67 (2010) (alteration in original) (quoting *State v. Tirado*, 358 N.C. 551, 571, 599 S.E. 2d 515, 529 (2004), *cert. denied*, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005)). The majority asserts that the *Summers* issue was adequately raised in the trial court by "the trial judge consider[ing] whether the police had authority to stop a person to protect the integrity of a scene during the execution of a search warrant." The majority reasoned that "[t]his inquiry is substantially equivalent to considering whether the *Summers* rule applies, so the trial judge appears to have determined (and we agree) that the *Summers* grounds for relief 'were . . . apparent from context.' "

I do not agree that the trial judge's inquiry with defense counsel at the hearing on defendant's motion to suppress substantially equated to the *Summers* issue. The inquiry to which the majority references does not demonstrate that the *Summers* issue was "raised and passed on" at the hearing on defendant's motion to suppress. *Davis*, 364 N.C. at 301, 698 S.E. 2d at 67 (quoting *Tirado*, 358 N.C. at 571, 599 S.E. 2d at 529). The majority refers us to a section of the trial transcript in which the trial court questioned the defendant's attorney in the following manner:

> THE COURT: Right. But isn't -- if he -- if Mr. Wilson's walking up the driveway and part of the purpose for [the officer] telling him to stop is to protect the integrity of the scene where the search warrant is taking place, that's a sufficient reason just to tell him to stop where he is, isn't it?
>
> I mean, if there's an ongoing search of the premises, you don't want a citizen who may or may not be related to the premises just walking on up there and starting to look for his moped while they're trying to conduct the search.

The majority asserts that "this inquiry is substantially equivalent to considering whether the *Summers* rule applied." It is not. It is important to note that the trial court did not mention *Summers* in this excerpt, and

although it inquired about the effect that the execution of the search warrant might have on the propriety of the stop, the trial court did not make any findings of fact or conclusions of law on these matters.

Also, to the extent the trial court engaged in analysis during this colloquy, the exchange was not "substantially equivalent" to a *Summers* analysis. In *Summers*, the Court considered: (1) that "[a] neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had authorized a substantial invasion of the privacy of the persons who resided there," 452 U.S. at 701, 101 S. Ct. at 2593, 69 L. Ed. 2d at 349; (2) "the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found," *id.* at 702, 101 S. Ct. at 2594, 69 L. Ed. 2d at 349; (3) that "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation," *id.* at 702-03, 101 S. Ct. at 2594, 69 L. Ed. 2d at 350 (citation omitted); (4) that "the orderly completion of the search may be facilitated if the occupants of the premises are present," *id.* at 703, 101 S. Ct. at 2594, 69 L. Ed. 2d at 350; and (5) that "[t]he connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant," *id.* at 703-04, 101 S. Ct. at 2594-95, 69 L. Ed. 2d at 350.

In *Bailey v. United States*, the Court seemingly limited the interests identified in *Summers* to: (1) whether the individual detained was an occupant, (2) officer safety, (3) facilitating the completion of the search, and (3) preventing flight. *See Bailey*, 568 U.S. 186, 195, 133 S. Ct. 1031, 1038, 185 L. Ed. 2d 19, 29 (2013). In addition, *Bailey* expressly limited the holding in *Summers* to cases in which the person was detained within "the immediate vicinity of the premises to be searched." *Id.* at 199, 133 S. Ct. at 1041, 185 L. Ed. 2d at 32.

Here, even if the trial court's inquiry could be construed to have considered and made findings on any of the *Summers* factors, the court certainly did not make a finding regarding whether defendant was an occupant of the premises being searched. The trial court merely stated that "I mean, if there's an ongoing search of the premises, you don't want a citizen who *may* or *may not* be related to the premises just walking up there." As such, the trial court, in its inquiry, made no findings on whether or not defendant was an occupant of the premises.

Whether the person detained is an occupant of the premises being searched is an indispensable aspect of the *Summers* analysis. *See Bailey*, 568 U.S. at 200, 133 S. Ct. at 1041, 185 L. Ed. 2d at 32-33 (stating that in *Summers* the Court recognized that "[b]ecause the detention occurs

in the *individual's own home*, 'it could add only minimally to the public stigma associated with the search itself and would involve neither the inconvenience nor the indignity associated with a compelled visit to the police station' " (emphasis added) (quoting *Summers*, 452 U.S. at 702, 101 S. Ct. at 2594, 69 L. Ed. 2d at 349)); *Muehler v. Mena*, 544 U.S. 93, 98, 125 S. Ct. 1465, 1469, 161 L. Ed. 2d 299, 306 (2005) ("In *Michigan v. Summers*, 452 U.S. 692 (1981), we held that officers executing a search warrant for contraband have the authority 'to detain the occupants of the premises while a proper search is conducted.' " (quoting *Summers*, 452 U.S. at 705, 101 S. Ct. at 2595, 69 L. Ed. 2d at 351)); *Summers*, 452 U.S. at 701, 101 S. Ct. at 2593, 69 L. Ed. 2d at 349 ("Of *prime importance* in assessing the intrusion is the fact that the police had obtained a warrant to search *respondent's house* for contraband.") emphases added)). As a result, by failing to find whether defendant was an occupant of the premises being searched, the trial court, in its inquiry, failed to engage in an analysis equivalent to *Summers*. Therefore, in my view "the *Summers* grounds for relief" are not "apparent" from the trial court's inquiry. N.C. R. App. P. 10(a)(1).

The "*Summers* grounds for relief" are also not "apparent" from the trial court's order denying defendant's motion to suppress. N.C. R. App. P. 10(a)(1). In fact, the order demonstrates that the *Summers* issue was not "raised and passed on by the trial court." *Davis*, 364 N.C. at 301, 698 S.E. 2d at 67 (quoting *Tirado*, 358 N.C. at 571, 599 S.E. 2d at 529). Specifically, the trial court, in its conclusions of law, analyzed defendant's detention only under *Terry v. Ohio* and neither defendant nor the trial court mentioned *Summers*. Further, the order contains no findings relevant to the rule discussed by the majority that a person is an occupant for the purposes of *Summers* when the person "poses a real threat to the safe and efficient execution of a search warrant." *Bailey*, 568 U.S. at 201, 133 S. Ct. at 1042, 185 L. Ed. 2d at 33. Specifically, the trial court's order made no findings concerning whether defendant was a threat. Therefore, the majority's assertions that "[w]e believe defendant posed a real threat to the safe and efficient execution of the search warrant in this case," and "[i]t was obvious that the defendant posed a threat" are not reflected by findings or conclusions in the actual order.

Lastly, contrary to the majority's conclusion, our decision in *Austin* does not stand for the principle that the State, as the appellee before the Court of Appeals, can argue an unpreserved constitutional issue. The majority relies on a quote of *Austin* in which we stated that "[t]he question for review is whether the ruling of the trial court was correct and not whether the reason given therefor is sound or tenable." *Austin*, 320

N.C. at 290, 357 S.E. 2d at 650 (citing *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E. 2d 867, 869 (1957)). Although this language may appear to support the majority's assertion, this Court in *Austin* did not allow a party to bring an unpreserved constitutional argument on appeal.

In *Austin*, defendant challenged the trial court's denial of his motion to suppress, arguing that the trial judge applied an incorrect legal standard on the issue of whether intoxication invalidated his voluntary consent to a search. *See id.* at 289-90, 357 S.E. 2d at 649-650. In denying defendant's motion to suppress, the trial court concluded that defendant's intoxication did not invalidate his consent to the search, because it did not "amount[ ] to a mania as to lead the user to be unconscious of the meaning of his words." *Id.* at 289, 357 S.E. 2d at 650. Defendant contended that this was an improper legal standard. *Id.* at 290, 357 S.E. 2d at 650. Rejecting defendant's argument, this Court reasoned that "[a]ssuming arguendo that the trial court's reasoning for denying defendant's motion to suppress was incorrect, we are not required on this basis alone to determine that the ruling was erroneous." *Id.* at 290, 357 S.E. 2d at 650 (citing *State v. Gardner*, 316 N.C. 605, 342 S.E. 2d 872 (1986)). We added that "[a] correct decision of a lower court will not be disturbed on review simply because an insufficient or superfluous reason is assigned. The question for review is whether the ruling of the trial court was correct and not whether the reason given therefor is sound or tenable." *Id.* at 290, 357 S.E. 2d at 650 (citing *Blackwell*, 246 N.C. at 644, 99 S.E. 2d at 869). We concluded, ultimately, that "[t]he crucial inquiry for this Court is admissibility and whether the ultimate ruling was supported by the evidence." *Id.* at 290, 357 S.E. 2d at 650.

The facts of *Austin*, however, are distinguishable from the facts here, because in *Austin* defendant explicitly raised the issue of the voluntariness of his consent to the search before the trial court. *See id.* at 290, 357 S.E. 2d at 650 ("[D]efendant challenged the voluntariness of his consent on two grounds: his alleged intoxication; and his low intelligence . . . ."). Therefore, *Austin* did not involve an unpreserved constitutional argument. *See id.* at 290, 357 S.E. 2d at 650.

Here, as demonstrated above, the trial court's inquiry with defendant's counsel did not preserve the *Summers* issue. Further, as demonstrated above, neither the trial court's inquiry, nor its order denying defendant's motion to suppress made the *Summers* issue "apparent from the context." N.C. R. App. P. 10(a)(1). Moreover, the *Summers* issue was not "apparent" from the State's argument before the trial court on defendant's motion to suppress. N.C. R. App. P. 10(a)(1). The State asserted that the case was "just as the thrust of the written motion

seems to indicate, purely a *Terry* issue." The State then proceeded to frame its constitutional claim as a *Terry* issue without ever mentioning *Summers*. As a result, the majority cannot rely on *Austin* for the principle that an unpreserved constitutional issue can be argued for the first time on appeal. *Austin* did not abrogate our general rule that "[c]onstitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *Davis*, 364 N.C. at 301, 698 S.E. 2d at 67 (alteration in original) (quoting *Tirado*, 358 N.C. at 571, 599 S.E. 2d at 529).

For the above reasons, I agree with the majority that defendant's detention was justified under *Terry*, and that our granting of the State's petition for discretionary review allowed it to argue *Summers* before this Court. However, I disagree with the majority's application of *Summers* here because *Terry* wholly resolved the issue of whether the seizure and search of defendant were constitutional, the trial judge's colloquy with defense counsel did not adequately preserve the *Summers* issue, the *Summers* issue was not "apparent from the context" of the discussion in the trial court as Rule 10(a)(1) of our Rules of Appellate Procedure contemplates, and our decision in *Austin* does not stand for the principle that an appellee before the Court of Appeals can bring an unpreserved constitutional issue for the first time on appeal. Therefore, I respectfully concur in part and concur in the result in part.

Justice BEASLEY and Justice MORGAN join in this concurring opinion.

Justice BEASLEY, concurring in the result only.

I join in Justice Hudson's concurring opinion. Nonetheless, I write separately to make clear that, regardless of whether the State's *Summers* argument was preserved for appellate review, I would decline to address it in this case. Because the instant case is fully resolved by application of the familiar and well-settled *Terry* standard, I would not extend the *Summers* rule to justify the search of defendant. Thus, for the reasons stated below, I concur only in the result reached by the majority.

The majority concludes that "a person is an occupant for the purposes of the *Summers* rule if he 'poses a real threat to the safe and efficient execution of a search warrant.' " *Majority Opinion* at 9 (quoting *Bailey v. United State*s, 568 U.S. 186, 201, 185 L. Ed. 2d 19, 33 (2013)). In addition to being only tangentially related to the rationales underlying *Summers*, this definition suffers from both overbreadth and vagueness.

In *Michigan v. Summers*, the Supreme Court held "that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." 452 U.S. 692, 705, 69 L. Ed. 2d 340, 351 (1981) (footnotes omitted). The Court has not defined the term "occupants" for purposes of the *Summers* doctrine, but it did explicitly state the rationales justifying the categorical rule: (1) the risk of the occupant fleeing the searched premises if contraband is found; (2) the risk of harm to law enforcement in the event of "sudden violence or frantic efforts to conceal or destroy evidence,"[1] and (3) the possibility that "the orderly completion of the search may be facilitated" by the presence of the occupants of the premises. *Id.* at 702-03, 69 L. Ed. 2d at 349-50.

Given the Court's stated justifications for *Summers*'s categorical rule, the term "occupant" can most reasonably be interpreted as a resident of the searched premises or a person physically on the premises that are the subject of the search warrant at the time the search is commenced.[2] A nonresident arriving on the scene after the search has commenced has no reason to flee upon the discovery of contraband, to attempt to dispose of evidence, to interfere with the search, or to harm law enforcement officers because, unlike a resident or a person found at the scene when the officers arrive to conduct the search, evidence of wrongdoing discovered on the premises could not reasonably be attributed to him.[3] Furthermore, the presence of a nonresident could

1. Notably, the Court did not rely on a generalized officer safety rationale, but on the specific threat to officers presented by the presence of an individual attempting to destroy or conceal evidence—someone who would reasonably be implicated in criminal activity should contraband be found.

