372 N.C.—No. 1 Pages 1-110

DISCIPLINE AND DISABILITY OF ATTORNEYS; LEGAL SPECIALIZATION; RULES OF PROFESSIONAL CONDUCT

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE 4, 2019

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

THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice

MARK D. MARTIN[1]
CHERI BEASLEY[2]

Associate Justices

PAUL MARTIN NEWBY
ROBIN E. HUDSON
SAMUEL J. ERVIN, IV
MICHAEL R. MORGAN
ANITA EARLS[3]
MARK DAVIS[4]

Former Chief Justices

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

Former Justices

ROBERT R. BROWNING
J. PHIL CARLTON
WILLIS P. WHICHARD
JAMES A. WYNN, JR.
FRANKLIN E. FREEMAN, JR.
G. K. BUTTERFIELD, JR.
ROBERT F. ORR
GEORGE L. WAINWRIGHT, JR.
EDWARD THOMAS BRADY
PATRICIA TIMMONS-GOODSON
ROBERT N. HUNTER, JR.
ROBERT H. EDMUNDS, JR.
BARBARA A. JACKSON[5]

Clerk

AMY L. FUNDERBURK

Librarian

THOMAS P. DAVIS

[1]Resigned 28 February 2019. [2]Sworn in 1 March 2019. [3]Sworn in 3 January 2019. [4]Sworn in 25 March 2019. [5]Term ended 31 December 2018.

ADMINISTRATIVE OFFICE OF THE COURTS

Director
MARION R. WARREN[6]

Interim Director
MCKINLEY WOOTEN[7]

Assistant Director
DAVID F. HOKE

OFFICE OF APPELLATE DIVISION REPORTER
HARRY JAMES HUTCHESON
KIMBERLY WOODELL SIEREDZKI
JENNIFER C. PETERSON

[6]Resigned 28 February 2019. [7]Appointed 28 February 2019.

SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 1 FEBRUARY 2019 AND 29 MARCH 2019

County of Durham ex rel. Wilson v. Burnette 64
In re J.A.M. 1
Pachas v. N.C. Dep't of Health & Human Servs. 12
Preiss v. Wine & Design Franchise, LLC 65
Saunders v. ADP TotalSource Fi Xi, Inc. 29
State v. Gentle 47
State v. Phachoumphone 72
State v. Tart 73
State v. Thompson 48

ORDERS

SciGrip, Inc. v. Osae 49
State v. J.C. 50
State ex rel. Cooper v. Berger 94

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

Accardi v. Hartford Underwriters Ins. Co. 97
Appalachian Materials, LLC v. Watauga Cty. 108
Armstrong v. Wilson Cty. 52
AVR Davis Raleigh, LLC v. Triangle Constr. Co., Inc. 59
Baker v. N.C. Psychology Bd. 61
Bank of Am., N.A. v. Schmitt 96
Barrett v. Coston 59
Block v. Block 106
Blumenschein v. Blumenschein 60
Brady v. Vlaanderen 57
Bynum v. Mecklenburg Co. Sch. Bd. 100
Bynum v. Progressive Universal Ins. 108
Byrd v. Byrd-Russ 99
Cabarrus Cty. Bd. of Educ. v. Bd. of Trustees, Teachers' & State Emps.' Ret. Sys. 106
Cabarrus Cty. Bd. of Educ. v. Dep't of State Treasurer 105
Carter v. St. Augustine's Univ. 109
Cates v. Bucholtz 62
Chambers v. Moses H. Cone Mem'l Hosp. 100
Chavez v. Carmichael 108
City of Charlotte v. Univ. Fin. Props., LLC 101
Clark v. Joyner 96
Cooper v. Berger 96
Cooper v. Berger 103
Corwin v. British Am. Tobacco PLC . . 53
Cty. of Durham v. Burnette 106
Davis v. Rizzo 58
Desmond v. News & Observer Publ'g Co. 99
Dickson v. Rucho 54
Dunhill Holdings, LLC v. Lindberg . . . 57
Evans v. State of N.C. 98
Everett's Lake Corp. v. Dye 107
Finan v. Child Protective Serv. 51
Flood v. Crews 56
Francis v. Mun. Ct. of Wake Cty. 57
Grande Villas at the Pres. Condo. Homeowners Ass'n, Inc. v. Indian Beach Acquisition LLC . . . 62
Greater Harvest Global Ministries, Inc. v. Blackwell Heating & Air Conditioning, Inc. 54
Grissom v. Cohen 52
Grodner v. Grodner 103
Guidotti v. Moore 60
Ham v. Millis 60
Hamlet H.M.A., LLC v. Hernandez . . 61
Harper v. Harper 51
In re B.O.A. 56
In re Bynum 99
In re C-R.D.G. 58
In re Duncan 109
In re E.M. 97
In re E.W.P. 106
In re Foreclosure of Radcliff 52

In re Frucella 105
In re J.B. 104
In re Kelford Owner, LLC 109
In re Radcliff 96
In re Ridgeway 98
In re Shuford 97
In re Snow Camp LLC 109
In re T.T.E. 101
In re V.P.M.A. 60
In re Waller 55
James v. State 109
Jones v. Slagle 61
Justus v. Rosner 55
Khaja v. Husna 60
LeTendre v. Currituck Cty. 54
LeTendre v. Currituck Cty. 59
Mahler v. Smithfield 97
Martin v. State of N.C. 101
Mastanduno v. Nat'l Freight Indus. 52
New Hanover Cty. Bd. of Educ. v. Stein 59
New Hanover Cty. Bd. of Educ. v. Stein 104
Nichols v. Pulley 56
NNN Durham Off. Portfolio 1, LLC v. Highwoods Realty Ltd. P'ship . . . 102
Rouse v. Forsyth Cty. Dep't of Soc. Servs. 51
SciGrip, Inc. v. Osae 54
Shallotte Partners, LLC v. Berkadia Com. Mortg., LLC 96
Smith v. N.C. Bd. of Funeral Serv. . . . 58
State ex rel. Utils. Comm'n v. Attorney Gen. 60
State v. Allen 99
State v. Augustine 99
State v. Ayers 103
State v. Baker 62
State v. Baldwin 53
State v. Banner 56
State v. Baskins 102
State v. Bennett 107
State v. Bradley 61
State v. Brooks 60
State v. Burke 101
State v. Burton 60
State v. Butler 110
State v. Byers 53
State v. Calhoun 53
State v. Casey 100
State v. Cody 100
State v. Cole 103
State v. Cole 108
State v. Coley 51
State v. Conley 98
State v. Cooper 98
State v. Cox 99
State v. Davis 55
State v. Daw 96
State v. Delair 52
State v. Dove 53
State v. Dove 99
State v. Dowd 109
State v. Enoch 105
State v. Ferrari 103
State v. Frost 98
State v. Fuller 61
State v. Fuller 106
State v. Geddie 61
State v. Gibson 98
State v. Gill 107
State v. Golphin 108
State v. Gray 105
State v. Greenfield 51
State v. Hairston 107
State v. Hayward 97
State v. Hinton 98
State v. Hobbs 102
State v. Holmes 97
State v. Huckabee 60
State v. Hudson 59
State v. J.C. 61
State v. James 62
State v. Jimenez 97
State v. Johnson 61
State v. Johnson 62
State v. Johnson 100
State v. Johnson 106
State v. Jones 53
State v. Jones 62
State v. Keels 104
State v. Kraft 62
State v. Lee 60
State v. LeGrande 104
State v. Lewis 100
State v. Malachi 100
State v. Maldonado 59
State v. McKinnon 57
State v. McNair 54
State v. Means 56
State v. Miller 54
State v. Miller 105
State v. Mitchell 98
State v. Morgan 52
State v. Morgan 97
State v. Mosby 63
State v. Myers-McNeil 109
State v. Osborne 59
State v. Parker 106

State v. Patterson 110
State v. Payne 96
State v. Perry 107
State v. Pineda 53
State v. Pinnix 97
State v. Powers 98
State v. Reid 52
State v. Richardson 102
State v. Robinson 107
State v. Royster 62
State v. Royster 108
State v. Ryan 105
State v. Sisk 107
State v. Smith 105
State v. Solomon 97
State v. Summers 58
State v. Taylor 51
State v. Thomas 106
State v. Thompson 107
State v. Tomas 98
State v. Wagoner 58
State v. Walters 110
State v. Walton 57
State v. Walton 103
State v. Warren 109
State v. Waycaster 56
State v. Waycaster 103
State v. White 60
State v. Williams 55
State v. Williams 97
State v. Williams 101
State v. Wright 63
Sykes v. Blue Cross & Blue Shield of N.C. 55
Sykes v. Health Network Solutions, Inc. 102
Taylor v. Hernandez 57
Taylor v. Wake Cty. 53
Thompson v. Bass 58
Town of Apex v. Rubin 107
Town of Littleton v. Layne Heavy Civil, Inc. 104
Town of Nags Head v. Richardson . . . 102
Wadhwania v. Wake Forest Univ. Baptist Med. Ctr. 109

HEADNOTE INDEX

APPEAL AND ERROR

Case relied upon by Court of Appeals—inapposite—In its decision limiting the trial court's jurisdiction to enforce its own order under N.C. Rule of Civil Procedure 70, the Court of Appeals erroneously relied on an inapposite case from the N.C. Supreme Court—a case that involved the law of the case doctrine rather than a motion to enforce a court order. **Pachas v. N.C. Dep't of Health & Human Servs., 12.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Previous cases of neglect—present risk to child—The Court of Appeals correctly determined that clear and convincing evidence and the trial court's findings of fact supported its conclusion that infant juvenile J.A.M. was neglected pursuant to N.C.G.S. § 7B-101(15). While a previous closed case involving neglect of other children cannot, standing alone, support an adjudication of neglect, the trial court here found other factors indicating a present risk to J.A.M. The Supreme Court also noted the trial court's statement that respondent-mother's "testimony was telling today," emphasizing the trial court's unique position in observing witness testimony firsthand and make credibility determinations. **In re J.A.M., 1.**

CRIMINAL LAW

Prosecutor's arguments—clarifying issues of mental state—permissible hyperbole—The trial court did not err by declining to intervene ex mero motu during the State's closing argument in defendant's trial for attempted first-degree

murder. The challenged statements served to clarify issues regarding defendant's mental state and also contained permissible hyperbole. **State v. Tart, 73.**

INDICTMENT AND INFORMATION

Indictment and Information—attempted first-degree murder—kill and murder—malice aforethought—A short-form indictment was sufficient to charge defendant with attempted first-degree murder even though it replaced the statutory language "kill and murder" with "kill and slay." The "malice aforethought" language provided certainty of the offense charged. **State v. Tart, 73.**

JURISDICTION

Trial court's authority to enforce its own order—new factual and legal issues—The trial court had jurisdiction under N.C. Rule of Civil Procedure 70 to find new facts and determine whether the N.C. Department of Health and Human Services had disobeyed the trial court's previous order to reinstate petitioner's Medicaid benefits. The Court of Appeals erred by holding that new factual and legal issues deprived the superior court of jurisdiction. **Pachas v. N.C. Dep't of Health & Human Servs., 12.**

WORKERS COMPENSATION

Attorney fees—appeal to superior court—consideration of additional evidence not presented to Commission—discretionary authority—Where the N.C. Industrial Commission declined to award certain attorney fees to plaintiff's attorneys, the superior court on appeal acted within its authority under N.C.G.S. § 97-90(c) when it considered additional evidence not presented to the Commission. The superior court exercised its statutory discretion in ordering attorney fees to be paid to plaintiff's attorneys from the reimbursement for retroactive attendant care medical compensation. **Saunders v. ADP TotalSource Fi Xi, Inc., 29.**

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
August 26, 27, 28, 29
September 30
October 1, 2, 3,
November 4, 5, 6, 7
December 9, 10, 11

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

IN THE MATTER OF J.A.M.

No. 7PA17-2

Filed 1 February 2019

Child Abuse, Dependency, and Neglect—previous cases of neglect —present risk to child

The Court of Appeals correctly determined that clear and convincing evidence and the trial court's findings of fact supported its conclusion that infant juvenile J.A.M. was neglected pursuant to N.C.G.S. § 7B-101(15). While a previous closed case involving neglect of other children cannot, standing alone, support an adjudication of neglect, the trial court here found other factors indicating a present risk to J.A.M. The Supreme Court also noted the trial court's statement that respondent-mother's "testimony was telling today," emphasizing the trial court's unique position in observing witness testimony first-hand and make credibility determinations.

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. ___, 816 S.E.2d 901 (2018), on remand from this Court, 370 N.C. 464, 809 S.E.2d 579 (2018), affirming an order entered on 30 March 2016 by Judge Louis A. Trosch in District Court, Mecklenburg County. Heard in the Supreme Court on 9 January 2019.

Matthew D. Wunsche, GAL Appellate Counsel, and Caroline P. Mackie for appellee Guardian ad Litem; and Marc S. Gentile,

Associate County Attorney, for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services.