2. Such an interpretation would also be consistent with the plain meaning of the word, *see Occupant*, *Black's Law Dictionary* (10th ed. 2014) ("1. Someone who has possessory rights in, or control over, certain property or premises. 2. Someone who acquires title by occupancy."); *Occupant*, *The American Heritage Dictionary of the English Language* 1215 (4th ed. 2000) ("1. One that occupies a position or place . . . 2. One who has certain legal rights to or control over the premises occupied; a tenant or owner. 3. *Law* One that is the first to take possession of something previously unowned."), and with the Court's later language on the topic, *see Bailey v. United States*, 568 U.S. 186, 201, 185 L. Ed. 2d 19, 33-34 (2013) (noting that one factor to consider in determining whether a person is subject to *Summers*'s categorical rule is "whether the occupant was within the line of sight of *his dwelling*" (emphasis added)). The majority's definition renders the word "occupant" interchangeable with terms no more specific than "person" or "individual."

3. That a nonresident who arrives on the scene after the search commences is not categorically subject to suspicionless detention does not mean he cannot be detained. As in the instant case, law enforcement officers may detain an individual when the totality of the circumstances supports reasonable suspicion that criminal activity is afoot, and officers may search him when they reasonably believe he is armed. *See Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1968).

do little to facilitate the search—a nonresident would not be able to open locked doors or containers and would have no interest in avoiding "the use of force that is not only damaging to property but may also delay the completion of the [search]," as contemplated by the Court in *Summers*. *See id.* at 703, 69 L. Ed. 2d at 350. Moreover, the existence of a valid search warrant—the foundation on which *Summers*'s categorical rule is built—is premised on a judicial officer's determination that "police have probable cause to believe that *someone in the home* is committing a crime." *Id.* at 703, 69 L. Ed. 2d at 350 (emphasis added). That finding of probable cause does not extend reasonably to a nonresident or a person who is not in the home during the search.

The majority's definition of "occupant" requires no connection whatsoever to the property that is the subject of a search warrant or the suspected criminal activity—only that the person detained "poses a real threat to the safe and efficient execution" of the warrant. It is not unusual for a crowd of curious onlookers to gather along a police perimeter. How an officer executing a search warrant might differentiate a person posing a real threat from a neighbor or an innocent bystander is unclear, as any person in the vicinity of a police search could potentially interfere with the search or harm officers. Moreover, if an officer were able to conclude that a person posed such a threat, invocation of *Summers*'s categorical rule would be unnecessary because, as was the case here, the detention and search of that person would be justified by *Terry*.

The majority contends that law enforcement officers' authority to "mitigate the risk of someone entering the premises during a search by taking routine precautions, for instance by erecting barricades or posting someone on the perimeter or at the door," gives rise to "some categorical authority for police to detain individuals who attempt to circumvent them." *Majority Opinion* at 9-10 (citations omitted). The power to exclude, however, is not the same as the power to detain; no Fourth Amendment issue arises from an individual's mere exclusion from an area. Law enforcement officers can, and routinely do, exclude members of the public from geographical areas for a variety of reasons, including during the execution of search warrants. The proper response when a person attempts to circumvent officers' instructions is an entirely separate question from whether all individuals in the vicinity of an active search—any of whom could conceivably pose a threat to officers—should be subject to suspicionless detention. Where, as here, an individual *does* attempt to bypass a police perimeter, his suspicious behavior likely justifies a *Terry* stop. Thus, the majority's extension

of *Summers*'s categorical rule dramatically expands the government's power over individuals but provides no additional protection for officers in the field.

Accordingly, I concur only in today's result.

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

12 DECEMBER 2018

023A18	State v. Angela Marie Rankin	Def's Motion for Appropriate Relief (COA17-396)	Dismissed as moot
140PA18	State v. Robert Dwayne Lewis	1. Joint Motion for Extension of Time to File Brief 2. Joint Motion to Consolidate	1. Allowed 2. Allowed
141PA18	State v. Robert Dwayne Lewis	1. Joint Motion for Extension of Time to File Brief 2. Joint Motion to Consolidate	1. Allowed 2. Allowed
409PA17	Cooper v. Berger, et al.	Defs' Motion to Strike Portions of Reply Brief	Denied

JUDICIAL STANDARDS COMMISSION
STATE OF NORTH CAROLINA

FORMAL ADVISORY OPINION: 2018-01

December 17, 2018

QUESTION:

May a judge serve as a manager in a real estate investment limited liability company (LLC) for the purpose of managing the judge's personal real estate investments or those of the judge's close family members?

CONCLUSION:

Yes. Canon 5C(2) of the North Carolina Code of Judicial Conduct allows judges to hold and manage their personal financial and real estate investments and the financial and real estate investments of "the judge's spouse, children, or parents . . . ." Canon 5C(2) further provides that judges may also engage "in other remunerative activity not otherwise inconsistent with the provisions of this Code but should not serve as an officer, director or manager of any business." This language creates a clear distinction between managing a judge's real estate investments and "other remunerative activity." While a judge may engage in "other remunerative activity," the language of Canon 5C(2) imposes an additional restriction that a judge may not serve as an "officer, director or manager of any business." As such, when managing a judge's personal or family real estate investments, a judge may create and serve as a manager of a LLC created for that purpose, subject to any other applicable limitations imposed in Canon 5C. If engaging in other types of remunerative activity to generate outside income, however, a judge may not serve as an officer, director or manager of a business.

DISCUSSION:

Canon 5C(2) of the North Carolina Code of Judicial Conduct provides that ". . . a judge may hold and manage the judge's own personal investments or those of the judge's spouse, children, or parents, including real estate investments, and may engage in other remunerative activity not otherwise inconsistent with the provisions of this Code but should not serve as an officer, director or manager of any business." This language distinguishes between a judge's activity in managing the judge's personal or family real estate investments and "other remunerative activity." The restriction on serving as an officer, director or manager is indicative of a restriction on the ability of a judge to earn outside income from sources other than the judge's personal financial or real estate investments. For example, the North Carolina Supreme Court

in *In re Belk*, 364 N.C. 114, 691 S.E.2d 685 (2010) made clear that the restriction in Canon 5C(2) strictly prohibits a judge from serving as on the board of directors of a for-profit business corporation. *See id.* at 123-24, 691 S.E.2d at 692.

Although a judge may serve as the manager of a real estate investment LLC that manages the personal real estate interests of the judge or the judge's close family members, such service continues to be limited by the other applicable provisions of Canon 5C. Even with permitted business and financial dealings, judges must "refrain from financial and business dealings" that either reflect adversely on the judge's impartiality, interfere with the proper performance of the judge's judicial duties, exploit the judge's judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves. *See* Canon 5C(1). Based on these restrictions, a judge should not voluntarily serve as a manager of a LLC formed to manage the judge's real estate investments if other members are available who could otherwise serve in that role, and a judge should avoid that role when practicable in order to ensure that serving as a manager does not create the appearance of exploiting the judge's judicial position or unnecessarily adding business obligations where other members of the LLC could easily undertake those same duties. A judge should also not serve as a manager of a real estate investment LLC formed for the purpose of holding and managing the judge's personal or family real estate interests if doing so would create a need for frequent disqualification. *See* Canon 5C(3).

The Commission distinguishes this conclusion from Formal Advisory Opinion 2009-01, which addressed the question of whether a judge could remain the sole member and manager of a Professional Limited Liability Company (PLLC) established for the practice of law if the PLLC was placed in "inactive status." The Commission distinguished the language in Canon 5C(2) allowing judges to hold and manage personal investments from the language allowing judges to engage in "other remunerative activity" so long as not serving "as an officer, director or manager" for a business concern. In the case of a PLLC formed for the purpose of engaging in the practice of law, the Commission also notes that under Canon 5F, judges are prohibited from engaging in the practice of law and thus should not serve as a manager of an entity created solely for that purpose.

References:

Canon 5C and Canon 5F of the North Carolina Code of Judicial Conduct
In re Belk, 364 N.C. 114, 691 S.E.2d 685 (2010)
Formal Advisory Opinion No. 2009-01

ORDER AMENDING THE RULES OF APPELLATE PROCEDURE

Pursuant to Article IV, Section 13(2), of the Constitution of North Carolina, the Court hereby amends the North Carolina Rules of Appellate Procedure. This order affects Rules 3, 3.1, 4, 9, 11, 12, 13, 18, 26, 28, 30, 37, 41, 42 (new) and Appendixes A, B, and D.

* * *

Rule 3. Appeal in Civil Cases—How and When Taken

(a) **Filing the Notice of Appeal**. Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subsection (c) of this rule.

(b) **Special Provisions**. Appeals in the following types of cases shall be taken in the time and manner set out in the General Statutes and Rules of Appellate Procedure sections noted:

(1) Juvenile matters pursuant to N.C.G.S. § 7B-2602~~; the identity of persons under the age of eighteen at the time of the proceedings in the trial division shall be protected pursuant to Rule 3.1(b).~~

(2) Appeals pursuant to N.C.G.S. § 7B-1001 shall be subject to the provisions of Rule 3.1.

(c) **Time for Taking Appeal**. In civil actions and special proceedings, a party must file and serve a notice of appeal:

(1) within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure; or

(2) within thirty days after service upon the party of a copy of the judgment if service was not made within that three-day period; provided that

(3) if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party, as provided in subdivisions (1) and (2) of this subsection (c).

In computing the time for filing a notice of appeal, the provision for additional time after service by mail in Rule 27(b) of these rules and Rule 6(e) of the Rules of Civil Procedure shall not apply.

If timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within ten days after the first notice of appeal was served on such party.

(d) **Content of Notice of Appeal**. The notice of appeal required to be filed and served by subsection (a) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(e) **Service of Notice of Appeal**. Service of copies of the notice of appeal may be made as provided in Rule 26.

* * *

~~Rule 3.1. Appeal in Qualifying Juvenile Cases—How and When Taken; Special Rules~~

~~(a) **Filing the Notice of Appeal**. Any party entitled by law to appeal from a trial court judgment or order rendered in a case involving termination of parental rights and issues of juvenile dependency or juvenile abuse and/or neglect, appealable pursuant to N.C.G.S. § 7B-1001, may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in the time and manner set out in Chapter 7B of the General Statutes of North Carolina. Trial counsel or an appellant not represented by counsel shall be responsible for filing and serving the notice of appeal in the time and manner required. If the appellant is represented by counsel, both the trial counsel and appellant must sign the notice of appeal, and the appellant shall cooperate with counsel throughout the appeal. All such appeals shall comply with the provisions set out in subsection (b) of this rule and, except as hereinafter provided by this rule, all other existing Rules of Appellate Procedure shall remain applicable.~~

~~(b) **Protecting the Identity of Juveniles**. For appeals filed pursuant to this rule and for extraordinary writs filed in cases to which this rule applies, the identity of involved persons under the age of eighteen at the time of the proceedings in the trial division (covered juveniles) shall be referenced only by the use of initials or pseudonyms in briefs, petitions, and all other filings, and shall be similarly redacted from all documents, exhibits, appendixes, or arguments submitted with such filings. If the parties desire to use pseudonyms, they shall stipulate in~~

~~the record on appeal to the pseudonym to be used for each covered juvenile. Courts of the appellate division are not bound by the stipulation, and case captions will utilize initials. Further, the addresses and social security numbers of all covered juveniles shall be excluded from all filings and documents, exhibits, appendixes, and arguments. In cases subject to this rule, the first document filed in the appellate courts and the record on appeal shall contain the notice required by Rule 9(a).~~

~~The substitution and redaction requirements of this rule shall not apply to settled records on appeal; supplements filed pursuant to Rule 11(c); objections, amendments, or proposed alternative records on appeal submitted pursuant to Rule 3.1(c)(2); and any verbatim transcripts submitted pursuant to Rule 9(c). Pleadings and filings not subject to substitution and redaction requirements shall include the following notice on the first page of the document immediately underneath the title and in uppercase typeface: FILED PURSUANT TO RULE [3(b)(1)] [3.1(b)] [4(e)]; SUBJECT TO PUBLIC INSPECTION ONLY BY ORDER OF A COURT OF THE APPELLATE DIVISION.~~

~~Filings in cases governed by this rule that are not subject to substitution and redaction requirements will not be published on the Court's electronic-filing site and will be available to the public only with the permission of a court of the appellate division. In addition, the juvenile's address and social security number shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c).~~

~~(c) **Expediting Filings**. Appeals filed pursuant to these provisions shall adhere strictly to the expedited procedures set forth below:~~

~~(1) **Transcripts**. Within one business day after the notice of appeal has been filed, the clerk of superior court shall notify the court-reporting coordinator of the Administrative Office of the Courts of the date the notice of appeal was filed and the names of the parties to the appeal and their respective addresses or addresses of their counsel. Within two business days of receipt of such notification, the court-reporting coordinator shall assign a transcriptionist to the case.~~

~~When there is an order establishing the indigency of the appellant, the transcriptionist shall produce and deliver a transcript of the designated proceedings to the appellant and provide copies to the office of the clerk of the Court of Appeals and to the respective parties to the appeal at the addresses provided within thirty-five days from the date of assignment.~~

~~When there is no order establishing the indigency of the appellant, the appellant shall have ten days from the date that the transcriptionist is assigned to make written arrangements with the assigned transcriptionist for the production and delivery of the transcript of the designated proceedings. If such written arrangement is made, the transcriptionist shall produce and deliver a transcript of the designated proceedings to the appellant and provide copies to the office of the clerk of the Court of Appeals and to the respective parties to the appeal at the addresses provided within forty-five days from the date of assignment. The non-indigent appellant shall bear the cost of the appellant's copy of the transcript.~~

~~When there is no order establishing the indigency of the appellee, the appellee shall bear the cost of receiving a copy of the requested transcript.~~

~~Motions for extensions of time to produce and deliver transcripts are disfavored and will not be allowed by the Court of Appeals absent extraordinary circumstances.~~

~~(2) **Record on Appeal**. Within ten days after receipt of the transcript, the appellant shall prepare and serve upon all other parties a proposed record on appeal constituted in accordance with Rule 9. Trial counsel for the appealing party shall have a duty to assist appellate counsel, if separate counsel is appointed or retained for the appeal, in preparing and serving a proposed record on appeal. Within ten days after service of the proposed record on appeal upon an appellee, the appellee may serve upon all other parties:~~

~~a. a notice of approval of the proposed record;~~

~~b. specific objections or amendments to the proposed record on appeal; or~~

~~c. a proposed alternative record on appeal.~~

~~If the parties agree to a settled record on appeal within twenty days after receipt of the transcript, the appellant shall file three legible copies of the settled record on appeal in the office of the clerk of the Court of Appeals within five business days from the date the record was settled. If all appellees fail within the times allowed them either to serve notices of approval or to serve objections, amendments, or proposed alternative records on appeal, the appellant's proposed record on appeal shall constitute~~

~~the settled record on appeal, and the appellant shall file three legible copies thereof in the office of the clerk of the Court of Appeals within five business days from the last date upon which any appellee could have served such objections, amendments, or proposed alternative record on appeal. If an appellee timely serves amendments, objections, or a proposed alternative record on appeal and the parties cannot agree to the settled record within thirty days after receipt of the transcript, each party shall file three legible copies of the following documents in the office of the clerk of the Court of Appeals within five business days after the last day upon which the record can be settled by agreement:~~

~~a. the appellant shall file his or her proposed record on appeal; and~~

~~b. an appellee shall file his or her objections, amendments, or proposed alternative record on appeal.~~

~~No counsel who has appeared as trial counsel for any party in the proceeding shall be permitted to withdraw, nor shall such counsel be otherwise relieved of any responsibilities imposed pursuant to this rule, until the record on appeal has been filed in the office of the clerk of the Court of Appeals as provided herein.~~

~~(3) **Briefs.** Within thirty days after the record on appeal has been filed with the Court of Appeals, the appellant shall file his or her brief in the office of the clerk of the Court of Appeals and serve copies upon all other parties of record. Within thirty days after the appellant's brief has been served on an appellee, the appellee shall file his or her brief in the office of the clerk of the Court of Appeals and serve copies upon all other parties of record. An appellant may file and serve a reply brief as provided in Rule 28(h). Motions for extensions of time to file briefs will not be allowed absent extraordinary circumstances.~~

~~(d) **No-Merit Briefs**. In an appeal taken pursuant to N.C.G.S. § 7B-1001, if, after a conscientious and thorough review of the record on appeal, appellate counsel concludes that the record contains no issue of merit on which to base an argument for relief and that the appeal would be frivolous, counsel may file a no-merit brief. In the brief, counsel shall identify any issues in the record on appeal that might arguably support the appeal and shall state why those issues lack merit or would not alter the ultimate result. Counsel shall provide the appellant with a~~

~~copy of the no-merit brief, the transcript, the record on appeal, and any Rule 11(c) supplement or exhibits that have been filed with the appellate court. Counsel shall also advise the appellant in writing that the appellant has the option of filing a pro se brief within thirty days of the date of the filing of the no-merit brief and shall attach to the brief evidence of compliance with this subsection.~~

~~(e) **Calendaring Priority**. Appeals filed pursuant to this rule will be given priority over other cases being considered by the Court of Appeals and will be calendared in accordance with a schedule promulgated by the Chief Judge. Unless otherwise ordered by the Court of Appeals, cases subject to the expedited procedures set forth in this rule shall be disposed of on the record and briefs and without oral argument.~~

Rule 3.1. Review in Cases Governed by Subchapter I of the Juvenile Code

(a) **Scope.** This rule applies in appeals filed under N.C.G.S. § 7B-1001 and in cases certified for review by the appellate courts in which the right to appeal under this statute has been lost.

(b) **Filing the Notice of Appeal.** Any party entitled to an appeal under N.C.G.S. § 7B-1001(a) and (a1) may take appeal by filing notice of appeal with the clerk of superior court and serving copies of the notice on all other parties in the time and manner set out in N.C.G.S. § 7B-1001(b) and (c).

(c) **Expediting the Delivery of the Transcript.** The clerk of superior court must complete the Expedited Juvenile Appeals Form within one business day after the notice of appeal is filed. The court reporting manager of the Administrative Office of the Courts must assign a transcriptionist for the appeal within five business days after the clerk completes the form.

The transcriptionist must produce the transcript of the entire proceedings at the State's expense if there is an order that establishes the indigency of the appellant. Otherwise, the appellant has ten days after the transcriptionist is assigned to contract for the transcription of the entire proceedings. In either situation, the transcriptionist must deliver electronically the transcript to each party to the appeal within forty days after receiving the assignment.

(d) **Expediting the Filing of the Record on Appeal**. The parties may settle the record on appeal by agreement at any time before the record on appeal is settled by any other procedure described in this subsection.

Absent agreement, the appellant must serve a proposed record on appeal on each party to the appeal within fifteen days after delivery of the transcript. Within ten days after having been served with the proposed record on appeal, the appellee may serve on each party to the appeal:

(1) a notice of approval of the proposed record on appeal;

(2) specific objections or amendments to the proposed record on appeal; or

(3) a proposed alternative record on appeal.

If the appellee serves a notice of approval, then this notice settles the record on appeal. If the appellee serves specific objections or amendments, or a proposed alternative record on appeal, then the provisions of Rule 11(c) apply. If the appellee fails to serve a notice of approval, specific objections or amendments, or a proposed alternative record on appeal, then the expiration of the ten-day period to serve one of these documents settles the record on appeal.

The appellant must file the record on appeal within five business days after the record is settled.

(e) **No-Merit Briefs**. When counsel for the appellant concludes that there is no issue of merit on which to base an argument for relief, counsel may file a no-merit brief. The appellant then may file a pro se brief within thirty days after the date of the filing of counsel's no-merit brief.

In the no-merit brief, counsel must identify any issues in the record on appeal that arguably support the appeal and must state why those issues lack merit or would not alter the ultimate result. Counsel must provide the appellant with a copy of the no-merit brief, the transcript, the printed record on appeal, and any supplements or exhibits that have been filed with the appellate court. Counsel must inform the appellant in writing that the appellant may file a pro se brief and that the pro se brief is due within thirty days after the date of the filing of the no-merit brief. Counsel must attach evidence of this communication to the no-merit brief.

(f) **Word-Count Limitations Applicable to Briefs**. Briefs must comply with Rule 28(j).

(g) **Motions for Extensions of Time**. Motions for extensions of time to produce and deliver the transcript, to file the record on appeal, and to file briefs are disfavored and will be allowed by the appellate courts only in extraordinary circumstances.

(h) **Duty of Trial Counsel**. Trial counsel for the appellant has a duty to assist appellate counsel with the preparation and service of appellant's proposed record on appeal.

(i) **Electronic Filing Required**. Unless granted an exception for good cause, counsel must file all documents electronically.

* * *

Rule 4. Appeal in Criminal Cases—How and When Taken

(a) **Manner and Time**. Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by:

(1) giving oral notice of appeal at trial, or

(2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment or order or within fourteen days after a ruling on a motion for appropriate relief made during the fourteen-day period following entry of the judgment or order. Appeals from district court to superior court are governed by N.C.G.S. §§ 15A-1431 and -1432.

(b) **Content of Notice of Appeal**. The notice of appeal required to be filed and served by subdivision (a)(2) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(c) **Service of Notice of Appeal.** Service of copies of the notice of appeal may be made as provided in Rule 26.

(d) **To Which Appellate Court Addressed.** An appeal of right from a judgment of a superior court by any person who has been convicted of murder in the first degree and sentenced to death shall be filed in the Supreme Court. In all other criminal cases, appeal shall be filed in the Court of Appeals.

~~(e) Protecting the Identity of Juvenile Victims of Sexual Offenses. For appeals filed pursuant to this rule and for extraordinary writs filed in cases to which this rule applies, the identities of all victims of sexual offenses the trial court record shows were under the age of eighteen when the trial division proceedings occurred, including documents or other materials concerning delinquency proceedings in district court, shall be protected pursuant to Rule 3.1(b).~~

* * *

Rule 9. The Record on Appeal

(a) **Function; Notice in Cases Involving Juveniles; Composition of Record**. In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9. Parties may cite any of these items in their briefs and arguments before the appellate courts.

~~All filings involving juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e) shall include the following notice in uppercase typeface:~~

~~FILED PURSUANT TO RULE [3(b)(1)] [3.1(b)] [4(e)]; SUBJECT TO PUBLIC INSPECTION ONLY BY ORDER OF A COURT OF THE APPELLATE DIVISION.~~

(1) **Composition of the Record in Civil Actions and Special Proceedings**. The record on appeal in civil actions and special proceedings shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons with return, or of other papers showing jurisdiction of the trial court over persons or property, or a statement showing same;

d. copies of the pleadings, and of any pretrial order on which the case or any part thereof was tried;

e. so much of the litigation, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given; and identification of the omitted instruction by setting out the requested instruction or its substance in the record on appeal immediately following the instruction given;

g. copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law;

h. a copy of the judgment, order, or other determination from which appeal is taken;

i. a copy of the notice of appeal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

j. copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all issues presented on appeal unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2);

k. proposed issues on appeal set out in the manner provided in Rule 10;

l. a statement, where appropriate, that the record of proceedings was made with an electronic recording device;

m. a statement, where appropriate, that a supplement compiled pursuant to Rule 11(c) is filed with the record on appeal; and

n. any order (issued prior to the filing of the record on appeal) ruling upon a motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

(2) **Composition of the Record in Appeals from Superior Court Review of Administrative Boards and Agencies**. The record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies, other than those specified in Rule 18(a), shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons, notice of hearing, or other papers showing jurisdiction of the board or agency over persons or property sought to be bound in the proceeding, or a statement showing same;

d. copies of all petitions and other pleadings filed in the superior court;

e. copies of all items properly before the superior court as are necessary for an understanding of all issues presented on appeal;

f. so much of the litigation in the superior court, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

g. a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken;

h. a copy of the notice of appeal from the superior court, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2) and (3);

i. proposed issues on appeal relating to the actions of the superior court, set out in the manner provided in Rule 10; and

j. any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

(3) **Composition of the Record in Criminal Actions**. The record on appeal in criminal actions shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court;

d. copies of docket entries or a statement showing all arraignments and pleas;

e. so much of the litigation, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the entire verbatim transcript of the proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given; and identification of the omitted instruction by setting out the requested instruction or its substance in the record on appeal immediately following the instruction given;

g. copies of the verdict and of the judgment, order, or other determination from which appeal is taken; and in capitally-tried cases, a copy of the jury verdict sheet for sentencing, showing the aggravating and mitigating circumstances submitted and found or not found;

h. a copy of the notice of appeal or an appropriate entry or statement showing appeal taken orally; of all orders establishing time limits relative to the perfecting of the appeal; of any order finding defendant indigent for the purposes of the appeal and assigning counsel; and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is to be filed pursuant to Rule 9(c)(2);

i. copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary

for an understanding of all issues presented on appeal, unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2);

j. proposed issues on appeal set out in the manner provided in Rule 10;

k. a statement, where appropriate, that the record of proceedings was made with an electronic recording device;

l. a statement, where appropriate, that a supplement compiled pursuant to Rule 11(c) is filed with the record on appeal; and

m. any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

~~(4) **Exclusion of Social Security Numbers from Record on Appeal**. Social security numbers shall be deleted or redacted from any document before including the document in the record on appeal~~.

(b) **Form of Record; Amendments**. The record on appeal shall be in the format prescribed by Rule 26(g) and the appendixes to these rules.

(1) **Order of Arrangement**. The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(2) **Inclusion of Unnecessary Matter; Penalty**. It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the issues presented on appeal~~, such as social security numbers referred to in Rule 9(a)(4)~~. The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(3) **Filing Dates and Signatures on Papers**. Every pleading, motion, affidavit, or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who

verified it. Every judgment, order, or other determination shall show the date on which it was entered. The typed or printed name of the person signing a paper shall be entered immediately below the signature.