Richard Croutharmel for respondent-appellant mother.

HUDSON, Justice.

The case comes to us based on a dissenting opinion in the Court of Appeals. The sole issue before us is whether the Court of Appeals majority correctly determined that the clear and convincing evidence and the trial court's findings of fact supported its conclusion of law that the juvenile J.A.M. was neglected. Because we conclude that the trial court made sufficient findings of fact based on evidence of conditions at the relevant time to support its conclusion of neglect, we affirm.

Background

J.A.M. was born in January 2016. In late February 2016, Mecklenburg County Department of Social Services, Youth and Family Services (YFS) received a child protective services report making the department aware of J.A.M.'s birth, and YFS immediately opened an investigation. On 29 February, YFS filed a juvenile petition alleging that J.A.M. was not safe in the home because of the histories of both parents.[1]

On 30 March 2016, a hearing regarding J.A.M. took place before Mecklenburg County District Court Judge Louis A. Trosch, who entered a consolidated adjudicatory and dispositional order in J.A.M.'s case based on testimony and exhibits admitted as evidence to the court. The court adjudicated J.A.M. neglected and, in the dispositional phase of the proceeding, ordered reunification efforts with J.A.M.'s mother (respondent-mother) to cease and established that the primary plan of care for J.A.M. would be reunification with her father (respondent-father).[2]

Respondent-mother has a significant history of involvement with YFS extending back to 2007 relating to children born prior to J.A.M.[3] Significant evidence relating to YFS' previous interactions with respondent-mother involving her older children was entered into the record in the adjudication phase of J.A.M.'s case. The evidence before the trial

1. Respondent-father is not a party to this appeal.

2. Only the neglect adjudication—and not the dispositional order—is before us.

3. J.A.M.'s father is not the father of any of respondent-mother's older children.

court tended to show that respondent-mother has a long history of violent relationships with the fathers of her previous six children, during which her children "not only witnessed domestic violence, but were caught in the middle of physical altercations." Furthermore, during this period, she repeatedly declined services from YFS and "continued to deny, minimize and avoid talking about incidences of violence." All of this resulted in her three oldest children first entering the custody of YFS on 24 February 2010.

The most serious incident occurred in June 2012 when respondent-mother was in a relationship with E.G. Sr., the father of her child E.G. Jr., a relationship that—like prior relationships between respondent-mother and other men—had a component of domestic violence. Respondent-mother had recently represented to the court that "her relationship with [E.G. Sr.] was over" and stated that she "realized that the relationship with [E.G. Sr.] was bad for her children"; however, she quickly invited E.G. Sr. back into her home. Following another domestic violence incident between respondent-mother and E.G. Sr., E.G. Jr. "was placed in an incredibly unsafe situation sleeping on the sofa with [E.G. Sr.]" for the night, which resulted in E.G. Jr. suffering severe, life-threatening injuries, including multiple skull fractures, at the hands of E.G. Sr. The next morning, respondent-mother "observed [E.G. Jr.'s] swollen head, his failure to respond, [and] his failure to open his eyes or move his limbs," but she did not dial 911 for over two hours. Following this incident, respondent-mother's children re-entered the custody of YFS. Afterwards, she refused to acknowledge E.G. Jr.'s "significant special needs" that resulted from his injuries, maintaining that "there [was] nothing wrong with him" and "stat[ing] that he [did] not need all the services that [were] being recommended for him." Respondent-mother proceeded to have another child with E.G. Sr. when he was out on bond for charges of felony child abuse.

In response to respondent-mother's failure to protect E.G. Jr., as well as her other children, her parental rights to the six children she had at the time were terminated in an order filed on 21 April 2014 by Judge Trosch. The 2014 termination order was based largely on the court's finding that she had "not taken any steps to change the pattern of domestic violence and lack of stability for the children since 2007."

At the 30 March 2016 adjudication hearing for J.A.M., the court received into evidence several exhibits that included the 21 April 2014 order terminating respondent-mother's parental rights to her six older children, a 27 February 2013 adjudication and disposition order regarding five of those children, and a certified copy of the criminal record of

respondent-father showing that he had been convicted twice in 2013 for assault on a female.[4]

In addition to receiving these exhibits into the record, the court also heard testimony from several witnesses. Stephanie West, social work supervisor at Mecklenburg County Child Protective Services, testified that when the department received the report regarding J.A.M., a social worker was assigned to go to the home and perform a safety assessment in light of both parents' prior YFS involvement. Both parents declined to sign the safety assessment. A department representative returned the following day to talk with respondent-mother about setting up a Child Family Team meeting, but she "adamantly stated she was not interested." Ms. West further discussed respondent-mother's viewpoint at the second visit.

> Q. And when she said she was not interested, not interested in what?
>
> A. More services. She was not going to engage in any services. She reported that she had gone through services, she didn't need any services, there were [sic] no current domestic violence going on, and she was -- and that was pretty-much [sic] all she had to say.

Respondent-mother also testified at the hearing and was asked questions on two subjects pertinent to this appeal: (1) her familiarity with respondent-father's domestic violence history, and (2) her understanding of what had led to the termination of her parental rights to her older children.

Respondent-mother stated that she knew the "warning signs" of domestic violence to look for in a relationship. However, she subsequently testified that she was aware that respondent-father had been arrested for assault on a female in a case involving his sister but acknowledged that she had never asked him whether he did, in fact, commit the assault.

Similarly, when asked what she learned from having her parental rights terminated to her six older children, respondent-mother generally

---

4. The court also received into evidence an 8 October 2012 order adjudicating neglected and abused another daughter of respondent-father that he had with a different woman. That order states that respondent-father's older daughter, then aged nine months, received a black eye while under her parents' care, "most likely during a DV incident" between them.

admitted to "bad decisions" and "bad choices" in the past, noting that she had since "learned to put my children first, before men."

Nonetheless, respondent-mother subsequently testified further about her prior YFS case:

> Q. Why were your rights terminated?
>
> A. Because when my child came back into -- my kids came back into custody, due to my child being physical injury by his father, [E.G. Sr]. That's --
>
> Q. So your understanding is that your rights to your six other children was -- were terminated because of one child being physically abused?
>
> A. Oh, yes, ma'am. . . . because I had completed all my services and did everything that was asked of me to do, up until my child got hurt by his father.

Regarding her role in that abuse, respondent-mother testified:

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

After reviewing the exhibits and hearing the testimony, the trial court concluded that J.A.M. was neglected because:

> Juv[enile] resides in an environment in which both parents have a [history] of domestic violence/assault and each parent had a child enter [YFS] custody that was deemed abused while in the care of each parent. All of juveniles' siblings were adjudicated neglected. *No evidence the parents have remedied the injurious environment they created for their other children.*

(Emphasis added.) In support of its conclusion, the trial court made the following additional findings of fact:

> Clear and convincing evidence juv[enile] is neglected. [Respondent-mother]'s testimony was telling today. Additionally, parents failed to make any substantive progress in their prior cases which resulted in [termination of parental rights] for [respondent-mother] and [Father]'s child was placed in the custody of that child's mother. [Department] attempted to engage parents when it received a referral and both parents declined to work [with Department] and reported not needing any services. [Respondent-mother] testified. [Maternal grandmother] and [Social Work Supervisor] West all testified. Previously [respondent-mother]'s children were returned to her care and ended up back in [YFS'] custody due to the abuse of one of the juveniles and it appeared [respondent-mother] was not demonstrating skills learned [from] service providers. [Father] did not dispute allegations in the petition. [Respondent-mother] has a [history] of dating violent men and [Father] in this case has been found guilty at least twice for assault on a female. [Respondent-mother] acknowledged being aware [Father] had been charged [with] assaulting his sister but [respondent-mother] said she never asked [Father] if he assaulted his sister despite testifying about the "red flags" she learned in DV servs. [Respondent-mother] testified to having a child [with] the man who abused one of her kids. [Department] received a total of 12 referrals regarding the [respondent-mother] and at least 11 referrals pertained to domestic violence. [Court] took into consideration all the exhibits (1-4) submitted by YFS when making its decision. To date, [respondent-mother] failed to acknowledge her role in the [juveniles'] entering custody and her rights subsequently being terminated.

Respondent-mother appealed Judge Trosch's 30 March 2016 order adjudicating J.A.M. a neglected juvenile to the Court of Appeals, which issued a unanimous decision on 20 December 2016 reversing the trial court's neglect adjudication. *See In re J.A.M.*, ___ N.C. App. ___, 795 S.E.2d 262 (2016). The Court of Appeals held that

> [d]ue to the intervening years between the prior cases and the facts before us, we conclude the parents' past histories, coupled only with Respondent-mother's failure to inquire about an alleged incident of prior domestic

> violence by J.A.M.'s father, do not support a legal conclusion that J.A.M. is a neglected juvenile. No evidence supports the trial court's findings of fact. The findings do not support its conclusion that J.A.M. is a neglected juvenile because she lives in an environment injurious to her welfare.

Id. at ___, 795 S.E.2d at 266 (citation omitted). YFS filed a petition for discretionary review with this Court, which we allowed on 8 June 2017. *See In re J.A.M.*, 369 N.C. 750, 799 S.E.2d 617 (2017). We heard argument on the case on 9 January 2018 and filed a per curiam opinion on 2 March 2018, *In re J.A.M.*, 370 N.C. 464, 809 S.E.2d 579 (2018) (*J.A.M. I*). In *J.A.M. I*, we held that the Court of Appeals had misapplied the standard of review and stated that "the trial court's finding was 'supported by clear and convincing competent evidence' and is therefore 'deemed conclusive.' " *Id.* at 466, 809 S.E.2d at 581 (citing *In re N.G.*, 186 N.C. App. 1, 4, 650 S.E.2d 45, 47 (2007), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008)). We reversed the Court of Appeals decision and remanded the case to that court for reconsideration and proper application of the standard of review. *Id.* at 467, 809 S.E.2d at 581.

On remand, the Court of Appeals issued another opinion on 5 June 2018, relying on the guidance we provided in *J.A.M. I*. In its new opinion, a majority of the panel affirmed the trial court's neglect adjudication, concluding that "[t]he cumulative weight of the trial court's findings [is] sufficient to support an adjudication of neglect, and our Court may not reweigh the underlying evidence on appeal." *In re J.A.M.*, ___ N.C. App. ___, ___, 816 S.E.2d 901, 905 (2018). The panel's majority noted that the trial court's findings that respondent-mother

> (1) continued to fail to acknowledge her role in her rights being terminated to her six other children, (2) denied the need for any services for J.A.M.'s case, and (3) became involved with the father, who [had] engaged in domestic violence . . . even though domestic violence was one of the reasons her children were removed from her home, constitute evidence that the trial court could find was predictive of future neglect.

Id. at ___, 816 S.E.2d at 905 (citing *In re N.G.*, 186 N.C. App. at 9-10, 650 S.E.2d at 51). The Court of Appeals dissent maintained that the evidence in the trial record was entirely inadequate to support the court's neglect adjudication. In the dissenter's opinion, "the trial court's order contains no findings of fact [ ] which are supported by any evidence, and certainly

not 'clear and convincing competent evidence,' that J.A.M. is presently at substantial risk of neglect by Respondent-mother." *Id.* at ___, 816 S.E.2d at 907 (Tyson, J., dissenting). On 27 June 2018, respondent-mother entered her notice of appeal based on the dissenting opinion. The parties briefed the issue of whether the competent evidence and the trial court's findings of fact supported its conclusion of law that J.A.M. was neglected. We heard argument for the second time on 9 January 2019.

Analysis

The North Carolina General Statutes set out the grounds upon which a juvenile can be adjudicated "neglected":

> Any juvenile less than 18 years of age (i) who is found to be a minor victim of human trafficking under G.S. 14-43.15 or (ii) whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; *or who lives in an environment injurious to the juvenile's welfare*; or the custody of whom has been unlawfully transferred under G.S. 14-321.2; or who has been placed for care or adoption in violation of law. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect *or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.*

N.C.G.S. § 7B-101(15) (Supp. 2018) (emphases added). In addition, allegations of neglect must be proved by clear and convincing evidence. *Id.* § 7B-805 (2017).

As we stated in *J.A.M. I*,

> [i]t is well settled that "[i]n a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re N.G.*, 186 N.C. App. 1, 4, 650 S.E.2d 45, 47 (2007) (quoting *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997)), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008); *see also In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984) ("Although the

> question of the *sufficiency* of the evidence to support the findings may be raised on appeal, our appellate courts are bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." (citations omitted)).

370 N.C. at 464-65, 809 S.E.2d at 580. A court may not adjudicate a juvenile neglected solely based upon previous Department of Social Services involvement relating to other children. Rather, in concluding that a juvenile "lives in an environment injurious to the juvenile's welfare," N.C.G.S. § 7B-101(15), the clear and convincing evidence in the record must show current circumstances that present a risk to the juvenile. The trial court's findings here did so and thus support the trial court's conclusion of law.

The neglect statute "neither dictates how much weight should be given to a prior neglect adjudication, nor suggests that a prior adjudication is determinative." *In re A.K.*, 360 N.C. 449, 456, 628 S.E.2d 753, 757 (2006) (citation omitted). "Rather, the statute affords the trial judge some discretion in determining the weight to be given such evidence." *In re Nicholson*, 114 N.C. App. 91, 94, 440 S.E.2d 852, 854 (1994).

"In order to adjudicate a juvenile neglected, our courts have additionally 'required that there be some physical, mental, or emotional impairment of the juvenile *or a substantial risk of such impairment* as a consequence of the failure to provide "proper care, supervision, or discipline." ' " *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003) (emphasis added) (quoting *In re Safriet*, 112 N.C.App. 747, 752, 436 S.E.2d 898, 901-02 (1993)). In neglect cases involving newborns, "the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999) (affirming the neglect adjudication of an infant based on the parents' failure to correct circumstances that led to the death of an older sibling before the infant was born).

The Court of Appeals dissenting opinion correctly notes that "[a] prior and closed case with other children . . . *standing alone*, cannot support an adjudication of current or future neglect." *In re J.A.M.*, ___ N.C. App. at ___, 816 S.E.2d at 908 (emphasis added); *see In re N.G.*, 186 N.C. App. at 9, 650 S.E.2d at 51 ("[T]he fact of prior abuse, standing alone, is not sufficient to support an adjudication of neglect."). Instead, we "require[ ] the presence of other factors to suggest that the neglect or

abuse will be repeated." *In re J.C.B.*, 233 N.C. App. 641, 644, 757 S.E.2d 487, 489, *disc. rev. denied*, 367 N.C. 524, 762 S.E.2d 213 (2014) (citations omitted). Here, the prior orders entered into the record were not the sole basis for the trial court's decision. Rather, the trial court also properly found "the presence of other factors" indicating a present risk to J.A.M. when it reached its conclusion that J.A.M. was neglected as a matter of law.

The Court of Appeals majority identified three findings of fact, all supported by clear and convincing evidence and all of which support a conclusion that J.A.M. presently faced substantial risk in her living environment. Specifically, the trial court found that respondent-mother

> (1) continued to fail to acknowledge her role in her rights being terminated to her six other children, (2) denied the need for any services for J.A.M.'s case, and (3) became involved with the father, who [had] engaged in domestic violence . . . even though domestic violence was one of the reasons her children were removed from her home . . . .

In re J.A.M., ___ N.C. App. at ___, 816 S.E.2d at 905 (majority opinion).

All of these findings were supported by the testimony in the 30 March 2016 hearing. Social Work Supervisor West's unchallenged testimony provided the basis for the finding that respondent-mother had denied the need for services, and respondent-mother's own testimony furnished the basis for the other two findings. Respondent-mother testified that she knew that respondent-father had been charged with assault on a female but did not ask him whether this report was true. This testimony supports the court's finding that she was involved with respondent-father despite her awareness of his history of domestic violence. Respondent-mother also testified that she believed her parental rights to her six older children were terminated because of the actions of E.G. Sr. in seriously injuring E.G. Jr. and that she had no role in the harm that came to their child. This testimony supports the finding that she "fail[ed] to acknowledge her role in" the termination of her rights as to her six older children.

In turn, the trial court's findings of fact also support the court's conclusion of law that J.A.M. was a neglected juvenile, a child who was at risk in that there was "[n]o evidence the parents ha[d] remedied the injurious environment they created for their other children." Combined with the lengthy record from her past cases, the findings that respondent-mother believed she did not need any services from YFS, had opted not to directly confront her romantic partner's prior domestic violence history, and continued to minimize the role her own prior

decisions played in the harm her older children had suffered all support a conclusion that respondent-mother had not made sufficient progress in recognizing domestic violence warning signs, in accurately assessing poor decisions from the past, or in identifying helpful resources. It was proper for the trial court to then reach the conclusion that respondent-mother had not developed the skills necessary to avoid placing J.A.M. in a living situation in which she would suffer harm.

In making its three findings indicating that the present circumstances of J.A.M.'s living environment placed her at a substantial risk of harm, the trial court stated that respondent-mother's "testimony was telling today." While this description would be too vague to support any legal conclusion standing on its own, the statement is noteworthy because it indicates that the trial court made a credibility determination following the testimony and that the court's credibility judgment supported its factual finding that respondent-mother had failed to take responsibility for her role in the termination of her parental rights to her other children. Arguably, there was testimony in the record below that could have supported different factual findings and possibly, even a different conclusion. But an important aspect of the trial court's role as finder of fact is assessing the demeanor and credibility of witnesses, often in light of inconsistencies or contradictory evidence. It is in part because the trial court is uniquely situated to make this credibility determination that appellate courts may not reweigh the underlying evidence presented at trial. This principle certainly applies in a case like this one, in which the same trial court judge had multiple opportunities over a period of time to see and hear the parties involved.

We conclude that the trial court's adjudication that J.A.M. was a neglected juvenile was based on findings of fact which were supported by competent evidence and included present risk factors in addition to an evaluation of past adjudications involving other children. Because the Court of Appeals majority properly applied the appropriate standard of review in affirming the trial court's order, we affirm the decision of the Court of Appeals.

AFFIRMED.

CARLOS PACHAS, BY HIS ATTORNEY IN FACT, JULISSA PACHAS, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF
HEALTH AND HUMAN SERVICES, RESPONDENT

No. 144A18

Filed 1 February 2019

1. Jurisdiction—trial court's authority to enforce its own order —new factual and legal issues

The trial court had jurisdiction under N.C. Rule of Civil Procedure 70 to find new facts and determine whether the N.C. Department of Health and Human Services had disobeyed the trial court's previous order to reinstate petitioner's Medicaid benefits. The Court of Appeals erred by holding that new factual and legal issues deprived the superior court of jurisdiction.

2. Appeal and Error—case relied upon by Court of Appeals —inapposite

In its decision limiting the trial court's jurisdiction to enforce its own order under N.C. Rule of Civil Procedure 70, the Court of Appeals erroneously relied on an inapposite case from the N.C. Supreme Court—a case that involved the law of the case doctrine rather than a motion to enforce a court order.

Justice EARLS did not participate in the consideration or decision of this case.

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. ___, 814 S.E.2d 136 (2018), affirming an order entered on 21 April 2017 by Judge W. Robert Bell in Superior Court, Mecklenburg County. Heard in the Supreme Court on 1 October 2018.

Charlotte Center for Legal Advocacy, by Douglas Stuart Sea and Cassidy Estes-Rogers, for petitioner-appellant.

Joshua H. Stein, Attorney General, by Lee J. Miller, Assistant Attorney General, for respondent-appellee.

John R. Rittelmeyer for Disability Rights North Carolina, amicus curiae.

HUDSON, Justice

This case comes to us by way of petitioner's notice of appeal based on a dissenting opinion in the Court of Appeals. We now review "whether the Court of Appeals erred as a matter of law in ruling that the superior court lacked jurisdiction to decide whether its previous order was being violated by a state agency on the grounds that petitioner failed to exhaust administrative remedies before moving to enforce the court's order." Because we conclude that the superior court had jurisdiction to enforce its previous order, we vacate the Court of Appeals' decision. *Pachas v. N.C. Dep't of Health & Human Servs.*, ___ N.C. App. ___, ___, 814 S.E.2d 136, 137 (2018). Accordingly, we remand this case to the Court of Appeals to address the merits of respondent's argument that the North Carolina Department of Health and Human Services (DHHS) did not violate the 17 March 2016 order.

I. Factual and Procedural Background

Petitioner Carlos Pachas, a resident of Mecklenburg County, and a Medicaid recipient, was left completely disabled and requiring twenty-four hour care as result of a stroke and a brain tumor in 2014. At the time, petitioner lived with his wife, their two minor children, and his wife's elderly parents. All members of the household were dependent on petitioner for their financial support. In January 2015, he began receiving Social Security Disability benefits, and thereafter applied for re-enrollment in Medicaid.

On 5 May 2015, the Mecklenburg County Department of Social Services (DSS) sent petitioner a notice that his currently ongoing Medicaid benefits would be terminated starting on 1 June 2015, and that he would need to meet a deductible of $6642 during the period of 1 May through 31 October 2015 to regain eligibility for Medicaid benefits. The DSS decision was based on the agency's determination that petitioner, because of his monthly Social Security Disability benefits of $1369 that began in January 2015, exceeded the income limit for an individual to qualify for Medicaid as "Categorically Needy"—the income limit being one hundred percent of the federal poverty level[1]—and that petitioner now qualified for Medicaid as "Medically Needy" under DSS regulations. Under these regulations, "Categorically Needy" Medicaid recipients are not charged a deductible, but "Medically Needy" recipients are.

1. This income limit was established by the Current Operations and Capital Improvements Appropriations Act of 2013, sec. 12H.10.(a)-(b)(1), 2013 N.C. Sess. Laws 2013-360 (Regular Sess.) 995, 1180-81.

Medicaid Eligibility Unit, Div. of Med. Assistance, N.C. Dep't of Health & Human Servs., *Aged Blind and Disabled Medicaid Manual*, MA-2360 ¶ I (Nov. 1, 2011).

Petitioner requested a hearing before DSS concerning the termination of his Medicaid benefits, and the hearing was held on 8 May 2015. On 13 May 2015, DSS sent petitioner a Notice of Decision affirming the termination of his Medicaid benefits. The Notice of Decision instructed petitioner that he could appeal the matter to DHHS. On the same day, petitioner filed a written request to appeal the decision, and the appeal was heard on 16 June. DHHS affirmed DSS's decision requiring Pachas to meet a $6642 deductible in a Notice of Decision dated 10 August 2015.

On 13 August, Pachas as petitioner appealed the unfavorable decision to DHHS, and he submitted his written appeal on 27 August 2015. In his appeal, petitioner maintained that DHHS erred in affirming the DSS decision to discontinue his Medicaid benefits arguing that DSS's method of calculating his income eligibility for Medicaid "violate[s] the plain language of the federal Medicaid statute and controlling North Carolina case law."

First, petitioner argued that DSS's policy violates the plain language of the controlling federal Medicaid statute, 42 U.S.C. § 1396a(m). Petitioner stated that the General Assembly elected to provide Medicaid to aged, blind, and disabled persons with incomes under one hundred percent of the federal poverty level. Petitioner noted that beneficiaries who meet these criteria are considered to be "Categorically Needy," and their eligibility for Medicaid is governed by 42 U.S.C. § 1396a(m). Petitioner then pointed to § 1396a(m)(2)(A), which states that a beneficiary's income level is determined by considering "a family of the size involved." Petitioner contended that this language required DSS to determine whether his monthly income from Social Security Disability payments was more than one hundred percent of the federal poverty line if used not just to support himself, but to support all six members of his family as dependents.

Second, petitioner argued that the North Carolina Court of Appeals' decision in *Martin v. North Carolina Department of Health and Human Services*, 194 N.C. App. 716, 670 S.E.2d 629, *disc. rev. denied*, 363 N.C. 374, 678 S.E.2d 665 (2009), required DSS to determine whether petitioner's income exceeded one hundred percent of the federal poverty guideline if used to support all six members of his family. According to petitioner, *Martin* involved a parallel Medicaid eligibility category,

Medicaid for Qualified Medicare Beneficiaries (MQB-B), which contained the same "family of the size involved" language. Petitioner further noted that the court in *Martin* held that "a family of the size involved" meant "a group consisting of parents and their children; a group of persons who live together and have a shared commitment to a domestic relationship." 194 N.C. App. at 722, 670 S.E.2d at 634. As a result, Pachas argued that *Martin* directed DHHS to consider his entire family when calculating whether his income rose above one hundred percent of the federal poverty level.

Finally, petitioner pointed to a decision of the Superior Court in Mecklenburg County that he viewed as applying the reasoning in *Martin* to "all individuals who receive Medicaid benefits on the basis of disability." *See Cody v. N.C. Dep't of Health & Human Servs.*, No. 13 CVS 19625 (N.C. Super. Ct. Mecklenburg County Mar. 11, 2014). Additionally, petitioner argued that "failure to consider his wife, children and dependent parents as part of his family leads to absurd results and violates the purpose of the Medicaid Act."