(4) **Pagination; Counsel Identified**. The pages of the printed record on appeal shall be numbered consecutively, be referred to as "record pages," and be cited as "(R p ___)." Pages of the Rule 11(c) or Rule 18(d)(3) supplement to the record on appeal shall be numbered consecutively with the pages of the record on appeal, the first page of the record supplement to bear the next consecutive number following the number of the last page of the printed record on appeal. These pages shall be referred to as "record supplement pages" and be cited as "(R S p ___)." Pages of the verbatim transcript of proceedings filed under Rule 9(c)(2) shall be referred to as "transcript pages" and be cited as "(T p ___)." At the end of the record on appeal shall appear the names, office addresses, telephone numbers, State Bar numbers, and e-mail addresses of counsel of record for all parties to the appeal.

(5) **Additions and Amendments to Record on Appeal**.

a. **Additional Materials in the Record on Appeal**. If the record on appeal as settled is insufficient to respond to the issues presented in an appellant's brief or the issues presented in an appellee's brief pursuant to Rule 10(c), the responding party may supplement the record on appeal with any items that could otherwise have been included pursuant to this Rule 9. The responding party shall serve a copy of those items on opposing counsel and shall file ~~three copies of~~ the items in a volume captioned "Rule 9(b)(5) Supplement to the Printed Record on Appeal." The supplement shall be filed no later than the responsive brief or within the time allowed for filing such a brief if none is filed.

b. **Motions Pertaining to Additions to the Record**. On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party, the appellate court may order any portion of the record on appeal or transcript amended to correct error shown

as to form or content. Prior to the filing of the record on appeal in the appellate court, such motions may be filed by any party in the trial court.

(c) **Presentation of Testimonial Evidence and Other Proceedings**. Testimonial evidence, voir dire, statements and events at evidentiary and non-evidentiary hearings, and other trial proceedings necessary to be presented for review by the appellate court may be included either in the record on appeal in the form specified in Rule 9(c)(1) or by designating the verbatim transcript of proceedings of the trial tribunal as provided in Rule 9(c)(2) and (3). When an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given shall be included in the record on appeal. ~~Verbatim transcripts or narration utilized in a case subject to Rules 3(b)(1), 3.1(b), or 4(e) initiated in the trial division under the provisions of Subchapter I of Chapter 7B of the General Statutes shall be produced and delivered to the office of the clerk of the appellate court to which the appeal has been taken in the manner specified by said rules.~~

(1) **When Testimonial Evidence, Voir Dire, Statements and Events at Evidentiary and Non-Evidentiary Hearings, and Other Trial Proceedings Narrated—How Set Out in Record**. When an issue is presented on appeal with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence, voir dire, statements and events at evidentiary and non-evidentiary hearings, and other trial proceedings required by Rule 9(a) to be included in the record on appeal shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form. Parties shall use that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. Parties may object to particular narration on the basis that it does not accurately reflect the true sense of testimony received, statements made, or events that occurred; or to particular questions and answers on the basis that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, the judge or referee shall settle the form in the course of settling the record on appeal.

(2) **Designation that Verbatim Transcript of Proceedings in Trial Tribunal Will Be Used**. Appellant may designate in the record on appeal that the testimonial evidence will be presented in the verbatim transcript of the evidence of the trial tribunal in lieu of narrating the evidence and other trial proceedings as permitted by Rule 9(c)(1). When a verbatim transcript of those proceedings has been made, appellant may also designate that the verbatim transcript will be used to present voir dire, statements and events at evidentiary and non-evidentiary hearings, or other trial proceedings when those proceedings are the basis for one or more issues presented on appeal. Any such designation shall refer to the page numbers of the transcript being designated. Appellant need not designate all of the verbatim transcript that has been made, provided that when the verbatim transcript is designated to show the testimonial evidence, so much of the testimonial evidence must be designated as is necessary for an understanding of all issues presented on appeal. When appellant has narrated the evidence and other trial proceedings under Rule 9(c)(1), the appellee may designate the verbatim transcript as a proposed alternative record on appeal.

(3) **Verbatim Transcript of Proceedings—Settlement, Filing, Copies, Briefs**. Whenever a verbatim transcript is designated to be used pursuant to Rule 9(c)(2):

a. it shall be settled, together with the record on appeal, according to the procedures established by Rule 11;

b. appellant shall cause the settled record on appeal and transcript to be filed pursuant to Rule 7 with the clerk of the appellate court in which the appeal has been docketed;

c. in criminal appeals, upon settlement of the record on appeal, the district attorney shall notify the Attorney General of North Carolina that the record on appeal and transcript have been settled; and

d. the briefs of the parties must comport with the requirements of Rule 28 regarding complete statement of the facts of the case and regarding appendixes to the briefs.

(4) **Presentation of Discovery Materials**. Discovery materials offered into evidence at trial shall be brought forward, if relevant, as other evidence. In all instances in which discovery materials are considered by the trial tribunal, other than as

evidence offered at trial, the following procedures for presenting those materials to the appellate court shall be used: Depositions shall be treated as testimonial evidence and shall be presented by narration or by transcript of the deposition in the manner prescribed by this Rule 9(c). Other discovery materials, including interrogatories and answers, requests for admission, responses to requests, motions to produce, and the like, pertinent to issues presented on appeal, may be set out in the record on appeal or may be sent up as documentary exhibits in accordance with Rule 9(d)(2).

(5) **Electronic Recordings**. When a narrative or transcript has been produced from an electronic recording, the parties shall not file a copy of the electronic recording with the appellate division except at the direction or with the approval of the appellate court.

(d) **Exhibits**. Any exhibit filed, served, submitted for consideration, admitted, or made the subject of an offer of proof may be made a part of the record on appeal if a party believes that its inclusion is necessary to understand an issue on appeal.

(1) **Documentary Exhibits Included in the Printed Record on Appeal**. A party may include a documentary exhibit in the printed record on appeal if it is of a size and nature to make inclusion possible without impairing the legibility or original significance of the exhibit.

(2) **Exhibits Not Included in the Printed Record on Appeal**. A documentary exhibit that is not included in the printed record on appeal can be made a part of the record on appeal by filing ~~three copies~~ a copy of the exhibit with the clerk of the appellate court. The ~~three copies~~ copy shall be paginated. If multiple exhibits are filed, an index must be included in the filing. ~~Copies~~ A copy that ~~impair~~ impairs the legibility or original significance of the exhibit may not be filed. An exhibit that is a tangible object or is an exhibit that cannot be copied without impairing its legibility or original significance can be made a part of the record on appeal by having it delivered by the clerk of superior court to the clerk of the appellate court. When a party files a written request with the clerk of superior court that the exhibit be delivered to the appellate court, the clerk must promptly have the exhibit delivered to the appellate court in a manner that ensures its security and availability for use in further trial proceedings. The party requesting

delivery of the exhibit to the appellate court shall not be required to move in the appellate court for delivery of the exhibit.

(3) ~~**Exclusion of Social Security Numbers from Exhibits**. Social security numbers must be deleted or redacted from copies of exhibits.~~[Reserved]

(4) **Removal of Exhibits from Appellate Court**. All models, diagrams, and exhibits of material placed in the custody of the clerk of the appellate court must be taken away by the parties within ninety days after the mandate of the Court has issued or the case has otherwise been closed by withdrawal, dismissal, or other order of the Court, unless notified otherwise by the clerk. When this is not done, the clerk shall notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the clerk shall destroy them, or make such other disposition of them as to the clerk may seem best.

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Rule 11. Settling the Record on Appeal

(a) **By Agreement**. ~~This rule applies to all cases except those subject to expedited schedules in Rule 3.1.~~

Within thirty-five days after the court reporter or transcriptionist certifies delivery of the transcript, if such was ordered (seventy days in capitally-tried cases), or thirty-five days after appellant files notice of appeal, whichever is later, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal.

(b) **By Appellee's Approval of Appellant's Proposed Record on Appeal**. If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9. Within thirty days (thirty-five days in capitally-tried cases) after service of the proposed record on appeal upon an appellee, that appellee may serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(c) **By Agreement, by Operation of Rule, or by Court Order After Appellee's Objection or Amendment**. Within thirty days (thirty-five days in capitally-tried cases) after service upon appellee of appellant's proposed record on appeal, that appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate. An appellant who objects to an appellee's response to the proposed record on appeal shall make the same specification in its request for judicial settlement. The formatting of the proposed record on appeal and the order in which items appear in it are the responsibility of the appellant.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the record on appeal shall consist of each item that is either among those items required by Rule 9(a) to be in the record on appeal or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal. If a party requests that an item be included in the record on appeal but not all other parties to the appeal agree to its inclusion, then that item shall not be included in the printed record on appeal, but shall be filed by the appellant with the printed record on appeal in ~~three copies of~~ a volume captioned "Rule 11(c) Supplement to the Printed Record on Appeal," along with any verbatim transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to these rules; provided that any item not filed, served, submitted for consideration, or admitted, or for which no offer of proof was tendered, shall not be included. Subject to the additional requirements of Rule 28(d), items in the Rule 11(c) supplement may be cited and used by the parties as would items in the printed record on appeal.

If a party does not agree to the wording of a statement or narration required or permitted by these rules, there shall be no judicial settlement to resolve the dispute unless the objection is based on a contention that the statement or narration concerns an item that was not filed, served, submitted for consideration, admitted, or tendered in an offer of proof, or that a statement or narration is factually inaccurate. Instead, the objecting party is permitted to have inserted in the settled record on appeal a concise counter-statement. Parties are strongly encouraged to reach agreement on the wording of statements in records on appeal. Judicial settlement is not appropriate for disputes that concern only the

formatting of a record on appeal or the order in which items appear in a record on appeal.

The Rule 11(c) supplement to the printed record on appeal shall contain an index of the contents of the supplement, which shall appear as the first page thereof. The Rule 11(c) supplement shall be paginated as required by Rule 9(b)(4) and the contents should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal. If a party does not agree to the inclusion or specification of an exhibit or transcript in the printed record, the printed record shall include a statement that such items are separately filed along with the supplement.

If any party to the appeal contends that materials proposed for inclusion in the record or for filing therewith pursuant to these rules were not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that a statement or narration permitted by these rules is not factually accurate, then that party, within ten days after expiration of the time within which the appellee last served with the appellant's proposed record on appeal might have served amendments, objections, or a proposed alternative record on appeal, may in writing request that the judge from whose judgment, order, or other determination appeal was taken settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court and served upon all other parties. Each party shall promptly provide to the judge a reference copy of the record items, amendments, or objections served by that party in the case.

The functions of the judge in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, to settle narrations of proceedings under Rule 9(c)(1), and to determine whether the record accurately reflects material filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by either party is relevant to the issues on appeal, non-duplicative, or otherwise suited for inclusion in the record on appeal.

The judge shall send written notice to counsel for all parties setting a place and a time for a hearing to settle the record on appeal. The hearing shall be held not later than fifteen days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than twenty days after service of the request for hearing upon the judge. If requested, the judge shall return the record items submitted for reference during the judicial-settlement process with the order settling the record on appeal.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is timely sought, the record is deemed settled as of the expiration of the ten-day period within which any party could have requested judicial settlement of the record on appeal under this Rule 11(c).

Provided that, nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

(d) **Multiple Appellants; Single Record on Appeal**. When there are multiple appellants (two or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal. The proposed issues on appeal of the several appellants shall be set out separately in the single record on appeal and attributed to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the judge from whose judgment, order, or other determination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs.

(e) **Extensions of Time**. The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

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Rule 12. Filing the Record; Docketing the Appeal; Copies of the Record

(a) **Time for Filing Record on Appeal**. Within fifteen days after the record on appeal has been settled by any of the procedures provided in Rule 11 or Rule 18, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.

(b) **Docketing the Appeal**. At the time of filing the record on appeal, the appellant shall pay to the clerk the docket fee fixed pursuant to N.C.G.S. § 7A-20(b), and the clerk shall thereupon enter the appeal upon the docket of the appellate court. If an appellant is authorized to appeal *in forma pauperis* as provided in N.C.G.S. §§ 1-288 or 7A-450 et seq., the clerk shall docket the appeal upon timely filing of the record on appeal. An appeal is docketed under the title given to the action in the trial division, with the appellant identified as such. The clerk shall forthwith give notice to all parties of the date on which the appeal was docketed in the appellate court.

(c) **Copies of Record on Appeal**. The appellant shall file one copy of the printed record on appeal, ~~three copies~~ one copy of each exhibit designated pursuant to Rule 9(d), ~~three copies~~ one copy of any supplement to the record on appeal submitted pursuant to Rule 11(c) or Rule 18(d)(3), one copy of any paper deposition or administrative hearing transcript, and shall cause any court proceeding transcript to be filed electronically pursuant to Rule 7. The clerk will reproduce and distribute copies of the printed record on appeal as directed by the court, billing the parties pursuant to these rules.

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Rule 13. Filing and Service of Briefs

(a) **Time for Filing and Service of Briefs**.

(1) **Cases Other Than Death Penalty Cases**. Within thirty days after the ~~clerk of~~ record on appeal has been filed with the appellate court ~~has mailed the printed record to the parties~~, the appellant shall file a brief in the office of the clerk of the appellate court and serve copies thereof upon all other parties separately represented. ~~The mailing of the printed record is not service for purposes of Rule 27(b); therefore, the provision of that rule allowing an additional three days after service by mail does not extend the period for the filing of an appellant's brief.~~ Within thirty days after appellant's brief has been served on an appellee, the appellee shall similarly file and serve copies of a brief. An appellant may file and serve a reply brief as provided in Rule 28(h).