In its Final Decision, dated 1 October 2015, DHHS affirmed that petitioner must meet a deductible in order to regain eligibility for Medicaid given that his income exceeded one hundred percent of the federal poverty guideline for a single individual. On 16 October 2015, petitioner sought judicial review of the DHHS Final Decision in the Superior Court in Mecklenburg County. Petitioner requested that the court grant the following relief: (1) reverse the final agency decision and declare DHHS's interpretation of the law illegal; (2) order DHHS to reinstate petitioner's Medicaid benefits without requiring a deductible effective 1 June 2015; and (3) award petitioner costs and a reasonable attorney's fee. In support of this request for relief, petitioner claimed, in pertinent part, that DHHS erred by "concluding that the Medicaid income limit applicable to Petitioner was the limit for a single individual in violation of 42 U.S.C. § 1396a(m), under which the applicable income limit is 100% of the federal poverty line for a 'family of the size involved.' "

On 17 March 2016,[2] the Superior Court in Mecklenburg County signed an order reversing the final decision of DHHS. The superior court reached this determination because it concluded that:

---

2. The dissenting judge at the Court of Appeals noted that although the order was entered on 18 March 2016, he was going to refer to the order as the 17 March 2016 order because that was how the parties had been referring to it. *Pachas*, ___ N.C. at ___, 814 S.E.2d at 142 n.6 (Hunter Jr., J., dissenting).

2. The North Carolina General Assembly has elected the option under the federal Medicaid statute, 42 U.S.C. § 1396a(m), to provide Medicaid to aged, blind and disabled persons with incomes under 100% of the federal poverty level. This category of Medicaid is known as categorically needy coverage for the aged, blind and disabled (MABD-CN).

3. The income limit for MABD-CN varies by the number of persons considered by the agency to be in the household unit because the federal poverty line varies by household size.

4. The DHHS Medicaid rule at issue in this case is contained in Section 2260 of the DHHS Adult Medicaid Manual. Under this provision, only the aged, blind or disabled individual is considered to be part of the household unit used for determining the applicable income limit for MABD-CN. The only exceptions in this rule are where the spouse of the individual is also aged, blind or disabled, or where the spouse has income that is deemed available to the aged, blind or disabled individual, in which case the household size is two.

. . . .

6. Pursuant to the challenged DHHS rule, Mecklenburg County DSS determined that Mr. Pachas' Social Security income of $1396 per month was greater than $981 per month, which is the current federal poverty limit for a household size of one person.

. . . .

8. The plain language of the controlling federal statutory provision, 42 U.S.C. § 1396a(m), states that the applicable Medicaid income limit for the MA[BD]-CN category must be based on a "family of the size involved." Because the official poverty line published annually by the federal government varies by family size, the determination of family size determines the applicable income limit under the language of this statute.

9. The Federal Medicare and Medicaid agency has interpreted the language "a family of the size involved" to

include "the applicant, the spouse who is living in the same household, if any, and the number of individuals who are related to the applicant or applicants, who are living in the same household and who are dependent on the applicant or the applicant's spouse for at least one-half of their financial support." 42 C.F.R. § 423.772 (2005).

10. There is no dispute in the record or the briefing that Petitioner is providing over half of the financial support for his wife, their two minor children and his wife's elderly parents, all of whom live with Petitioner.

11. In *Martin v. North Carolina Department of Health and Human Services*, the North Carolina Court of Appeals interpreted the identical phrase, "family of the size involved," applied to similar facts, in reviewing a parallel provision of the federal Medicaid statute for the MQB category of benefits. The Court of Appeals held that the DHHS interpretation of "family of the size involved" for the MQB program violated the federal Medicaid statute and was therefore invalid.

12. Following the *Martin* decision, DHHS updated its Medicaid state plan and manual provisions to clarify that MQB eligibility must be based upon "family size" which includes "the [applicant/beneficiary], the spouse if there is one, and any dependent children under age 18 living in the home." However, DHHS did not change its rule as to the MABD-CN category.

13. The provisions of the Federal Medicaid statute at issue in *Martin* and in this case contain precisely the same language regarding both the determination of family size and the countable income for Medicaid beneficiaries.

14. DHHS conceded at oral argument that prior to the *Martin* ruling, the same methodology for determining eligibility was used for both the MA[BD]-CN and MQB programs.

(second alteration in original). While reversing the DHHS final decision on these grounds, the superior court ordered, in pertinent part, that DHHS "promptly reinstate Medicaid benefits to Petitioner effective

June 1, 2015 and [ ] continue providing Medicaid to Petitioner until determined ineligible under the rules as modified according to this decision."

Following the superior court's reversal of the DHHS final decision, on 13 April 2016, DHHS instructed Mecklenburg County DSS to reinstate petitioner's Medicaid benefits. Thereafter, following a hospital stay, Pachas entered a nursing facility on 6 May 2016, and his Medicaid benefits continued the entire time he was in the nursing home; on 14 February 2017, he was discharged from the nursing facility and returned home to live with his family. Pachas suffered from anxiety as well as his physical conditions while being away from his family. Pachas was to receive at-home care under Medicaid's Community Alternative Program for Disabled Adults (CAP-DA).

On the same day Pachas left the nursing facility and his care under CAP-DA was set to begin, Mecklenburg County DSS mailed him a notice that his benefits would be changed and, effective 1 March 2017, he would be required to meet a monthly deductible of $1113 for his CAP-DA care. In the notice DSS stated that the change in benefits was required by state regulations found in "MA 2280." The notice also advised Pachas that he had sixty days to request an agency hearing if he disagreed with the decision.

Instead of requesting an agency hearing, Pachas filed a motion in the cause to enforce the court's order and a petition for writ of mandamus in the Superior Court in Mecklenburg County on 15 February 2017. In the motion and petition, Pachas requested the following relief pertinent to this appeal: (1) entry of an order enforcing the court's 17 March 2016 order and directing North Carolina DHHS "to immediately reinstate his Medicaid benefits, including his CAP-DA services," and ordering that the benefits be continued without his having to first meet a deductible; (2) issuance of a writ of mandamus ordering DHHS to reinstate his benefits effective 14 February 2017; and (3) entry of an order requiring Mecklenburg County DSS to reinstate his benefits if DHHS failed to do so within ten days of the court's forthcoming order.

On 6 March 2017, DHHS moved to dismiss petitioner's motion and petition. DHHS argued, in pertinent part, that the motion and petition should be dismissed for these reasons: (1) the superior court did not have jurisdiction over the matter, because petitioner had not exhausted his administrative remedies; (2) with regard to the petition for writ of mandamus specifically, that petitioner had another adequate remedy at law through the agency appeal process; and (3) petitioner's eligibility for the CAP-DA program did not fall within the 17 March 2016 order,

because the CAP-DA program, which has its own eligibility and income limit rules under 42 U.S.C. § 1396n, is a "*Waiver*" program that is separate from the "*State Plan*" that was the subject of the previous order.

In support of his motion in the cause seeking enforcement of the 17 March 2016 order and petition for writ of mandamus, petitioner argued that: (1) DHHS's termination of all of petitioner's Medicaid benefits on 14 February 2017 violated the 17 March 2016 order which required DHHS to immediately reinstate petitioner's Medicaid benefits and continue to provide them until petitioner is "determined ineligible under the rules as modified according to [the order]"; (2) under the terms of DHHS's waiver application for CAP-DA, and as stated in its own instruction manuals, individuals who qualify for Medicaid under the "Categorically Needy" eligibility group, the very category under which the 17 March 2016 order determined that petitioner's benefits were to be reinstated and to continue, are eligible for CAP-DA without a deductible; (3) the CAP-DA waiver provision in 42 U.S.C. § 1396n(c) does not contain any "language waiving the requirement in § 1396a(m) to use 'family size' budgeting"; (4) DHHS's own budgeting rules which state that "the income of a spouse cannot be counted in determining the CAP-DA applicant's Medicaid eligibility" do not apply to "Categorically Needy" Medicaid recipients and are inconsistent with the 17 March 2016 order; and (5) petitioner fully exhausted his administrative remedies previously and he should not be required to do so again now because the superior court has sole jurisdiction to enforce its own order and exhaustion would be an inadequate or futile remedy.

DHHS responded to petitioner's arguments by asserting that the motion and petition should be dismissed on the following grounds: (1) the superior court's 17 March 2016 order "does not apply because it only contemplated Petitioner's eligibility for State Plan services and does not address Petitioner's Medicaid eligibility through the CAP/DA waiver," which is governed by separate federal rules and regulations; (2) petitioner remains eligible for State Plan Medicaid benefits and therefore DHHS did not violate the 17 March 2016 order; (3) petitioner failed to exhaust his available administrative remedies; and (4) petitioner has failed to demonstrate how exhaustion of his administrative remedies would be futile when the administrative remedy provides "relief more or less commensurate with the claim." *Huang v. N.C. State. Univ.*, 107 N.C. App. 710, 715, 421 S.E.2d 812, 815 (1992).

The superior court dismissed petitioner's motion in the cause to enforce the court's order and his petition for writ of mandamus on

21 April 2017. In so doing, the court found that DHHS "has not violated the Order signed on March 17, 2016." The court reached this decision for the following reasons:

> 6. According to 42 U.S.C. § 1396n(c)(3), DHHS is allowed to waive the State Plan requirements for income and resource rules under 42 U.S.C. § 1396a(m) that the Court considered in the March 17, 2016 Order.
>
> 7. DHHS does not consider the "size of the family involved" when determining an individual's deductible under the CAP/DA waiver.
>
> 8. Therefore, the Order signed on March 17, 2016 does not apply to Petitioner's Medicaid eligibility under the CAP/DA waiver.
>
> 9. Petitioner must resort to the administrative process governed by N.C.G.S. § 108A-79 to appeal the February 14, 2017 decision issued by the Mecklenburg County DSS.

Following this last order, Julissa Pachas filed a motion on 9 May 2017 to substitute herself as petitioner in the case because Carlos died on 17 April. After being substituted as petitioner, Julissa Pachas appealed the superior court's 21 April 2017 order to the North Carolina Court of Appeals, where she presented the issue of whether "42 U.S.C. § 1396a(m) require[s] respondent/appellee DHHS to determine eligibility for Medicaid for the aged, blind and disabled in North Carolina based on a 'family of the size involved,' regardless of what Medicaid services the aged, blind or disabled person requests or receives."

The Court of Appeals majority affirmed the 21 April 2017 order of the Superior Court in Mecklenburg County dismissing petitioner's motion and petition based on its conclusion that the trial court lacked jurisdiction. *Pachas*, ___ N.C. App. at ___, 814 S.E.2d at 140. The Court of Appeals reached this decision for two reasons. First, in relying on a previous decision from our Court, the Court of Appeals concluded that "[t]he scope of this waiver provision [under 42 U.S.C. § 1396n(c)], and whether the State in fact applied for and received a waiver of the income limits provision, involve facts and legal questions that were *not* 'actually presented and necessarily involved' in the trial court's [17 March 2016] order addressing traditional Medicaid coverage." *Id.* at ___, 814 S.E.2d at 139 (quoting *Tenn.-Carolina Transp., Inc. v. Strick Corp.*, 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974)). Specifically, the Court of Appeals majority reasoned that:

> Here, the trial court properly concluded that the agency's determination of Pachas's CAP/DA program eligibility involved *different* facts and legal issues than the traditional Medicaid benefits at issue in its first order. As the trial court observed, its first order instructed the State to "reinstate Petitioner's Medicaid eligibility through the North Carolina Medicaid State Plan pursuant to the controlling federal statutory provision, 42 U.S.C. § 1396a(m)."

Id. at ___, 814 S.E.2d at 139. The Court of Appeals majority determined that the introduction of these different facts and issues deprived the trial court of the supervisory authority and jurisdiction that it generally maintains under Rule 70 of the North Carolina Rules of Civil Procedure to ensure that an agency complies with the court's order. *Id.* at ___, 814 S.E.2d at 139-40. As a result, the majority concluded that "[t]he trial court lacks jurisdiction to review the legal and factual issues raised in this appeal until they reach the court through exhaustion of the administrative review process and a petition for judicial review." *Id.* at ___, 814 S.E.2d at 140.

Second, the Court of Appeals majority concluded that the trial court did not have jurisdiction over petitioner's motion and petition because petitioner could not demonstrate that the administrative review process was "futile" or "inadequate." *Id.* at ___, 814 S.E.2d at 140. Specifically, the majority reasoned that "[a]lthough the agency seems convinced of its legal position, that does not make the administrative review process 'futile' or 'inadequate' as those terms are defined by law." *Id.* at ___, 814 S.E.2d at 140 (citing *Huang*, 107 N.C. App. at 715, 421 S.E.2d at 815-16).

Presumably as a result of its holding that the trial court did not have jurisdiction over petitioner's motion and petition, the Court of Appeals majority did not announce a holding with regard to the ultimate issue that petitioner presented on appeal: "Does 42 U.S.C. § 1396a(m) require respondent/appellee DHHS to determine eligibility for Medicaid for the aged, blind and disabled in North Carolina based on a 'family of the size involved,' regardless of what Medicaid services the aged, blind or disabled person requests or receives?" *Id.* at ___, 814 S.E.2d at 140 (affirming the trial court's dismissal of petitioner's motion and petition only because the trial court lacked jurisdiction).