(2) **Death Penalty Cases**. Within sixty days after the ~~clerk of~~ record on appeal has been filed with the Supreme Court ~~has mailed the printed record to the parties~~, the appellant in a criminal appeal which includes a sentence of death shall file a brief in the office of the clerk and serve copies thereof upon all other parties separately represented. ~~The mailing of the printed record is not service for purposes of Rule 27(b); therefore, the provision of that rule allowing an additional three days after service by mail does not extend the period for the filing of an appellant's brief.~~ Within sixty days after appellant's brief has been served, the appellee shall similarly file and serve copies of a brief. An appellant may file and serve a reply brief as provided in Rule 28(h).

(b) **Copies Reproduced by Clerk**. A party need file but a single copy of a brief. At the time of filing the party may be required to pay to

the clerk of the appellate court a deposit fixed by the clerk to cover the cost of reproducing copies of the brief. The clerk will reproduce and distribute copies of briefs as directed by the court.

(c) **Consequence of Failure to File and Serve Briefs**. If an appellant fails to file and serve a brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve its brief within the time allowed, the appellee may not be heard in oral argument except by permission of the court.

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Rule 18. Taking Appeal; Record on Appeal—Composition and Settlement

(a) **General**. Appeals of right from administrative agencies, boards, commissions, or the Office of Administrative Hearings (referred to in these rules as "administrative tribunals") directly to the appellate division under N.C.G.S. § 7A-29 shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial divisions, except as provided in this Article.

(b) **Time and Method for Taking Appeals**.

(1) The times and methods for taking appeals from an administrative tribunal shall be as provided in this Rule 18 unless the General Statutes provide otherwise, in which case the General Statutes shall control.

(2) Any party to the proceeding may appeal from a final decision of an administrative tribunal to the appropriate court of the appellate division for alleged errors of law by filing and serving a notice of appeal within thirty days after receipt of a copy of the final decision of the administrative tribunal. The final decision of the administrative tribunal is to be sent to the parties by Registered or Certified Mail. The notice of appeal shall specify the party or parties taking the appeal; shall designate the final administrative tribunal decision from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(3) If a transcript of fact-finding proceedings is not made as part of the process leading up to the final administrative tribunal decision, the appealing party may contract with a court reporter for production of such parts of the

proceedings not already on file as it deems necessary, pursuant to the procedures prescribed in Rule 7.

(c) **Composition of Record on Appeal**. The record on appeal in appeals from any administrative tribunal shall contain:

(1) an index of the contents of the record on appeal, which shall appear as the first page thereof;

(2) a statement identifying the administrative tribunal from whose judgment, order, or opinion appeal is taken; the session at which the judgment, order, or opinion was rendered, or if rendered out of session, the time and place of rendition; and the party appealing;

(3) a copy of the summons with return, notice of hearing, or other papers showing jurisdiction of the administrative tribunal over persons or property sought to be bound in the proceeding, or a statement showing same;

(4) copies of all other notices, pleadings, petitions, or other papers required by law or rule to be filed with the administrative tribunal to present and define the matter for determination, including a Form 44 for all workers' compensation cases which originate from the Industrial Commission;

(5) a copy of any findings of fact and conclusions of law and a copy of the order, award, decision, or other determination of the administrative tribunal from which appeal was taken;

(6) so much of the litigation before the administrative tribunal or before any division, commissioner, deputy commissioner, or hearing officer of the administrative tribunal, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2) and (3);

(7) when the administrative tribunal has reviewed a record of proceedings before a division or an individual commissioner, deputy commissioner, or hearing officer of the administrative tribunal, copies of all items included in the record filed with the administrative tribunal which are necessary for an understanding of all issues presented on appeal;

(8) copies of all other papers filed and statements of all other proceedings had before the administrative tribunal or any

of its individual commissioners, deputies, or divisions which are necessary to an understanding of all issues presented on appeal, unless they appear in the verbatim transcript of proceedings being filed pursuant to Rule 9(c)(2) and (3);

(9) a copy of the notice of appeal from the administrative tribunal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

(10) proposed issues on appeal relating to the actions of the administrative tribunal, set out as provided in Rule 10;

(11) a statement, when appropriate, that the record of proceedings was made with an electronic recording device;

(12) a statement, when appropriate, that a supplement compiled pursuant to Rule 18(d)(3) is filed with the record on appeal; and

(13) any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

(d) **Settling the Record on Appeal**. The record on appeal may be settled by any of the following methods:

(1) **By Agreement**. Within thirty-five days after filing of the notice of appeal, or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with this Rule 18 as the record on appeal.

(2) **By Appellee's Approval of Appellant's Proposed Record on Appeal**. If the record on appeal is not settled by agreement under Rule 18(d)(1), the appellant shall, within thirty-five days after filing of the notice of appeal, or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), serve upon all other parties a

proposed record on appeal constituted in accordance with the provisions of Rule 18(c). Within thirty days after service of the proposed record on appeal upon an appellee, that appellee may serve upon all other parties a notice of approval of the proposed record on appeal or objections, amendments, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate. An appellant who objects to an appellee's response to the proposed record on appeal shall make the same specification in its request for judicial settlement. The formatting of the proposed record on appeal and the order in which items appear in it is the responsibility of the appellant. Judicial settlement is not appropriate for disputes concerning only the formatting or the order in which items appear in the settled record on appeal. If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(3) **By Agreement, by Operation of Rule, or by Court Order After Appellee's Objection or Amendment**. If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the record on appeal shall consist of each item that is either among those items required by Rule 18(c) to be in the record on appeal or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal, in the absence of contentions that the item was not filed, served, or offered into evidence. If a party requests that an item be included in the record on appeal but not all parties to the appeal agree to its inclusion, then that item shall not be included in the printed record on appeal, but shall be filed by the appellant with the record on appeal in ~~three copies of~~ a volume captioned "Rule 18(d)(3) Supplement to the Printed Record on Appeal," along with any verbatim transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to these rules;

provided that any item not filed, served, submitted for consideration, admitted, or for which no offer of proof was tendered shall not be included. Subject to the additional requirements of Rule 28(d), items in the Rule 18(d)(3) supplement may be cited and used by the parties as would items in the printed record on appeal.

If a party does not agree to the wording of a statement or narration required or permitted by these rules, there shall be no judicial settlement to resolve the dispute unless the objection is based on a contention that the statement or narration concerns an item that was not filed, served, submitted for consideration, admitted, or tendered in an offer of proof, or that a statement or narration is factually inaccurate. Instead, the objecting party is permitted to have inserted in the settled record on appeal a concise counter-statement. Parties are strongly encouraged to reach agreement on the wording of statements in records on appeal.

The Rule 18(d)(3) supplement to the printed record on appeal shall contain an index of the contents of the supplement, which shall appear as the first page thereof. The Rule 18(d)(3) supplement shall be paginated consecutively with the pages of the record on appeal, the first page of the supplement to bear the next consecutive number following the number of the last page of the record on appeal. These pages shall be referred to as "record supplement pages," and shall be cited as "(R S p ___)." The contents of the supplement should be arranged, so far as practicable, in the order in which they occurred or were filed in the administrative tribunal. If a party does not agree to the inclusion or specification of an exhibit or transcript in the printed record, the printed record shall include a statement that such items are separately filed along with the supplement.

If any party to the appeal contends that materials proposed for inclusion in the record or for filing therewith pursuant to these rules were not filed, served, submitted for consideration, admitted, or offered into evidence, or that a statement or narration permitted by these rules is not factually accurate, then that party, within ten days after expiration of the time within which the appellee last served with the appellant's proposed record on appeal might have served amendments, objections, or a proposed alternative record on appeal, may in writing request

that the administrative tribunal convene a conference to settle the record on appeal. A copy of that request, endorsed with a certificate showing service on the administrative tribunal, shall be served upon all other parties. Each party shall promptly provide to the administrative tribunal a reference copy of the record items, amendments, or objections served by that party in the case.

The functions of the administrative tribunal in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, to settle narrations of proceedings under Rule 18(c)(6), and to determine whether the record accurately reflects material filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by either party is relevant to the issues on appeal, non-duplicative, or otherwise suited for inclusion in the record on appeal.

Upon receipt of a request for settlement of the record on appeal, the administrative tribunal shall send written notice to counsel for all parties setting a place and time for a conference to settle the record on appeal. The conference shall be held not later than fifteen days after service of the request upon the administrative tribunal. The administrative tribunal or a delegate appointed in writing by the administrative tribunal shall settle the record on appeal by order entered not more than twenty days after service of the request for settlement upon the administrative tribunal. If requested, the settling official shall return the record items submitted for reference during the settlement process with the order settling the record on appeal.

When the administrative tribunal is a party to the appeal, the administrative tribunal shall forthwith request the Chief Judge of the Court of Appeals or the Chief Justice of the Supreme Court, as appropriate, to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of these rules and the appointing order.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is sought, the record is deemed settled as of the expiration of the ten-day period within

which any party could have requested judicial settlement of the record on appeal under this Rule 18(d)(3).

Nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by administrative tribunal decision.

(e) **Further Procedures and Additional Materials in the Record on Appeal**. Further procedures for perfecting and prosecuting the appeal shall be as provided by these rules for appeals from the courts of the trial divisions.

(f) **Extensions of Time**. The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

* * *

Rule 26. Filing and Service

(a) **Filing**. Papers required or permitted by these rules to be filed in the trial or appellate divisions shall be filed with the clerk of the appropriate court. Filing may be accomplished by mail or by electronic means as set forth in this rule.

(1) **Filing by Mail.** Filing may be accomplished by mail addressed to the clerk but is not timely unless the papers are received by the clerk within the time fixed for filing, except that motions, responses to petitions, the record on appeal, and briefs shall be deemed filed on the date of mailing, as evidenced by the proof of service.

(2) **Filing by Electronic Means**. Filing in the appellate courts may be accomplished by electronic means by use of the electronic-filing site at https://www.ncappellatecourts.org. Many documents may be filed electronically through the use of this site. The site identifies those types of documents that may not be filed electronically. A document filed by use of the electronic-filing site is deemed filed as of the time that the document is received electronically. Responses and motions may be filed by facsimile machines, if an oral request for permission to do so has first been tendered to and approved by the clerk of the appropriate appellate court. In all cases in which a document has been filed by facsimile machine pursuant to this rule, counsel must forward the following items by first class mail, contemporaneously with the transmission:

the original signed document, the electronic-transmission fee, and the applicable filing fee for the document, if any. The party filing a document by electronic means shall be responsible for all costs of the transmission, and neither they nor the electronic transmission fee may be recovered as costs of the appeal. When a document is filed to the electronic-filing site at https://www.ncappellatecourts.org, counsel may either have his or her account drafted electronically by following the procedures described at the electronic-filing site, or counsel must forward the applicable filing fee for the document by first class mail, contemporaneously with the transmission.

(b) **Service of All Papers Required**. Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal.

(c) **Manner of Service**. Service may be made in the manner provided for service and return of process in Rule 4 of the Rules of Civil Procedure and may be so made upon a party or upon its attorney of record. Service may also be made upon a party or its attorney of record by delivering a copy to either or by mailing a copy to the recipient's last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper is filed. Delivery of a copy within this rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the paper enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service, or, for those having access to such services, upon deposit with the State Courier Service or Inter-Office Mail. When a document is filed electronically to the electronic-filing site, service also may be accomplished electronically by use of the other counsel's correct and current e-mail address(es), or service may be accomplished in the manner described previously in this subsection.

(d) **Proof of Service**. Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the papers filed.

(e) **Joint Appellants and Appellees**. Any paper required by these rules to be served on a party is properly served upon all parties joined in the appeal by service upon any one of them.

(f) **Numerous Parties to Appeal Proceeding Separately**. When there are unusually large numbers of appellees or appellants proceeding separately, the trial tribunal, upon motion of any party or on its own initiative, may order that any papers required by these rules to be served by a party on all other parties need be served only upon parties designated in the order, and that the filing of such a paper and service thereof upon the parties designated constitutes due notice of it to all other parties. A copy of every such order shall be served upon all parties to the action in such manner and form as the court directs.

(g) **Documents Filed with Appellate Courts**.

(1) **Form of Papers**. Papers presented to either appellate court for filing shall be letter size (8½ x 11") with the exception of wills and exhibits. All printed matter must appear in font no smaller than 12-point and no larger than 14-point, using a proportionally spaced font with serifs. Examples of proportionally spaced fonts with serifs include, but are not limited to, Constantia and Century typeface as described in Appendix B to these rules. Unglazed white paper of 16- to 20-pound substance should be utilized so as to produce a clear, black image, leaving a margin of approximately one inch on each side. The body of text shall be presented with double spacing between each line of text. Lines of text shall be no wider than 6½ inches. The format of all papers presented for filing shall follow the additional instructions found in the appendixes to these rules. The format of briefs shall follow the additional instructions found in Rule 28(j).

(2) **Index Required**. All documents presented to either appellate court other than records on appeal, which in this respect are governed by Rule 9, shall, unless they are less than ten pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and textbooks cited, with references to the pages where they are cited.

(3) **Closing**. The body of the document shall at its close bear the printed name, post office address, telephone number, State Bar number and e-mail address of counsel of record, and in addition, at the appropriate place, the manuscript signature of counsel of record. If the document has been filed electronically by use of the electronic-filing site at https://www.ncappellatecourts.org, the manuscript signature of counsel of record is not required.

~~(4) **Protecting the Identity of Certain Juveniles**. Parties shall protect the identity of juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e) pursuant to said rules.~~

* * *

Rule 28. Briefs—Function and Content

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

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

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

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

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

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

to support appellate review on the ground that the challenged order affects a substantial right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) **When Appendixes to Appellant's Brief Are Not Required**. Notwithstanding the requirements of Rule 28(d)(1), the

appellant is not required to reproduce an appendix to its brief with respect to an issue presented:

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

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

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

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

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

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

(4) **Format of Appendixes**. The appendixes to the briefs of any party shall be in the format prescribed by Rule 26(g) and shall consist of clear photocopies of transcript pages that have been deemed necessary for inclusion in the appendix under this Rule 28(d). The pages of the appendix shall be consecutively numbered, and an index to the appendix shall be placed at its beginning.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) **Certificate of Compliance**. Parties shall submit with the brief, immediately before the certificate of service, a certification, signed by counsel of record, or in the case of

parties filing briefs pro se, by the party, that the brief contains no more than the number of words allowed by this rule. For purposes of this certification, counsel and parties may rely on word counts reported by word-processing software, as long as footnotes and citations are included in those word counts.

* * *

Rule 30. Oral Argument and Unpublished Opinions

(a) **Order and Content of Argument**.

(1) The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Oral arguments should complement the written briefs, and counsel will therefore not be permitted to read at length from briefs, records, and authorities.

(2) ~~In cases involving juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e), counsel shall refrain from using a juvenile's name in oral argument and shall refer to the juvenile pursuant to said rules.~~ In matters listed in Rule 42(b), counsel must use initials or a pseudonym in oral argument instead of the minor's name.

(b) **Time Allowed for Argument**.

(1) **In General**. Ordinarily a total of thirty minutes will be allowed all appellants and a total of thirty minutes will be allowed all appellees for oral argument. Upon written or oral application of any party, the court for good cause shown may extend the times limited for argument. Among other causes, the existence of adverse interests between multiple appellants or between multiple appellees may be suggested as good cause for such an extension. The court of its own initiative may direct argument on specific points outside the times limited.

Counsel is not obliged to use all the time allowed, and should avoid unnecessary repetition; the court may terminate argument whenever it considers further argument unnecessary.

(2) **Numerous Counsel**. Any number of counsel representing individual appellants or appellees proceeding separately or jointly may be heard in argument within the times herein limited or allowed by order of court. When more than one counsel is heard, duplication or supplementation

of argument on the same points shall be avoided unless specifically directed by the court.

(c) **Non-Appearance of Parties**. If counsel for any party fails to appear to present oral argument, the court will hear argument from opposing counsel. If counsel for no party appears, the court will decide the case on the written briefs unless it orders otherwise.

(d) **Submission on Written Briefs**. By agreement of the parties, a case may be submitted for decision on the written briefs, but the court may nevertheless order oral argument before deciding the case.

(e) **Unpublished Opinions**.

(1) In order to minimize the cost of publication and of providing storage space for the published reports, the Court of Appeals is not required to publish an opinion in every decided case. If the panel that hears the case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as a precedent, it may direct that no opinion be published.

(2) The text of a decision without published opinion shall be posted on the ~~Court's web site~~ opinions web page of the Court of Appeals at ~~https://appellate.nccourts.org/opinions,~~ https://appellate.nccourts.org/opinion-filings/coa and reported only by listing the case and the decision in the advance sheets and the bound volumes of the North Carolina Court of Appeals Reports.

(3) An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing claim preclusion, issue preclusion, or the law of the case. If a party believes, nevertheless, that an unpublished opinion has precedential value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion if that party serves a copy thereof on all other parties in the case and on the court to which the citation is offered. This service may be accomplished by including the copy of the unpublished opinion in an addendum to a brief or memorandum. A party who cites an unpublished opinion for the first time at a hearing or oral argument must attach a copy of the unpublished opinion relied upon pursuant to the requirements of

Rule 28(g). When citing an unpublished opinion, a party must indicate the opinion's unpublished status.

(4) Counsel of record and pro se parties of record may move for publication of an unpublished opinion, citing reasons based on Rule 30(e)(1) and serving a copy of the motion upon all other counsel and pro se parties of record. The motion shall be filed and served within ten days of the filing of the opinion. Any objection to the requested publication by counsel or pro se parties of record must be filed within five days after service of the motion requesting publication. The panel that heard the case shall determine whether to allow or deny such motion.

(f) **Pre-Argument Review; Decision of Appeal Without Oral Argument**.

(1) At any time that the Supreme Court concludes that oral argument in any case pending before it will not be of assistance to the Court, it may dispose of the case on the record and briefs. In those cases, counsel will be notified not to appear for oral argument.

(2) The Chief Judge of the Court of Appeals may from time to time designate a panel to review any pending case, after all briefs are filed but before argument, for decision under this rule. If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument will not be of assistance to the Court, the case may be disposed of on the record and briefs. Counsel will be notified not to appear for oral argument.

* * *

Rule 37. Motions in Appellate Courts

(a) **Time; Content of Motions; Response**. An application to a court of the appellate division for an order or for other relief available under these rules may be made by filing a motion for such order or other relief with the clerk of the court, with service on all other parties. Unless another time is expressly provided by these rules, the motion may be filed and served at any time before the case is called for oral argument. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion and shall state with particularity the grounds on which it is based and the order or relief sought. If a motion is supported by affidavits, briefs, or other papers, these shall be served and filed with the motion. Within ten days after a

motion is served or until the appeal is called for oral argument, whichever period is shorter, a party may file and serve copies of a response in opposition to the motion, which may be supported by affidavits, briefs, or other papers in the same manner as motions. The court may shorten or extend the time for responding to any motion.

(b) **Determination**. Notwithstanding the provisions of Rule 37(a), a motion may be acted upon at any time, despite the absence of notice to all parties and without awaiting a response thereto. A party who has not received actual notice of such a motion, or who has not filed a response at the time such action is taken, and who is adversely affected by the action may request reconsideration, vacation, or modification thereof. Motions will be determined without argument, unless the court orders otherwise.

(c) ~~**Protecting the Identity of Certain Juveniles**. Parties shall protect the identity of juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e) pursuant to said rules.~~[Reserved]

(d) **Withdrawal of Appeal in Criminal Cases**. Withdrawal of appeal in criminal cases shall be in accordance with N.C.G.S. § 15A-1450. In addition to the requirements of N.C.G.S. § 15A-1450, after the record on appeal in a criminal case has been filed in an appellate court but before the filing of an opinion, the defendant shall also file a written notice of the withdrawal with the clerk of the appropriate appellate court.

(e) **Withdrawal of Appeal in Civil Cases**.

(1) Prior to the filing of a record on appeal in the appellate court, an appellant or cross-appellant may, without the consent of the other party, file a notice of withdrawal of its appeal with the tribunal from which appeal has been taken. Alternatively, prior to the filing of a record on appeal, the parties may file a signed stipulation agreeing to dismiss the appeal with the tribunal from which the appeal has been taken.

(2) After the record on appeal has been filed, an appellant or cross-appellant or all parties jointly may move the appellate court in which the appeal is pending, prior to the filing of an opinion, for dismissal of the appeal. The motion must specify the reasons therefor, the positions of all parties on the motion to dismiss, and the positions of all parties on the allocation of taxed costs. The appeal may be dismissed by order upon such terms as agreed to by the parties or as fixed by the appellate court.

(f) **Effect of Withdrawal of Appeal**. The withdrawal of an appeal shall not affect the right of any other party to file or continue such party's appeal or cross-appeal.

* * *

Rule 41. Appeal Information Statement

~~(a) The Court of Appeals has adopted an Appeal Information Statement (AIS) which will be revised from time to time. The purpose of the AIS is to provide the Court the substance of an appeal and the information needed by the Court for effective case management.~~

~~(b) Each appellant shall complete, file, and serve the AIS as set out in this rule.~~

~~(1) The clerk of the Court of Appeals shall furnish an AIS form to all parties to the appeal when the record on appeal is docketed in the Court of Appeals.~~

~~(2) Each appellant shall complete and file the AIS with the clerk of the Court of Appeals at or before the time his or her appellant's brief is due and shall serve a copy of the AIS upon all other parties to the appeal pursuant to Rule 26. The AIS may be filed by mail addressed to the clerk and, if first class mail is utilized, is deemed filed on the date of mailing as evidenced by the proof of service. Parties shall protect the identity of juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e) pursuant to said rules.~~

~~(3) If any party to the appeal concludes that the AIS is in any way inaccurate or incomplete, that party may file with the Court of Appeals a written statement setting out additions or corrections within seven days of the service of the AIS and shall serve a copy of the written statement upon all other parties to the appeal pursuant to Rule 26. The written statement may be filed by mail addressed to the clerk and, if first class mail is utilized, is deemed filed on the date of mailing as evidenced by the proof of service.~~

The appellant must complete an Appeal Information Statement using the electronic-filing site at https://www.ncappellatecourts.org before the appellant's brief is filed.

* * *

Rule 42. Protecting Identities—Sealed Items and Identification Numbers

(a) **Items Sealed in the Trial Tribunal**. Items sealed in the trial tribunal remain under seal in the appellate courts. When these items are filed with the appellate courts, counsel must attach a copy of the order, statute, or other legal authority that sealed the item below.

(b) **Items Sealed by Operation of Rule**. By virtue of this subsection, items filed with the appellate courts are under seal in the following matters:

(1) Appeals filed under N.C.G.S. § 7B-1001;

(2) Appeals filed under N.C.G.S. § 7B-2602;

(3) Appeals filed under N.C.G.S. § 7A-27 that involve a sexual offense committed against a minor; and

(4) Cases in which the right to appeal under one of these statutes has been lost.

In briefs, motions, and petitions filed in these matters, counsel must use initials or a pseudonym instead of the minor's name. Counsel for each party must agree on the initials or pseudonym and must include a stipulation that evidences this agreement in the record on appeal.

(c) **Items Sealed by the Appellate Courts**. If an item was not sealed in the trial tribunal or by operation of rule, then counsel may move the appellate court to seal that item. Items subject to a motion to seal will be held under seal pending the appellate court's disposition of the motion.

(d) **Labeling Sealed Items**. Documents filed with the appellate courts that are under seal must display at the top of the first page this notice:

UNDER SEAL AND SUBJECT TO PUBLIC INSPECTION ONLY BY ORDER OF A COURT OF THE APPELLATE DIVISION

If the document under seal is included within another document, then this notice must also be displayed at the top of the first page of that other document. Non-documentary items filed with the appellate courts that are under seal must be submitted in an envelope or box that displays the same notice.

(e) **Identification Numbers**. Driver license numbers, financial account numbers, social security numbers, and tax identification numbers

must be excluded or redacted from all documents that are filed with the appellate courts unless the number is necessary to the disposition of the appeal. If the number is necessary to the disposition of the appeal, then counsel may move to seal the documents in which the number appears.