The dissenting judge at the Court of Appeals disagreed with the majority's decision that the trial court did not have jurisdiction over petitioner's motion and petition and that petitioner would have to exhaust

his administrative remedies before seeking judicial review. *Id.* at ___, 814 S.E.2d at 140 (Hunter Jr., J., dissenting). The dissenting judge concluded that the trial court did have jurisdiction over petitioner's motion and petition for two reasons. First, the dissenting judge noted that "Pachas is correct that it is well settled the 'exhaustion requirement may be excused if the administrative remedy would be futile or inadequate.' " *Id.* at ___, 814 S.E.2d at 145 (quoting *Justice for Animals, Inc. v. Robeson County*, 164 N.C. App. 366, 372, 595 S.E.2d 773, 777 (2004)). The dissenting judge reasoned that petitioner's administrative remedy here would be futile and inadequate because:

> Given the tragic history of Pachas, I cannot vote to place him, or others similarly situated, back in the hands of the Medicaid bureaucracy, which has already denied benefits on the identical question of family size and its relation to required deductibles for Medicaid coverage. In my view, it is particularly telling that in the first case, the law of his case was based upon the conclusion that the State had made an error of law in denying him benefits. To tell a dying indigent that he or his family must endure another round of "administrative remedies", when the Medicaid authorities moved him from one program to another for their own cost benefits, and when the issue is a matter of law, which had been previously adjudicated, is simply unjust and wrong. Under the specific facts of this case, I would hold requiring the dying indigent to exhaust his administrative remedies would be futile.

Id. at ___, 814 S.E.2d at 145.

Second, the dissenting judge reasoned that the trial court had jurisdiction over petitioner's motion and petition because although N.C.G.S. § 108A-79 provides an administrative "remedy for individuals who wish to challenge the termination of their Medicaid coverage," petitioner here "is not simply challenging the Medicaid coverage termination, but, rather, the violation of the trial court's 17 March 2016 order requiring DHHS to apply his family size to income considerations. Specifically, this is an appeal for enforcement." *Id.* at ___, 814 S.E.2d at 145. The dissenting judge added that "[a] trial court's authority encompasses the power to enforce its own judgments." *Id.* at ___, 814 S.E.2d at 145 (first citing *Sturgill v. Sturgill*, 49 N.C. App. 580, 587, 272 S.E.2d 423, 428-29 (1980); and then citing *Parker v. Parker*, 13 N.C. App. 616, 618, 186 S.E.2d 607, 608 (1972)).

Petitioner filed his notice of appeal based on the dissent in the Court of Appeals presenting the following issue: "Did the Court of Appeals majority err as a matter of law in ruling that the superior court lacked jurisdiction to decide whether its previous order was violated because petitioner failed to exhaust administrative remedies before moving to enforce the court's order?"

II. Analysis

We conclude that the Court of Appeals did err in ruling that the superior court lacked jurisdiction to decide whether DHHS violated the 17 March 2016 order. Because we so conclude, we vacate the decision of the Court of Appeals affirming the trial court's dismissal of petitioner's motion and petition on that basis. We also remand this case to the Court of Appeals to address the merits of whether the superior court erred in determining that DHHS did not violate the 17 March 2016 order because DHHS allegedly obtained a waiver of the requirements of 42 U.S.C. § 1396a(m) in compliance with 42 U.S.C. § 1396n(c). Because we conclude that the trial court had jurisdiction over petitioner's motion and petition, we need not determine whether exhaustion of administrative remedies was inadequate or futile in this case.

The Court of Appeals erred in concluding that the trial court did not have jurisdiction over petitioner's motion and petition because: (1) trial courts have jurisdiction to find new facts and determine whether a party has been "disobedient" under a court order requiring the party to perform a "specific act," N.C. R. Civ. P. 70, and (2) the Court of Appeals relied on an inapposite case from our Court to conclude that, because the issue of petitioner's CAP-DA eligibility involved "facts and legal questions that were *not* 'actually presented and necessarily involved' " in the 17 March 2016 order, *Pachas*, ___ N.C. App. at ___, 814 S.E.2d at 139 (majority opinion) (quoting *Tenn.-Carolina Transp.*, 286 N.C. at 239, 210 S.E.2d at 183), the trial court did not have jurisdiction over the matter.

This Court reviews a 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); *see also State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994) (explaining that this is the standard of review of a determination by the Court of Appeals whether the case is before us "by appeal of right or discretionary review" (first citing *State v. Colson*, 274 N.C. 295, 163 S.E.2d 376 (1968), *cert. denied*, 393 U.S. 1087, 89 S. Ct. 876, 21 L. Ed. 2d 780 (1969); then citing *State v. Williams*, 274 N.C. 328, 163 S.E.2d 353 (1968); and then citing N.C. R. App. P. 16(a)(1994))).

A. The trial court had jurisdiction under the North Carolina Rules of Civil Procedure (Rule 70) to find new facts and determine whether DHHS disobeyed the 17 March 2016 order.

[1] It is well settled that, consistent with their inherent authority to enforce their own orders, North Carolina trial courts have jurisdiction to find new facts and determine whether a party has been "disobedient" under a previous order that required the party to perform a "specific act." N.C. R. Civ. P. 70. Since 1967 the Rules of Civil Procedure have provided in part:

> If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the judge may direct the act to be done at the cost of the disobedient party by some other person appointed by the judge and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The judge may also in proper cases adjudge the party in contempt.

N.C. R. Civ. P. 70.

Here it appears that DHHS's decision to cancel petitioner's Medicaid benefits under the CAP-DA program and require him to pay a deductible to regain eligibility invoked the trial court's power to enforce its 17 March 2016 order.[3] In that order the superior court instructed DHHS "to promptly reinstate Medicaid benefits to Petitioner . . . and to continue providing Medicaid to Petitioner until determined ineligible under the rules as modified according to this decision." The rules as modified by the order required that petitioner be considered eligible for Medicaid under the Categorically Needy category so long as his income did not exceed one hundred percent of the federal poverty level based on a family of six while he was providing more one-half of their financial support.

It appears, according to DHHS's own Adult Medicaid Manual and without considering any effect of the waiver that DHHS allegedly obtained, that petitioner—having been determined to fit within the Categorically Needy eligibility group and to be entitled to continued Medicaid benefits

3. We do not express an opinion on the merits of the waiver issue we are remanding to the Court of Appeals.

under the 17 March 2016 order—should have seamlessly qualified on 14 February 2017 for Medicaid's CAP-DA program without a deductible. Specifically, even DHHS's waiver application pursuant to 42 U.S.C. § 1396n(c) lists "Categorically Needy" individuals as a Medicaid-eligible group that will be served by the CAP-DA program. Furthermore, DHHS's own manual provides that DHHS will "[d]etermine eligibility [for CAP-DA] according to requirements for the appropriate aid program/category." Medicaid Eligibility Unit, Div. of Med. Assistance, N.C. Dep't of Health & Human Servs., *Aged, Blind and Disabled Medicaid Manual*, MA-2280 ¶ III.A.a.(2) (Oct. 1, 2012) titled "Medicaid Eligibility and CAP Eligibility." Moreover, DHHS's manual states that "[w]hen Medicaid eligibility can be established regardless of eligibility for CAP," DHHS will "not wait for CAP approval" and it will "[a]uthorize [CAP-DA], if appropriate, as for any other applicant." *Id.* MA-2280 ¶ III.A.a.2(c)(1)-(2). Additionally, DHHS's own manual indicates that "Categorically Needy" Medicaid recipients will not be charged a deductible. *See id.* MA-2360 ¶ I (Nov. 1, 2011) (providing that the deductible requirement is only to be applied to Medically Needy Medicaid recipients and "[t]he policy in this section may not be used to find a client eligible in MAABD Categorically Needy – No Money Payment (N) Classification . . . . Deductible does not apply in these coverage's [sic]"). We conclude that—because the 17 March 2016 order determined that petitioner was to continue receiving Medicaid benefits under the "Categorically Needy" eligibility group until he was determined to be ineligible under the rules as modified by that order—DHHS's decision to terminate petitioner's Medicaid benefits under the CAP-DA program on 14 February 2017 and require him to meet a deductible before he could regain his benefits squarely raises the issue of whether DHHS acted as a "disobedient party" under the 17 March 2016 order. N.C. R. Civ. P. 70.

DHHS contends that it did not disobey the 17 March 2016 order, and that the trial court did not have jurisdiction to enforce that order, because the waiver that it allegedly obtained under 42 U.S.C. § 1396n(c) allowed it to create different eligibility rules for the CAP-DA program. Without reaching any conclusions as to the merits of this argument, we hold that the trial court, in accord with its jurisdiction to find new facts and determine whether a party has been "disobedient" under a previous order directing the party to perform a "specific act," was authorized to determine the precise issue of whether the waiver that DHHS allegedly obtained under 42 U.S.C. § 1396n(c) allowed the agency to comply with the 17 March 2016 order while terminating petitioner's Medicaid benefits under the CAP-DA program on 14 February 2017 and requiring him to pay a deductible before qualifying again for Medicaid.

Our conclusion that the trial court had authority to determine that issue is further supported by the Administrative Procedure Act (the Act) itself. The language of the Act suggests that the General Assembly contemplated that trial courts would have such jurisdiction to enforce their own court orders against disobedient agencies upon motion from a party in the case. Specifically, the Act provides that "[n]othing in this Chapter shall prevent any party or person aggrieved from invoking *any judicial remedy available to the party or person aggrieved under the law* to test the validity of *any administrative action not made reviewable* under this Article." N.C.G.S. § 150B-43 (2017) (emphases added).

Here the relevant judicial remedy available to petitioner under the law is enforcement of the trial court's 17 March 2016 order. Neither the Act, nor N.C.G.S. § 108A-79 which governs public assistance and social services appeals, provide for administrative review of DHHS's alleged violation of the 17 March 2016 order. *See id.* § 108A-79 (2017) (making no mention that the agency appeals process will consider whether the agency violated a court order during either the local appeal hearing, or the hearing before DHHS, or when rendering the final agency decision); *see also id.* § 108A-79(k) (2017) (stating that the judicial review at the superior court "shall be conducted according to the provisions of Article 4, Chapter 150B, of the North Carolina General Statutes"); *see also id.* § 150B-51(b)(1)-(6) (2017) (not including violation of a court order as grounds upon which a trial court can "reverse or modify" a final decision of the agency); *but see id.* § 150B-51(d) (2017) (allowing a trial court to enter certain orders when it reviews "a final [agency] decision allowing judgment on the pleadings or summary judgment").

Because the trial court had jurisdiction to find new facts in order to determine whether DHHS was a disobedient party under its 17 March 2016 order, we conclude that the Court of Appeals erred in holding that the trial court no longer had jurisdiction over the case given the new factual and legal issues regarding the effect of DHHS's alleged waiver under 42 U.S.C. § 1396n(c).

B. The Court of Appeals relied on inapposite authority in limiting the trial court's jurisdiction under the North Carolina Rules of Civil Procedure (Rule 70).

[2] The Court of Appeals majority relied on our decision in *Tennessee-Carolina Transportation, Inc. v. Strick Corp.* for the principle that a "trial court's authority [under the North Carolina Rules of Civil Procedure (Rule 70)] to supervise the agency's actions extends only to issues 'actually presented and necessarily involved in determining the

case.' " *Pachas*, ___ N.C. App. at ___, 814 S.E.2d at 139 (quoting *Tenn.-Carolina Transp.*, 286 N.C. at 239, 210 S.E.2d at 183). The Court of Appeals majority then stated, "In other words, the trial court's continuing jurisdiction applies to issues involving 'the same facts and the same questions, which were determined in the previous *appeal*.' " *Id.* at ___, 814 S.E.2d at 139 (emphasis added) (quoting *Tenn.-Carolina Transp.*, 286 N.C. at 239, 210 S.E.2d at 183)).

The Court of Appeals majority then applied the above principle to the facts here and concluded that the trial court did not have jurisdiction over petitioner's motion and petition, and that petitioner would have to exhaust his administrative remedies, because "[t]he scope of [the 42 U.S.C. § 1396n(c)] waiver provision, and whether the State in fact applied for and received a waiver of the income limits provision, involve facts and legal questions that were *not* 'actually presented and necessarily involved' in the trial court's order addressing traditional Medicaid coverage." *Id.* at ___, 814 S.E.2d at 139 (quoting *Tenn.-Carolina Transp.*, 286 N.C. at 239, 210 S.E.2d at 183).

We conclude that the Court of Appeals erred in relying on *Tennessee-Carolina Transportation* for the proposition that a trial court's jurisdiction under the North Carolina Rules of Civil Procedure (Rule 70) to ensure that an agency complies with the court's order necessarily ends when new facts and legal issues arise that were not "actually presented and necessarily involved" in the previous order. *Id.* at ___, 814 S.E.2d at 139 (quoting *Tenn.-Carolina Transp.*, 286 N.C. at 239, 210 S.E.2d at 183). The *Tennessee-Carolina Transportation* case involved application of the "law of the case" doctrine; it did not involve a motion to enforce a court order as we have here. *See Tenn.-Carolina Transp.*, 286 N.C. at 238-39, 210 S.E.2d at 183-84). The issue in *Tennessee-Carolina Transportation* was whether a decision we made in a former appeal in that case, in which we determined that Pennsylvania law governed the action, continued to apply. *See id.* at 238-39, 210 S.E.2d at 183-84. We concluded that the decision in the former appeal did continue to govern the case because "[t]he decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal." *Id.* at 239, 210 S.E.2d at 183. The full passage from *Tennessee-Carolina Transportation* which the Court of Appeals majority quotes only in part as authority for its rule, reads as follows:

> As a general rule, when an appellate court passes on questions and remands the case for further proceedings to the trial court, the questions therein *actually presented*

> *and necessarily involved in determining the case*, and the decision on those questions become the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal, provided *the same facts and the same questions*, *which were determined in the previous appeal*, are involved in the second appeal.

Id. at 239, 210 S.E.2d at 183 (emphases added) (quoting *Collins v. Simms*, 257 N.C. 1, 11, 125 S.E.2d 298, 305 (1962) (Parker, J., concurring in the result)); *see also Pachas*, ___ N.C. App. at ___, 814 S.E.2d at 139. Because *Tennessee-Carolina Transportation* involved the doctrine of the law of the case—and did not involve a motion to enforce a court order, which is the issue here—the Court of Appeals majority erred in relying on that case to limit the scope of the trial court's jurisdiction under the North Carolina Rules of Civil Procedure (Rule 70).

III. Conclusion

We vacate the Court of Appeals' decision concluding that the trial court did not have jurisdiction to consider whether DHHS violated the trial court's previous order. Accordingly, we remand to the Court of Appeals to address DHHS's argument that the agency did not violate the 17 March 2016 order because it allegedly obtained a waiver under 42 U.S.C. § 1396n(c), permitting it to create its own rules for CAP-DA eligibility apart from the requirements of 42 U.S.C. § 1396a(m). Because we conclude that the trial court had jurisdiction over petitioner's motion and petition, we need not determine whether exhaustion of administrative remedies was inadequate or futile here.

VACATED AND REMANDED.

Justice EARLS did not participate in the consideration or decision of this case.

KEITH SAUNDERS
v.
ADP TOTALSOURCE FI XI, INC., EMPLOYER,
LIBERTY MUTUAL/HELMSMAN MANAGEMENT SERVICES, CARRIER

No. 399PA16

Filed 1 February 2019

Workers Compensation—attorney fees—appeal to superior court—consideration of additional evidence not presented to Commission—discretionary authority

Where the N.C. Industrial Commission declined to award certain attorney fees to plaintiff's attorneys, the superior court on appeal acted within its authority under N.C.G.S. § 97-90(c) when it considered additional evidence not presented to the Commission. The superior court exercised its statutory discretion in ordering attorney fees to be paid to plaintiff's attorneys from the reimbursement for retroactive attendant care medical compensation.

Justice EARLS did not participate in the consideration or decision of this case.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 249 N.C. App. 361, 791 S.E.2d 466 (2016), vacating and remanding an order entered on 4 September 2015 by Judge Alan Z. Thornburg in Superior Court, Buncombe County that reversed in part an opinion and award filed on 23 February 2015 by the North Carolina Industrial Commission. Heard in the Supreme Court on 27 August 2018.

The Sumwalt Law Firm, by Mark T. Sumwalt, Vernon Sumwalt, and Lauren H. Walker; and Grimes Teich Anderson, LLP, by Henry E. Teich, for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, Kari L. Schultz, and Linda Stephens, for defendant-appellees.

HUDSON, Justice.

Plaintiff Keith Saunders appealed the Opinion and Award of the North Carolina Industrial Commission (the Commission), which declined to award certain attorney's fees to plaintiff's attorneys, to the

Superior Court in Buncombe County pursuant to N.C.G.S. § 97-90(c). The superior court reversed the Commission's decision and ordered attorney's fees to be paid to plaintiff's attorneys from the reimbursement for retroactive attendant care medical compensation that the Commission had awarded to plaintiff. Both plaintiff and defendants ADP TotalSource Fi Xi, Inc. and Liberty Mutual/Helmsman Management Services, appealed from the superior court's order. On appeal, the Court of Appeals vacated the superior court's order and remanded the matter to the court for further remand to the Commission, holding that the superior court exceeded the "narrow scope" of its statutory authority to review the reasonableness of a Commission's fee award under N.C.G.S. § 97-90(c) by taking and considering new evidence that was not presented before the Commission. *Saunders v. ADP TotalSource Fi Xi, Inc.*, 248 N.C. App. 361, 376, 791 S.E.2d 466, 477-78 (2016). Because we conclude that N.C.G.S. § 97-90(c) authorizes the superior court to consider additional evidence and exercise its "discretion" in reviewing the reasonableness or setting the amount of attorney's fees, we reverse.

Background

Plaintiff was employed as a bartender for defendant-employer when on 6 March 2010 and 7 July 2010 he sustained two work-related injuries by accident to his lower back. On 15 October 2010, defendants filed a Form 60 with the North Carolina Industrial Commission, in which they accepted plaintiff's claim as compensable under the Workers' Compensation Act (the Act) and described the injury as "extruded disk herniation left side L4-5." On 21 October 2010, plaintiff underwent back surgery performed by Stephen David, M.D. "involving L4 and L5-S1 laminectomies, bilateral partial medial facetectomies, and bilateral foraminotomies with discectomy." In spite of his surgery, as well as extended physical therapy, plaintiff continued to experience "severe disabling pain" and he developed left foot drop and "reflex sympathetic dystrophy (RSD), or complex regional pain syndrome (CRPS)."

On 3 November 2010, plaintiff retained Henry E. Teich to represent him before the Commission. Plaintiff and Mr. Teich entered into a fee agreement that provided Mr. Teich's law firm a contingency fee of "25% of any recovery as Ordered by the North Carolina Industrial Commission." At the time of this agreement, there were no issues involving attendant care or home modification. Plaintiff and Mr. Teich later supplemented this agreement to provide for an attorney's fee of 25% of ongoing temporary total disability payments. On 23 April 2012, the Commission filed an order approving this arrangement through which Mr. Teich's firm received every fourth temporary total disability check due plaintiff.

Plaintiff's deteriorating medical condition resulted in his "suffer[ing] several falls or near-falls, . . . which place him at a significant[ly] increased risk of suffering a fall," and plaintiff was ultimately rendered incapable of "perform[ing] activities of daily living or otherwise liv[ing] independently." Multiple medical providers recommended that plaintiff install safety equipment and assistance devices in his home and that he receive attendant care medical services. Defendants received notice of plaintiff's attendant care needs at least as of January 2012, and they agreed to provide attendant care to plaintiff starting on 4 February 2012, but they conditioned continued payments for attendant care upon being allowed to take depositions of two of plaintiff's doctors without an evidentiary hearing. Following a dispute about the depositions, defendants ceased providing attendant care payments to plaintiff on 8 May 2012. In the absence of continued attendant care provided by a home health agency, plaintiff's then-partner and now-husband, Glenn Holappa, began providing the necessary attendant care services to plaintiff on a daily basis.

In June 2012, with the consent of plaintiff and Mr. Holappa, Mr. Teich associated Mark T. Sumwalt and The Sumwalt Law Firm to assist in litigating the attendant care issues in plaintiff's claim. Mr. Teich had associated Mr. Sumwalt in previous workers' compensation cases involving attendant care issues because of Mr. Sumwalt's significant experience and expertise in attendant care litigation. On 7 January 2013, plaintiff filed a Form 33 requesting a hearing before the Commission because "defendants are refusing to pay compensation for attendant care services." Plaintiff's counsel extensively litigated the attendant care issues, as well as issues "pertaining to home modifications, equipment needs, prescription medications, and psychological treatment." Plaintiff sought, *inter alia*, ongoing future attendant care through a home health care agency and retroactive compensation for the attendant care services provided by Mr. Holappa following defendants' refusal to provide attendant care beyond 8 May 2012. Defendants denied any compensation for past attendant care, future attendant care, and psychological treatment.

Deputy Commissioner J. Brad Donovan heard the matter on 19 March 2013. On 23 December 2013, Deputy Commissioner Donovan entered an "Opinion and Award in which he awarded retroactive attendant care compensation to Plaintiff's family for eight hours per day, seven days per week, at a rate of $18.00 per hour, and ongoing attendant care compensation for eight hours per day, seven days per week at a rate of $18.00 per hour." Moreover, Deputy Commissioner Donovan "approved a reasonable attorneys' fees [sic] of 25% of the value of the retroactive attendant care services provided by Plaintiff's family from May 8, 2012

to December 23, 2013, which were payable to plaintiff and/or his family." Defendants appealed to the Full Commission, which heard the case on 15 May 2014.

On 23 February 2015, the Full Commission issued an "Opinion and Award in which it awarded retroactive attendant care compensation to Mr. Holappa, for six hours per day, seven days per week, at a rate of $10.00 per hour, and ongoing attendant care compensation through a home health agency for eight hours per day, seven days per week." The Commission found that because plaintiff had not paid Mr. Holappa for the attendant care services he provided, "any payment for retroactive attendant care services should be paid to the provider in the first instance, i.e., Mr. Holappa, as opposed to plaintiff as reimbursement for what he paid out of pocket." Furthermore, the Commission found that "[t]he only attorney fee agreement of record at the Industrial Commission is the one entered into between Grimes & Teich, L.L.P. and plaintiff." With regard to the attorney's fee of twenty-five percent of the reimbursement for retroactive attendant care compensation, the Commission concluded:

> In the case at bar, the Full Commission finds and concludes that the fee agreement between plaintiff and plaintiff's counsel is reasonable, as is the attorney fee plaintiff's counsel has received and will continue to receive from plaintiff's ongoing indemnity compensation. However, "[m]edical and hospital expenses which employers must provide pursuant to N.C.G.S. § 97-25 are not a part of 'compensation' as it always has been defined in the Workers' Compensation Act." *Hyler v. GTE Products Co.*, 333 N.C. 258, 264, 425 S.E.2d 698, 702 (1993) (citation omitted). "[T]he relief obtainable as general 'compensation' is different and is separate and apart from the medical expenses recoverable under the Act's definition of 'medical compensation." *Id.* at 265, 425 S.E.2d at 703. There is no evidence of a fee agreement between plaintiff's counsel and any of plaintiffs medical providers, including Mr. Holappa. The Full Commission concludes that to the extent plaintiff's counsel's fee agreement with plaintiff, and specifically the phrase "any recovery," could be interpreted to include medical compensation, it is unreasonable under the facts of this case. The Full Commission therefore declines to approve an attorney fee for plaintiff's counsel out of the medical compensation which defendants have been ordered to pay to Mr. Holappa.

Plaintiff appealed the Commission's denial of attorney's fees to the Superior Court in Buncombe County pursuant to N.C.G.S. § 97-90(c), which authorizes the senior resident superior court judge to "consider the matter and determine in his discretion the reasonableness of said agreement or fix the fee" in situations in which there is an agreement and "[i]n all other cases where there is no agreement for fee or compensation . . . [to] consider the matter of such fee and determine in his discretion the attorneys' fees to be allowed in the cause." On 27 April 2015, defendants filed a motion to intervene, which was allowed by the superior court.

After a hearing, the superior court entered an order on 25 August 2015, followed by an amended order on 4 September 2015 in order to cure an ambiguity in the final paragraph of the initial order. The superior court reversed the Commission's denial of attorney's fees from the reimbursement for retroactive attendant care medical compensation. In its order, the superior court found, in pertinent part:

> 7. With the knowledge and approval of Plaintiff and Mr. Holappa, attorney Mark T. Sumwalt and his firm The Sumwalt Law Firm were subsequently associated to assist in litigating the attendant care issues that had arisen in Plaintiff's claim as a result of Defendants' refusal to voluntarily provide the recommended attendant care to Plaintiff and compensate Mr. Holappa for the attendant care services he provided to Plaintiff.
>
> 8. Mr, Holappa, through Plaintiff's counsel, submitted an affidavit to this Court in which he stated that he consented and agreed to Plaintiff's counsel's pursuit of such recovery on his behalf with the understanding and desire that any recovery made on his behalf through Plaintiff's workers' compensation claim would be subject to the 25% fee previously agreed to in the retainer agreement.
>
> 9. Mr. Sumwalt was associated in approximately June 2012, and litigation commenced with the clear understanding of all parties involved that any compensation recovered on behalf of Mr. Holappa for providing attendant care services to Plaintiff would be subject to the previously agreed upon amount of 25% of any benefits ordered by the Industrial Commission, in accordance with the parties' retainer agreement contract.

. . . .

13. Plaintiff's counsel did not request fees from the home modifications, equipment needs, prescription medications, or compensation for psychological treatment that Plaintiff's counsel obtained on Plaintiff's behalf through litigation, despite the significant monetary value of these awards. Plaintiff's counsel requested an attorneys' fee only from the attendant care compensation obtained for Mr. Holappa in accordance with the retainer agreement.