* * *

Appendix A. Timetables for Appeals

Timetable of Appeals from Trial Division and Administrative Tribunals Under Articles II and IV of the Rules of Appellate Procedure

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Taking Appeal (Civil)	30	Entry of Judgment (Unless Tolled)	3(c)
Cross-Appeal	10	Service and Filing of a Timely Notice of Appeal	3(c)
Taking Appeal (Administrative Tribunal)	30	Receipt of Final Administrative Tribunal Decision (Unless Statutes Provide Otherwise)	18(b)(2)
Taking Appeal (Criminal)	14	Entry of Judgment (Unless Tolled)	4(a)
Ordering Transcript (Civil, Administrative Tribunal)	14	Filing Notice of Appeal	7(a)(1) 18(b)(3)
Ordering Transcript (Criminal Indigent)	14	Order Filed by Clerk of Superior Court	7(a)(2)
Preparing and Delivering Transcript (Civil, Non-Capital Criminal) (Capital Criminal)	 60 120	Service of Order for Transcript”	7(b)(1)
Serving Proposed Record on Appeal (Civil, Non-Capital Criminal) (Administrative Tribunal)	 35 35	Notice of Appeal (No Transcript) or Court Reporter’s Certificate of Delivery of Transcript	11(b) 18(d)
Serving Proposed Record on Appeal (Capital)	70	Court Reporter’s Certificate of Delivery	11(b)

Serving Objections or Proposed Alternative Record on Appeal (Civil, Non-Capital Criminal) (Capital Criminal) (Administrative Tribunal)	 30 35 30	Service of Proposed Record Service of Proposed Record	11(c) 18(d)(2)
Requesting Judicial Settlement of Record	10	Expiration of the Last Day Within Which an Appellee Who Has Been Served Could Serve Objections, etc.	11(c) 18(d)(3)
Judicial Settlement of Record	20	Service on Judge of Request for Settlement	11(c) 18(d)(3)
Filing Record on Appeal in Appellate Court	15	Settlement of Record on Appeal	12(a)
Filing Appellant's Brief (or Mailing Brief Under Rule 26(a))	30	~~Clerk's Mailing of Printed Record~~ Filing the Record on Appeal in Appellate Court (60 Days in Death Cases)	13(a)
Filing Appellee's Brief (or Mailing Brief Under Rule 26(a))	30	Service of Appellant's Brief (60 Days in Death Cases)	13(a)
Filing Appellant's Reply Brief (or Mailing Brief Under Rule 26(a))	14	Service of Appellee's Brief	28(h)
Oral Argument	30	Filing Appellant's Brief (Usual Minimum Time)	29
Certification or Mandate	20	Issuance of Opinion	32
Petition for Rehearing (Civil Action Only)	15	Mandate	31(a)

Timetable of Appeals from Trial Division Under Article II, Rule 3.1, of the Rules of Appellate Procedure

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Taking Appeal	30	Entry of Judgment	3.1~~(a)~~(b); N.C.G.S. § 7B-1001
Notifying ~~Court-Reporting Coordinator~~ Court Reporting Manager~~(Clerk of Superior Court)~~	1 (Business)	Filing Notice of Appeal	3.1(c)~~(1)~~
Assigning Transcriptionist ~~(Court-Reporting Coordinator)~~	~~2~~5 (Business)	~~Receipt of Notification Court-Reporting Coordinator~~Completion of Expedited Juvenile Appeals Form	3.1(c)~~(1)~~
~~Preparing and Delivering a Transcript of Designated Proceedings (Indigent Appellant)~~Delivering a Transcript of the Proceedings	~~35~~40	Assignment by ~~Court-Reporting Coordinator~~Court Reporting Manager	3.1(c)~~(1)~~
~~Preparing and Delivering a Transcript of Designated Proceedings (Non-Indigent Appellant)~~	~~45~~	~~Assignment of Transcriptionist~~	~~3.1(c)(1)~~
Serving Proposed Record on Appeal	~~10~~15	~~Receipt~~ Delivery of Transcript	3.1~~(c)(2)~~ (d)
Serving Notice of Approval, ~~or Objections~~ Specific Objections or Amendments, or Proposed Alternative Record on Appeal	10	Service of Proposed Record on Appeal	3.1~~(c)(2)~~ (d)

~~Filing Record on Appeal When Parties Agree to a Settled Record Within 20 Days of Receipt of Transcript~~	~~5 (Business)~~	~~Settlement of Record~~	~~3.1(c)(2)~~
~~Filing Record on Appeal if *All* Appellees Fail Either to Serve Notices of Approval, or Objections, or Proposed Alternative Records on Appeal~~	~~5 (Business)~~	~~Last Date on Which *Any* Appellee Could so Serve~~	~~3.1(c)(2)~~
~~Appellant Files Proposed Record on Appeal and Appellee(s) Files Objections and Amendments or an Alternative Proposed Record on Appeal When Parties Cannot Agree to a Settled Record on Appeal Within 30 Days After Receipt of the Transcript~~	~~5 (Business)~~	~~Last Date on Which the Record Could be Settled by Agreement~~	~~3.1(c)(2)~~
Requesting Judicial Settlement of Record	10	Expiration of the Last Day Within Which an Appellee Who Has Been Served Could Serve Objections, etc.	3.1(d); 11(c)
Judicial Settlement of Record	20	Service on Judge of Request for Settlement	3.1(d); 11(c)
Filing Record on Appeal in Appellate Court	5 (Business)	Settlement of Record on Appeal	3.1(d)
Filing Appellant's Brief	30	Filing of Record on Appeal	~~3.1(c)(3)~~ 13(a)(1)
Filing Appellee's Brief	30	Service of Appellant's Brief	~~3.1(c)(3)~~ 13(a)(1)

Filing Appellant's Reply Brief (or Mailing Brief Under Rule 26(a))	14	Service of Appellee's Brief	~~3.1(c)(3)~~ 13(a)(1); 28(h)

Timetable of Appeals to the Supreme Court from the Court of Appeals Under Article III of the Rules of Appellate Procedure

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Petition for Discretionary Review Prior to Determination	15	Docketing Appeal in Court of Appeals	15(b)
Notice of Appeal and/or Petition for Discretionary Review	15	Mandate of Court of Appeals (or From Order of Court of Appeals Denying Petition for Rehearing)	14(a) 15(b)
Cross-Notice of Appeal	10	Filing of First Notice of Appeal	14(a)
Response to Petition for Discretionary Review	10	Service of Petition	15(d)
Filing Appellant's Brief (or Mailing Brief Under Rule 26(a))	30	Filing Notice of Appeal Certification of Review	14(d) 15(g)(2)
Filing Appellee's Brief (or Mailing Brief Under Rule 26(a))	30	Service of Appellant's Brief	14(d) 15(g)
Filing Appellant's Reply Brief (or Mailing Brief Under Rule 26(a))	14	Service of Appellee's Brief	28(h)
Oral Argument	30	Filing Appellee's Brief (Usual Minimum Time)	29
Certification or Mandate	20	Issuance of Opinion	32
Petition for Rehearing (Civil Action Only)	15	Mandate	31(a)

All of the critical time intervals outlined here except those for taking an appeal, petitioning for discretionary review, responding to a petition for discretionary review, or petitioning for rehearing may be extended by order of the court in which the appeal is docketed at the time. Note that Rule 7(b)(1) authorizes the trial tribunal to grant only one extension of time for production of the transcript and that the trial tribunal lacks such authority in criminal cases in which a sentence of death has been imposed. Note also that Rule 27 authorizes the trial tribunal to grant only one extension of time for service of the proposed record. All other motions for extension of the times provided in these rules must be filed with the appellate court to which the appeal of right lies.

No time limits are prescribed for petitions for writs of certiorari other than that they be "filed without unreasonable delay." (Rule 21(c)).

* * *

Appendix B. Format and Style

All documents for filing in either appellate court are prepared on 8½ x 11", plain, white unglazed paper of 16- to 20-pound weight. Typing is done on one side only, although the document will be reproduced in two-sided format. No vertical rules, law firm marginal return addresses, or punched holes will be accepted. The papers need not be stapled; a binder clip or rubber bands are adequate to secure them in order.

Papers shall be prepared using font no smaller than 12-point and no larger than 14-point using a proportionally spaced font with serifs. Examples of proportionally spaced fonts with serifs include, but are not limited to, Constantia, Century, Century Schoolbook, and Century Old Style typeface. To allow for binding of documents, a margin of approximately one inch shall be left on all sides of the page. The formatted page should be approximately 6½ inches wide and 9 inches long. Tabs are located at the following distances from the left margin: ½", 1", 1½", 2", 4¼" (center), and 5".

CAPTIONS OF DOCUMENTS

All documents to be filed in either appellate court shall be headed by a caption. The caption contains: the number to be assigned the case by the clerk; the Judicial District from which the case arises; the appellate court to whose attention the document is addressed; the style of the case showing the names of all parties to the action, except as provided by ~~Rules 3(b)(1), 3.1(b), and 4(e)~~ Rule 42; the county from which the case comes; the indictment or docket numbers of the case below (in records on appeal and in motions and petitions in the cause filed prior to the filing of the record); and the title of the document. The caption shall

be placed beginning at the top margin of a cover page and again on the first textual page of the document.

No. _____ (Number) DISTRICT

(SUPREME COURT OF NORTH CAROLINA)
(or)
(NORTH CAROLINA COURT OF APPEALS)

****

STATE OF NORTH CAROLINA	)	
or	)	
(Name of Plaintiff)	)	From (Name) County
	)	
v	)	No. _____
	)	
(Name of Defendant)	)	

****

(TITLE OF DOCUMENT)

****

The caption should reflect the title of the action (all parties named except as provided by ~~Rules 3(b)(1), 3.1(b), and 4(e)~~ Rule 42) as it appeared in the trial division. The appellant or petitioner is not automatically given topside billing; the relative positions of the plaintiff and defendant should be retained.

The caption of a record on appeal and of a notice of appeal from the trial division should include directly below the name of the county, the indictment or docket numbers of the case in the trial division. Those numbers, however, should not be included in other documents, except a petition for writ of certiorari or other petitions and motions in which no record on appeal has yet been created in the case. In notices of appeal or petitions to the Supreme Court from decisions of the Court of Appeals, the caption should show the Court of Appeals docket number in similar fashion.

Immediately below the caption of each document, centered and underlined, in all capital letters, should be the title of the document, e.g., PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. § 7A-31, or DEFENDANT-APPELLANT'S BRIEF. A brief filed in the Supreme Court in a case previously heard and decided by the Court of Appeals is entitled NEW BRIEF.

INDEXES

A brief or petition that is ten pages or more in length and all appendixes to briefs (Rule 28) must contain an index to the contents.

The index should be indented approximately ¾" from each margin, providing a 5" line. The form of the index for a record on appeal should be as follows (indexes for briefs are addressed in Appendix E):

(Record)

INDEX

Organization of the Court 1
Complaint of Tri-Cities Mfg. 1

* * *

*PLAINTIFF'S EVIDENCE:
John Smith 17
Tom Jones 23
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*DEFENDANT'S EVIDENCE:
John Q. Public 86
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Order Extending Time 111
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Certificate of Service 114
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USE OF THE TRANSCRIPT OF EVIDENCE WITH RECORD ON APPEAL

Those portions of the printed record on appeal that correspond to the items asterisked (*) in the sample index above would be omitted if the transcript option were selected under Rule 9(c). In their place, counsel should insert a statement in substantially the following form:

> "Per Rule 9(c) of the Rules of Appellate Procedure, the transcript of proceedings in this case, taken by (name), court reporter, from (date) to (date) and consisting of (# of volumes) volumes and (# of pages) pages, numbered (1) through (last page #), is electronically filed pursuant to Rule 7."

Entire transcripts should not be inserted into the printed record on appeal, but rather should be electronically filed by the court reporter pursuant to Rule 7. Transcript pages inserted into the record on appeal will be treated as a narration and will be printed at the standard page charge. Counsel should note that transcripts will not be reproduced with the record on appeal, but will be treated and used as an exhibit.

TABLE OF CASES AND AUTHORITIES

Immediately following the index and before the inside caption, all briefs, petitions, and motions that are ten pages or greater in length shall contain a table of cases and authorities. Cases should be arranged alphabetically, followed by constitutional provisions, statutes, regulations, and other textbooks and authorities. The format should be similar to that of the index. Citations should be made according to the most recent edition of *The Bluebook: A Uniform System of Citation*. Citations to regional reporters shall include parallel citations to official state reporters.

FORMAT OF BODY OF DOCUMENT

Paragraphs within the body of the record on appeal should be single-spaced, with double spaces between paragraphs. The body of petitions, notices of appeal, responses, motions, and briefs should be double-spaced, with captions, headings, issues, and long quotes single-spaced.

Adherence to the margins is important because the document will be reproduced front and back and will be bound on the side. No part of the text should be obscured by that binding.

Quotations of more than three lines in length should be indented ¾" from each margin and should be single-spaced. The citation should immediately follow the quote.

References to the record on appeal should be made using a parenthetical in the text: (R pp 38-40). References to the transcript, if used, should be made in a similar manner: (T p 558, line 21).

TOPICAL HEADINGS

The various sections of the brief or petition should be separated (and indexed) by topical headings, centered and underlined, in all capital letters.

Within the argument section, the issues presented should be set out as a heading in all capital letters and in paragraph format from margin to margin. Sub-issues should be presented in similar format, but block indented ½" from the left margin.

NUMBERING PAGES

The cover page containing the caption of the document (and the index in records on appeal) is unnumbered. The index and table of cases and authorities are on pages numbered with lowercase Roman numerals, e.g., i, ii, iv.

While the page containing the inside caption and the beginning of the substance of the petition or brief bears no number, it is page 1. Subsequent pages are sequentially numbered by Arabic numbers, flanked by dashes, at the center of the top margin of the page, e.g., -4-.

An appendix to the brief should be separately numbered in the manner of a brief.

SIGNATURE AND ADDRESS

Unless filed pro se, all original papers filed in a case will bear the original signature of at least one counsel participating in the case, as in the example below. The name, address, telephone number, State Bar number, and e-mail address of the person signing, together with the capacity in which that person signs the paper, will be included. When counsel or the firm is retained, the firm name should be included above the signature; however, if counsel is appointed in an indigent criminal appeal, only the name of the appointed counsel should appear, without identification of any firm affiliation. Counsel participating in argument must have signed the brief in the case prior to that argument.