. . . .

20. At the hearing in this matter, Mr. Sumwalt represented to this Court that his firm has invested over 500 hours of attorney time in this case and over $13,000.00 in litigation costs.

21. As a result of Mr. Sumwalt's and Mr. Teich's representation, Mr. Holappa recovered over $61,000.00 in retroactive attendant care compensation.

. . . .

26. Neither Plaintiff nor Defendants were able to cite any case where the Industrial Commission failed to award an attorneys' fee from retroactive family member-provided attendant care compensation.

From its findings of fact, the court made the following conclusions of law:

3. In reaching its decision, this Court considered, with regard to the efforts of Mr. Teich and Mr. Sumwalt to achieve an award for retroactive attendant care services, the following: the significant time investment of the attorneys, the amount involved, the favorable results achieved, the contingent nature of the fee retainer agreement, the customary nature of the 25% fee for similar services, the specialized skill level and significant experience of Mr. Sumwalt in the area of attendant care service recovery, and the appropriate and necessary nature of the attorneys' services given the Defendant[s'] denial of the claim. N.C. Gen. Stat. § 97-90(c).

4. After consideration of these factors, this Court determined that Mr. Sumwalt performed significant legal

services and expended substantial sums in litigation costs in this matter, which services and costs were necessary and essential to the prosecution of Plaintiff's case and the achievement of the award for retroactive attendant care services.

5. This Court therefore concludes that Plaintiff's counsel's fee agreement of "25% of any recovery as Ordered by the North Carolina Industrial Commission" is reasonable.

. . . .

7. This Court does not find Defendants' argument that [*Palmer v. Jackson*] prohibits an award of attorneys' fees from retroactive family member-provided attendant care compensation to be persuasive. In Palmer, the plaintiff's attorneys did not have a fee agreement with, or the consent of, the medical provider in that case (a hospital) to pursue the recovery of its fees, and the hospital objected to having to pay an attorneys' fee from the fees that the plaintiff's attorneys recovered on the hospital's behalf outside of an attorney-client relationship. Those are not the facts of the instant case. Plaintiff's counsel had the consent of and a fee agreement with both Plaintiff and Mr. Holappa.

. . . .

9. Awards of the value of retroactive attendant care services are not prohibited, and neither are reasonable attorneys' fees based on such awards.

Accordingly, the court "in its discretion, determine[d] that a reasonable attorney's fee for the retroactive attendant care compensation recovered [on] Mr. Holappa's behalf for services he provided to Plaintiff is 25% and shall therefore be allowed." Both parties appealed to the Court of Appeals.[1]

---

1. On appeal, plaintiff argued that the superior court erred in granting defendants' motion to intervene and that defendants lacked standing to challenge a contract to which they were not a party. The Court of Appeals determined that the superior court did not err in allowing defendants' motion to intervene and that defendants did have standing to challenge the superior court's order on appeal. *Saunders*, 249 N.C. App. at 364-69, 791 S.E.2d at 471-74. Plaintiff raised these issues in his petition for discretionary review, but this Court did not allow review of these issues and they are therefore not before this Court.

At the Court of Appeals, defendants argued that the superior court did not have subject-matter jurisdiction to review the Commission's denial of attorney's fees because N.C.G.S. § 97-90(c) limits the superior court solely to reviewing the reasonableness of an attorney's fee under an explicit or implied fee agreement between an attorney and a claimant that was presented to the Commission for approval. Defendants asserted that the only fee agreement presented to the Commission here was between plaintiff and his counsel and that the superior court therefore lacked the authority to consider new affidavits and to review the reasonableness of a purported implied agreement between plaintiff's counsel and Mr. Holappa that had not been presented to the Commission. In the alternative, defendants argued that the Act does not allow attorney's fees to be paid out of medical compensation.

The Court of Appeals examined the language and legislative history of N.C.G.S. § 97-90(c), noting that subsection (c) was added in response to the decision in *Brice v. Robertson House Moving, Wrecking & Salvage Co.*, 249 N.C. 74, 105 S.E.2d 439 (1958), in order "to rectify the specific problem of the trial court not having jurisdiction over attorneys' fees in [ ] workers' compensation cases." *Saunders*, 249 N.C. App. at 371, 791 S.E.2d at 475 (quoting *Palmer v. Jackson*, 157 N.C. App. 625, 632, 579 S.E.2d 901, 906 (2003), *disc. rev. improvidently allowed*, 358 N.C. 373, 595 S.E.2d 145 (2004)). The court determined that "the statute solely applies to an appellate reasonableness review of a fee award on a contract between the claimant-employee and his attorney previously reviewed by the Full Commission, and not a *de novo* hearing." *Id.* at 371, 791 S.E.2d at 474. According to the Court of Appeals, subsection (c)'s "narrow scope" authorizes the superior court "to consider the factors set forth in the statute in reviewing the Commission's determination of the 'reasonableness' of a fee agreement" but does not authorize the superior court "to look beyond the evidence presented before the Commission or to take new evidence." *Id.* at 374, 791 S.E.2d at 476 (citing *Blevins v. Steel Dynamics, Inc.*, 202 N.C. App. 584, 691 S.E.2d 133, 2010 WL 521029 (2010) (unpublished)).

The Court of Appeals determined that the superior court here, in contravention of this statutory authority,

> considered evidence, the purported "fee agreement" between Plaintiff's attorney and Mr. Holappa, which was not considered before the Industrial Commission. Plaintiff's counsel took the indemnity and disability fee contract between Plaintiff and Mr. Teich, added an affidavit, which had never been considered by or ruled upon by

> the Industrial Commission, and argued for the first time before the superior court that these documents "created" an implied third party contract between Plaintiff's counsel and Mr. Holappa.
>
> Plaintiff's counsel did not petition the superior court for appellate review of the "reasonableness" of the Industrial Commission's decision related to the "agreement for fee or compensation" between Plaintiff and his attorneys referenced in the Full Commission's Opinion and Award, but instead presented a theory and a purported "fee contract," which was never presented to or reviewed by the Industrial Commission. *See* N.C. Gen. Stat. § 97-90(c).

Id. at 373-74, 791 S.E.2d at 476. Accordingly, the Court of Appeals concluded that the superior court had "acted beyond the scope of its statutory and limited appellate review of the reasonableness of the Commission's fee award by taking and considering new evidence, which was not presented to the Commission." *Id.* at 375, 791 S.E.2d at 477. The court also questioned whether, given that the enactment of subsection (c) predated the establishment of the Court of Appeals, to which appeals from the Commission under the Act typically lie, "the reasonableness review by the superior court under subsection (c) may have become an obsolete relic." *Id.* at 375, 791 S.E.2d at 477. Nonetheless, the court "refer[red] this issue to the General Assembly and request[ed] its review of . . . the continuing need for this limited appellate review by the superior court of the reasonableness of the Commission's attorney's fee awards." *Id.* at 376, 791 S.E.2d at 477.

The Court of Appeals further determined that the superior court "ruled far beyond an appellate review of the 'reasonableness' of the attorney's fee" in that "[t]he superior court purported to adjudicate a question of workers' compensation law, *i.e.*, whether the Commission may order an attorney's fee to be paid from the award of medical compensation." *Id.* at 374, 791 S.E.2d at 476. According to the Court of Appeals:

> This determination is outside the scope [of] the superior court's appellate jurisdiction under N.C. Gen. Stat. § 97-90(c), and rests within the statutes governing the Industrial Commission, subject to appeal to this Court. N.C. Gen. Stat. § 97-91 (2015). Our Court has determined "medical compensation is solely in the realm of the Industrial Commission, and § 97-90(c) gives no authority

> to the superior court to adjust such an award under the guise of attorneys' fees. Doing so constitutes an improper invasion of the province of the Industrial Commission, and constitutes an abuse of discretion."

Id. at 374, 791 S.E.2d at 476-77 (quoting *Palmer*, 157 N.C. App. at 635, 579 S.E.2d at 908 (citation omitted)). The court concluded that because the superior court "was without jurisdiction under N.C. Gen. Stat. § 90-97(c) to re-weigh the Commission's factual determinations under these facts, or to award, *de novo*, attorney's fees from attendant care medical compensation to be paid to a third party medical provider," the superior court's order "is a nullity and is vacated." *Id.* at 376, 791 S.E.2d at 477. Accordingly, the court remanded the case to the superior court for further remand to the Commission. *Id.* at 376, 791 S.E.2d at 477-78.

On 25 October 2016, plaintiff filed a petition seeking discretionary review of the following issues:

> I. Whether the Court of Appeals' opinion in *Saunders* is inconsistent with the Supreme Court's previous decisions in *Schofield* and *Virmani*.
>
> II. Whether the Court of Appeals' opinion in *Saunders* is inconsistent with its own prior decisions, including *Kanipe*, *Boylan II*, *Koenig*, *Davis*, *Boylan I*, *Creel*, and *Priddy*.
>
> III. Whether the Court of Appeals' opinion in *Saunders* is consistent with N.C. Gen. Stat. § 97-90(c) and case law construing the statute.

On 1 November 2017, this Court entered a special order granting discretionary review solely of Issue III.

Analysis

We conclude that the decision of the Court of Appeals is not consistent with N.C.G.S. § 97-90(c) and therefore, reverse the Court of Appeals. The issue we agreed to hear on discretionary review is one of statutory interpretation, meaning it is a "question[ ] of law and [ ] reviewed de novo." *In re D.S.*, 364 N.C. 184, 187, 694 S.E.2d 758, 760 (2010) (citing *Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998)); *see also Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611, 781 S.E.2d 282, 284 (2016) ("When considering a case on discretionary review from the Court of Appeals, we review the decision for errors of law." (citing N.C. R. App. P. 16(a))). "We have held in decision

after decision that our Workmen's Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependants, and its benefits should not be denied by a technical, narrow, and strict construction." *Hollman v. City of Raleigh*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968) (citing 3 Strong's North Carolina Index: *Master and Servant* § 45 (1960)); *see also Deese v. Se. Lawn & Tree Expert Co.*, 306 N.C. 275, 278, 293 S.E.2d 140, 143 (1982) ("[I]n all cases of doubt, the intent of the legislature regarding the operation or application of a particular provision is to be discerned from a consideration of the Act as a whole—its language, purposes and spirit.").

Attorney's fees are regulated under the Act by N.C.G.S. § 97-90, which states that "[f]ees for attorneys . . . shall be subject to the approval of the Commission." N.C.G.S. § 97-90(a) (2017). In addition, the Act mandates that any attorney who accepts a fee not approved by the Commission or the superior court is guilty of a Class 1 misdemeanor. *Id.* § 97-90(b) (2017). The superior court's role in approving attorney's fees is defined in subsection (c), which provides:

> If an attorney has an agreement for fee or compensation under this Article, he shall file a copy or memorandum thereof with the hearing officer or Commission prior to the conclusion of the hearing. If the agreement is not considered unreasonable, the hearing officer or Commission shall approve it at the time of rendering decision. If the agreement is found to be unreasonable by the hearing officer or Commission, the reasons therefor shall be given and what is considered to be reasonable fee allowed. If within five days after receipt of notice of such fee allowance, the attorney shall file notice of appeal to the full Commission, the full Commission shall hear the matter and determine whether or not the attorney's agreement as to a fee or the fee allowed is unreasonable. If the full Commission is of the opinion that such agreement or fee allowance is unreasonable and so finds, then the attorney may, by filing written notice of appeal within 10 days after receipt of such action by the full Commission, appeal to the senior resident judge of the superior court in the county in which the cause of action arose or in which the claimant resides; and *upon such appeal said judge shall consider the matter and determine in his discretion the reasonableness of said agreement or fix the fee and direct an order to the Commission* following his determination

therein. The Commission shall, within 20 days after receipt of notice of appeal from its action concerning said agreement or allowance, transmit its findings and reasons as to its action concerning such agreement or allowance to the judge of the superior court designated in the notice of appeal. In all other cases where there is no agreement for fee or compensation, the attorney or claimant may, by filing written notice of appeal within five days after receipt of notice of action of the full Commission with respect to attorneys' fees, appeal to the senior resident judge of the superior court of the district of the county in which the cause arose or in which the claimant resides; and *upon such appeal said judge shall consider the matter of such fee and determine in his discretion the attorneys' fees to be allowed in the cause.* The Commission shall, within 20 days after notice of appeal has been filed, transmit its findings and reasons as to its action concerning such fee or compensation to the judge of the superior court designated in the notice of appeal; provided that the Commission shall in no event have any jurisdiction over any attorneys' fees in any third-party action. In any case in which an attorney appeals to the superior court on the question of attorneys' fees, the appealing attorney shall notify the Commission and the employee of any and all proceedings before the superior court on the appeal, and either or both may appear and be represented at such proceedings.