(Retained) [LAW FIRM NAME]
By: _____
[Name]

By: _____
[Name]
Attorneys for Plaintiff-Appellants
P. O. Box 0000
Raleigh, NC 27600
(919) 999-9999
State Bar No. _____
[e-mail address]

(Appointed) _____
[Name]
Attorney for Defendant-Appellant
P. O. Box 0000
Raleigh, NC 27600
(919) 999-9999
State Bar No. _____
[e-mail address]

* * *

Appendix D. Forms

Captions for all documents filed in the appellate division should be in the format prescribed by Appendix B, addressed to the Court whose review is sought.

NOTICES OF APPEAL

(1) To Court of Appeals from Trial Division

Appropriate in all appeals of right from district or superior court except appeals from criminal judgments imposing sentences of death.

(Caption)

****

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), hereby gives notice of appeal to the Court of Appeals of North Carolina (from the final judgment)(from the order) entered on (date) in (District)(Superior) Court, _____ County, (describing it).

Respectfully submitted this the __ day of _____, 2___.

s/_____

Attorney for (Plaintiff)(Defendant)-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

(2) To Supreme Court from a Judgment of the Superior Court Including a Sentence of Death

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Name of Defendant), Defendant, hereby gives notice of appeal to the Supreme Court of North Carolina from the final judgment entered by (name of Judge) in Superior Court, _____ County, on (date), which judgment included a conviction of murder in the first degree and a sentence of death.

Respectfully submitted this the __ day of _____, 2___.

s/_____

Attorney for Defendant-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

(3) **To Supreme Court from a Judgment of the Court of Appeals**

Appropriate in all appeals taken as of right from opinions and judgments of the Court of Appeals to the Supreme Court under N.C.G.S. § 7A-30. The appealing party shall enclose a clear copy of the opinion of the Court of Appeals with the notice. To take account of the possibility that the Supreme Court may determine that the appeal does not lie of right, an alternative petition for discretionary review may be filed with the notice of appeal.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), hereby appeals to the Supreme Court of North Carolina from the judgment of the Court of Appeals (describe it), which judgment . . . .

(Constitutional question—N.C.G.S. § 7A-30(1)) . . . directly involves a substantial question arising under the Constitution(s) (of the United States)(and)(or)(of the State of North Carolina) as follows:

(Here describe the specific issues, citing constitutional provisions under which they arise and showing how such issues were timely raised below and are set out in the record of appeal, e.g.:

Issue 1: Said judgment directly involves a substantial question arising under the Fourth and Fourteenth Amendments to the Constitution of the United States and under Article 1, Section 20 of the Constitution of the State of North Carolina, in that it deprives rights secured thereunder to the defendant by overruling defendant's challenge to the denial of (his)(her) Motion to Suppress Evidence Obtained by a Search Warrant, thereby depriving defendant of the constitutional right to be secure in his or her person, house, papers, and effects against unreasonable searches and seizures and violating constitutional prohibitions against warrants issued without probable cause and warrants not supported by evidence. This constitutional issue

was timely raised in the trial tribunal by defendant's Motion to Suppress Evidence Obtained by a Search Warrant made prior to trial of defendant (R pp 7-10). This constitutional issue was determined erroneously by the Court of Appeals.)

In the event the Court finds this constitutional question to be substantial, petitioner intends to present the following issues in its brief for review:

(Here list all issues to be presented in appellant's brief to the Supreme Court, not limited to those which are the basis of the constitutional question claim. An issue may not be briefed if it is not listed in the notice of appeal.)

(Dissent—N.C.G.S. § 7A-30(2)) . . . was entered with a dissent by Judge (name), based on the following issue(s):

(Here state the issue or issues that are the basis of the dissenting opinion in the Court of Appeals. Do not state additional issues. Any additional issues desired to be raised in the Supreme Court when the appeal of right is based solely on a dissenting opinion must be presented by a petition for discretionary review as to the additional issues.)

Respectfully submitted this the __ day of _____, 2___.

s/_____

Attorney for (Plaintiff)(Defendant)-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. § 7A-31

To seek review of the opinion and judgment of the Court of Appeals when petitioner contends the case involves issues of public interest or jurisprudential significance. May also be filed as a separate paper in conjunction with a notice of appeal to the Supreme Court when the appellant contends that such appeal lies of right due to substantial constitutional questions under N.C.G.S. § 7A-30, but desires to have the Court consider discretionary review should it determine that appeal does not lie of right in the particular case.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), respectfully petitions the Supreme Court of North Carolina to certify for discretionary review the judgment of the Court of Appeals (describing it) on the basis that (here set out the grounds from N.C.G.S. § 7A-31 that provide the basis for the petition). In support of this petition, (Plaintiff)(Defendant) shows the following:

Facts

(Here state first the procedural history of the case through the trial division and the Court of Appeals. Then set out factual background necessary for understanding the basis of the petition.)

Reasons Why Certification Should Issue

(Here set out factual and legal arguments to justify certification of the case for full review. While some substantive argument will certainly be helpful, the focus of the argument in the petition should show how the opinion of the Court of Appeals conflicts with prior decisions of the Supreme Court or how the case is significant to the jurisprudence of the State or of significant public interest. If the Court is persuaded to take the case, the appellant may deal thoroughly with the substantive issues in the new brief.)

Issues to Be Briefed

In the event the Court allows this petition for discretionary review, petitioner intends to present the following issues in its brief for review:

(Here list all issues to be presented in appellant's brief to the Supreme Court, not limited to those that are the basis of the petition. An issue may not be briefed if it is not listed in the petition.)

Respectfully submitted this the __ day of _____, 2___.

s/_____

Attorney for (Plaintiff)(Defendant)-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

Attached to the petition shall be a certificate of service upon the opposing parties and a clear copy of the opinion of the Court of Appeals in the case.

PETITION FOR WRIT OF CERTIORARI

To seek review: (1) by the appropriate appellate court of judgments or orders of trial tribunals when the right to prosecute an appeal has been lost or when no right to appeal exists; and (2) by the Supreme Court of decisions and orders of the Court of Appeals when no right to appeal or to petition for discretionary review exists or when such right has been lost by failure to take timely action.

(Caption)

****

TO THE HONORABLE (SUPREME COURT)(COURT OF APPEALS)
OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), respectfully petitions this Court to issue its writ of certiorari pursuant to Rule 21 of the Rules of Appellate Procedure to review the (judgment)(order)(decree) of the [Honorable (name), Judge Presiding, (Superior)(District) Court, _____ County][North Carolina Court of Appeals], dated (date), (here describe the judgment, order, or decree appealed from), and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding the basis of the petition: e.g., failure to perfect appeal by reason of circumstances constituting excusable neglect; non-appealability of right of an interlocutory order, etc.) (If circumstances are that transcript could not be procured from court reporter, statement should include estimate of date of availability and supporting affidavit from the court reporter.)

Reasons Why Writ Should Issue

(Here set out factual and legal arguments to justify issuance of writ: e.g., reasons why interlocutory order makes it impracticable for petitioner to proceed further in trial court; meritorious basis of petitioner's proposed issues, etc.)

Attachments

Attached to this petition for consideration by the Court are certified copies of the (judgment)(order)(decree) sought to be reviewed, and (here list any other certified items from the trial court record and any affidavits attached as pertinent to consideration of the petition).

Wherefore, petitioner respectfully prays that this Court issue its writ of certiorari to the [(Superior)(District) Court, _____ County]

[North Carolina Court of Appeals] to permit review of the (judgment)(order)(decree) above specified, upon issues stated as follows: (here list the issues, in the manner provided for in the petition for discretionary review); and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted this the __ day of _____, 2___.

s/_____

Attorney for Petitioner
(Address, Telephone Number, State Bar Number, and E-mail Address)

(Verification by petitioner or counsel)

(Certificate of service upon opposing parties)

(Attach a clear copy of the opinion, order, etc. which is the subject of the petition and other attachments as described in the petition.)

PETITION FOR WRIT OF SUPERSEDEAS UNDER RULE 23 AND MOTION FOR TEMPORARY STAY

A writ of supersedeas operates to stay the execution or enforcement of any judgment, order, or other determination of a trial court or of the Court of Appeals in civil cases under Rule 8 or to stay imprisonment or execution of a sentence of death in criminal cases (other portions of criminal sentences, e.g., fines, are stayed automatically pending an appeal of right).

A motion for temporary stay under Rule 23(e) is appropriate to seek an immediate stay of execution on an *ex parte* basis pending the Court's decision on the petition for supersedeas or the substantive petition in the case.

(Caption)

****

TO THE HONORABLE (COURT OF APPEALS)(SUPREME COURT) OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), respectfully petitions this Court to issue its writ of supersedeas to stay (execution)(enforcement) of the (judgment)(order)(decree) of the [Honorable _____, Judge Presiding, (Superior)(District) Court, _____ County][North Carolina Court of Appeals] dated _____, pending review by this Court of said (judgment)(order)(decree) which (here describe the

judgment, order, or decree and its operation if not stayed); and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding the basis of the petition and justifying its filing under Rule 23: e.g., trial judge has vacated the entry upon finding security deposited under N.C.G.S. § _____ inadequate; trial judge has refused to stay execution upon motion therefor by petitioner; circumstances make it impracticable to apply first to trial judge for stay, etc.; and showing that review of the trial court judgment is being sought by appeal or extraordinary writ.)

Reasons Why Writ Should Issue

(Here set out factual and legal arguments for justice of issuing the writ; e.g., that security deemed inadequate by trial judge is adequate under the circumstances; that irreparable harm will result to petitioner if it is required to obey decree pending its review; that petitioner has meritorious basis for seeking review, etc.)

Attachments

Attached to this petition for consideration by the court are certified copies of the (judgment)(order)(decree) sought to be stayed and (here list any other certified items from the trial court record and any affidavits deemed necessary to consideration of the petition).

Wherefore, petitioner respectfully prays that this Court issue its writ of supersedeas to the [(Superior)(District) Court, _____ County)] [North Carolina Court of Appeals] staying (execution)(enforcement) of its (judgment)(order)(decree) above specified, pending issuance of the mandate to this Court following its review and determination of the (appeal)(discretionary review)(review by extraordinary writ) (now pending)(the petition for which will be timely filed); and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted this the __ day of _____, 2___.

s/_____

Attorney for Petitioner
(Address, Telephone Number, State Bar Number, and E-mail Address)

(Verification by petitioner or counsel)

(Certificate of Service upon opposing party)

Rule 23(e) provides that in conjunction with a petition for supersedeas, either as part of it or separately, the petitioner may move for a temporary stay of execution or enforcement pending the Court's ruling on the petition for supersedeas. The following form is illustrative of such a motion for temporary stay, either included as part of the main petition or filed separately.

Motion for Temporary Stay

(Plaintiff)(Defendant) respectfully applies to the Court for an order temporarily staying (execution)(enforcement) of the (judgment)(order)(decree) that is the subject of (this)(the accompanying) petition for writ of supersedeas, such order to be in effect until determination by this Court whether it shall issue its writ. In support of this Application, movant shows that (here set out the legal and factual arguments for the issuance of such a temporary stay order; e.g., irreparable harm practically threatened if petitioner must obey decree of trial court during interval before decision by Court whether to issue writ of supersedeas).

Motion for Stay of Execution

In death cases, the Supreme Court uses an order for stay of execution of death sentence in lieu of the writ of supersedeas. Counsel should promptly apply for such a stay after the judgment of the superior court imposing the death sentence. The stay of execution order will provide that it remains in effect until dissolved. The following form illustrates the contents needed in such a motion.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Now comes the defendant, (name), who respectfully shows the Court:

1. That on (date of judgment), The Honorable _____, Judge Presiding, Superior Court, _____ County, sentenced the defendant to death, execution being set for (date of execution).

2. That pursuant to N.C.G.S. § 15A-2000(d)(1), there is an automatic appeal of this matter to the Supreme Court of North Carolina, and defendant's notice of appeal was given (describe the circumstances and date of notice).

3. That the record on appeal in this case cannot be served and settled, the matter docketed, the briefs prepared, the arguments heard, and a decision rendered before the date scheduled for execution.

WHEREFORE, the defendant prays the Court to enter an order staying the execution pending judgment and further orders of this Court.

Respectfully submitted this the __ day of _____, 2___.

s/_____

Attorney for Defendant-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

(Certificate of Service on Attorney General, District Attorney, and Warden of Central Prison)

~~PROTECTING THE IDENTITY OF CERTAIN JUVENILES; NOTICE~~

~~In cases governed by Rules 3(b), 3.1(b), and 4(e), the notice requirement of Rules 3.1(b) and 9(a) is as follows:~~

~~(Caption)~~

~~**********************************~~

~~TO THE HONORABLE (COURT OF APPEALS)(SUPREME COURT) OF NORTH CAROLINA:~~

~~FILED PURSUANT TO RULE [3(b)(1)][3.1(b)][4(e)]; SUBJECT TO PUBLIC INSPECTION ONLY BY ORDER OF A COURT OF THE APPELLATE DIVISION.~~

* * *

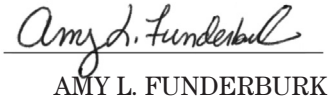
These amendments to the North Carolina Rules of Appellate Procedure become effective on 1 January 2019.

These amendments shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 19th day of December, 2018.

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 19th day of December, 2018.



AMY L. FUNDERBURK
Clerk of the Supreme Court

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