The Commission, in determining an allowance of attorneys' fees, shall examine the record to determine the services rendered. The factors which may be considered by the Commission in allowing a reasonable fee include, but are not limited to, the time invested, the amount involved, the results achieved, whether the fee is fixed or contingent, the customary fee for similar services, the experience and skill level of the attorney, and the nature of the attorney's services.

In making the allowance of attorneys' fees, the Commission shall, upon its own motion or that of an interested party, set forth findings sufficient to support the amount approved.

> The Commission may deny or reduce an attorney's fees upon proof of solicitation of employment in violation of the Rules of Professional Conduct of the North Carolina State Bar.

Id. § 97-90(c) (2017) (emphases added).

Subsection (c) contains no language that limits the superior court solely to "the [same] factors set forth in the statute" that are to be considered by the Commission or that prohibits the superior court from "look[ing] beyond the evidence presented before the Commission or [ ] tak[ing] new evidence." *Saunders*, 249 N.C. App. at 374, 791 S.E.2d at 476. On the contrary, the statute vests the superior court judge with the authority to "consider the matter and determine *in his discretion* the reasonableness of said agreement or fix the fee" when there is an agreement, and "[i]n all other cases where there is no agreement for fee or compensation . . . [to] consider the matter of such fee and *determine in his discretion* the attorneys' fees to be allowed in the cause." N.C.G.S. § 97-90(c) (emphases added). We find that the plain language of the statute—committing the matter of attorney's fees to the superior court judge to "consider the matter" of a fee and "determine [it] in his discretion"—sets forth a broad, de novo fact-finding role to be played by the superior court. *See, e.g.*, *White v. White*, 312 N.C. 770, 777-78, 324 S.E.2d 829, 833 (1985) (explaining that "[i]t is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion," and "[a] ruling committed to a trial court's discretion is to be accorded great deference" and discussing how "[t]he findings of fact show that the trial court *admitted and considered evidence* relating to several of the twelve factors contained in" the statute at issue (emphasis added) (citations omitted)); *see also Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986) ("The abuse of discretion standard of review is applied to those decisions which necessarily require the exercise of judgment. . . . [T]he reviewing court sits only to insure that the decision could, *in light of the factual context in which it is made*, be the product of reason." (emphasis added)). Accordingly, we conclude that the Court of Appeals erred by reading strict limits into the statutory review to be conducted by the superior court. Instead, we hold that, in accord with the authority given in N.C.G.S. § 97-90(c) to "consider the matter" of attorney's fees and "in his discretion" fix the attorney's fees to be allowed, the superior court judge may take and consider additional evidence not presented to the Commission in order to properly consider the matter and exercise the court's discretion.

Here, the Commission found that "[t]he only fee agreement of record at the Industrial Commission is the one entered into between [Teich's firm] and plaintiff" and concluded that "[t]here is no evidence of a fee agreement between plaintiff's counsel and any of plaintiff's medical providers, including Mr. Holappa." The superior court, under its authority to "consider the matter" of attorney's fees and "in [its] discretion" fix the attorney's fees to be allowed, considered the evidence, including an affidavit from Mr. Holappa, and determined that there actually was such an agreement. In fact, the very same agreement between plaintiff's counsel and plaintiff that was before the Commission was the one submitted to the superior court for review; Mr. Holappa's affidavit made clear that he was also a party to that agreement. The superior court thereupon found the following facts:

> 7. With the knowledge and approval of Plaintiff and Mr. Holappa, attorney Mark T. Sumwalt and his firm The Sumwalt Law Firm were subsequently associated to assist in litigating the attendant care issues that had arisen in Plaintiff's claim as a result of Defendants' refusal to voluntarily provide the recommended attendant care to Plaintiff and compensate Mr. Holappa for the attendant care services he provided to Plaintiff.
>
> 8. Mr. Holappa, through Plaintiff's counsel, submitted an affidavit to this Court in which he stated that he consented and agreed to Plaintiff's counsel's pursuit of such recovery on his behalf *with the understanding and desire that any recovery made on his behalf through Plaintiff's workers' compensation claim would be subject to the 25% fee previously agreed to in the retainer agreement.*
>
> 9. Mr. Sumwalt was associated in approximately June 2012, and litigation commenced with the clear understanding of all parties involved that any compensation recovered on behalf of Mr. Holappa for providing attendant care services to Plaintiff would be subject to the previously agreed upon amount of 25% of any benefits ordered by the Industrial Commission, *in accordance with the parties' retainer agreement contract.*
>
> . . . .
>
> 13. Plaintiff's counsel did not request fees from the home modifications, equipment needs, prescription medications, or compensation for psychological treatment that

> Plaintiff's counsel obtained on Plaintiff's behalf through litigation, despite the significant monetary value of these awards. Plaintiff's counsel requested an attorneys' fee only from the attendant care compensation obtained for Mr. Holappa *in accordance with the retainer agreement*.

(Emphases added.) The court then concluded:

> 1. . . . Plaintiff's counsel participated in complex litigation, including the defense of the case on appeal before the Full Commission, predominantly on the issue of attendant care and *with a contingency fee agreement with Plaintiff and Mr. Holappa in place*.
>
> . . . .
>
> 5. This Court therefore concludes that *Plaintiff's counsel's fee agreement of [ ] "25% of any recovery as Ordered by the North Carolina Industrial Commission" is reasonable*.
>
> . . . .
>
> 7. This Court . . . . [finds that the facts in *Palmer*] are not the facts of the instant case. Plaintiff's counsel had the consent of and a fee agreement with both Plaintiff and Mr. Holappa.

(Emphases added.) (Citation omitted.) Having determined that Mr. Holappa was a party to the agreement between plaintiff and his counsel providing for attorney's fees of "25% of any recovery," the superior court considered all the factors listed in subsection (c) and "in its discretion, determine[d] that a reasonable attorney's fee . . . is 25% and shall therefore be allowed."

We note first that "[a] mere recital in an order that it is entered in the exercise of the court's discretion does not necessarily make the subject of the order a discretionary matter" and "[r]ulings of the court on matters of law are as a rule not discretionary." *Hollingsworth GMC Trucks, Inc. v. Smith*, 249 N.C. 764, 767, 107 S.E.2d 746, 749 (1959) (first citing *Poovey v. City of Hickory*, 210 N.C. 630, 631, 188 S.E. 78, 79 (1936); then citing 2 Thomas Johnston Wilson, II & Jane Myers Wilson, *McIntosh North Carolina Practice and Procedure* (2d ed. 1956), § 1782(4) at 209). Here, the Court of Appeals determined that the superior court exceeded its discretionary authority under subsection (c) not only by taking additional evidence, but also by "purport[ing] to adjudicate a question of

workers' compensation law, *i.e.*, whether the Commission may order an attorney's fee to be paid from the award of medical compensation." *Saunders*, 249 N.C. App. at 374, 791 S.E.2d at 476. According to the Court of Appeals, "medical compensation is solely in the realm of the Industrial Commission, and § 97-90(c) gives no authority to the superior court to adjust such an award under the guise of attorneys' fees." *Id.* at 374, 791 S.E.2d at 476 (quoting *Palmer*, 157 N.C. App. at 635, 579 S.E.2d at 908).[2] We disagree and conclude that the superior court below acted exactly within the authority and discretion provided to it by the plain language of N.C.G.S. § 97-90(c).

Moreover, contrary to the suggestion of the Court of Appeals, we do not consider N.C.G.S. § 97-90(c) to be an "obsolete relic." *Id.* at 375, 791 S.E.2d at 477. In noting that subsection (c) was added in response to the *Brice* decision and "prior to the establishment of the Court of Appeals in 1967 and the establishment of [the Court of Appeals'] comprehensive jurisdiction to review direct appeals from the Industrial Commission," *id.* at 371, 791 S.E.2d at 475; *see also* Act of June 2, 1967, ch. 669, sec. 1, 1967 N.C. Sess. Laws 755, 755 (vesting appeals from Commission decisions for errors of law in the Court of Appeals), the Court of Appeals suggested that subsection (c)'s review of attorney's fees was lodged in the superior court merely because the Court of Appeals was not yet in existence when subsection (c) was enacted. In that respect, we note that the legislature, following the creation of the Court of Appeals, more than once has amended subsection (c) without removing the superior court's discretion to review attorney's fees. The Workers' Compensation Reform Act of 1994, ch. 679, sec. 9.1, 1993 N.C. Sess. Laws (Reg. Sess. 1994) 394, 417-18; *see also* Act of July 11, 2013, ch. 278, sec. 1, 2013 N.C. Sess. Laws 755, 755-56 (authorizing the Commission to hear disputes between an employee's previous and current attorneys regarding the division of a fee and providing that "[a]n attorney who is a party to an action under this subsection shall have the same rights of appeal as outlined in subsection (c) of this section"). The superior court's comprehensive factual review of an attorney's fee as contemplated by N.C.G.S. § 97-90(c) is quite unlike the kind of analysis conducted by the Court of Appeals, which typically reviews for errors of law. *See* N.C.G.S. § 97-86 (2017) ("[A]ppeal from the decision of [the] Commission to the Court of Appeals [is] *for errors of law* under the same terms and conditions

2. This contention based on *Palmer* is misplaced, however, as neither the superior court nor the Commission purported to adjudicate the question of law that was at issue in *Palmer*. *See Palmer*, 157 N.C. App. at 627-28, 579 S.E.2d at 903-04. We express no opinion on the decision of the Court of Appeals in *Palmer*, which is not binding on this Court.

as govern appeals from the superior court to the Court of Appeals in ordinary civil actions." (emphasis added)); *see also id.* § 7A-26 (2017) (providing that the Court of Appeals has "jurisdiction to review upon appeal decisions of the several courts of the General Court of Justice and of administrative agencies, *upon matters of law or legal inference*" (emphasis added)).

Indeed, the appellate jurisdiction now possessed by the Court of Appeals was the same as that possessed by the superior court before the enactment of subsection (c), as explained in *Brice*:

> When the appeal comes on for hearing[,] it is heard by the presiding [superior court] judge who sits as an appellate court. His function is to review alleged errors of law made by the Industrial Commission, as disclosed by the record and as presented to him by exceptions duly entered. Necessarily, the scope of review is limited to the record as certified by the Commission and to the questions of law therein presented.
>
> . . . 'In passing upon an appeal from an award of the Industrial Commission in a proceeding coming within the purview of the act, the Superior Court is limited in its inquiry to these two questions of law: (1) Whether or not there was any competent evidence before the commission to support its findings of fact; and (2) whether or not the findings of fact of the commission justify its legal conclusions and decision. *The Superior Court cannot consider the evidence in the proceeding in any event for the purpose of finding the facts for itself.*

Brice, 249 N.C. at 82, 105 S.E.2d at 445 (emphasis added) (citations omitted) (first quoting *Penland v. Bird Coal Co.*, 246 N.C. 26, 33, 97 S.E.2d 432, 438 (1957); then quoting *Thomason v. Red Bird Cab Co.*, 235 N.C. 602, 605, 70 S.E.2d 706, 708 (1952)). We conclude that subsection (c)—enacted "in response to the *Brice* decision," *Saunders*, 249 N.C. App. at 371, 791 S.E.2d at 475—is separate from the appellate review for errors of law that was formerly vested in the superior court and is now vested in the Court of Appeals; instead, a review under subsection 97-90(c) is a unique, fact-based avenue of review covering a limited subject matter[3] that the legislature has chosen to vest in the superior court.

3. Notably, the matter of attorney's fees is not the only area under the Act that the legislature has committed to the discretion of the superior court. In 1983, after the creation

Conclusion

In sum, we hold that the decision of the Court of Appeals here is inconsistent with N.C.G.S. § 97-90(c) and that the superior court had jurisdiction to take and consider additional evidence not previously considered by the Commission. We further conclude that the superior court based its determination on factual findings and an exercise of discretion, as specifically authorized in N.C.G.S. § 97-90(c). Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for remand to the superior court for further remand to the Commission for entry of an order setting attorney's fees as determined by the superior court, and for additional proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Justice EARLS did not participate in the consideration or decision of this case.

---

of the Court of Appeals, the legislature added N.C.G.S. § 97-10.2(j), providing that when an employee obtains a judgment pursuant to a settlement from a third-party tortfeasor, the employee or the employer (or the employer's insurance carrier) may apply to the superior court to have the presiding judge determine the amount of the employer's lien. Act of June 30, 1983, ch. 645, sec. 1, 1983 N.C. Sess. Laws 604, 604; see Act of June 26, 1991, ch. 408, sec. 1, 1991 N.C. Sess. Laws 768, 772 (amending subsection (j) to provide that "with or without the consent of the employer, the [superior court] judge shall determine, *in his discretion*, the amount, if any, of the employer's lien" (emphasis added)); *see*, *e.g.*, *Easter-Rozzelle v. City of Charlotte*, 370 N.C. 286, 300, 807 S.E.2d 122, 131 (2017) (concluding that the plaintiff did not waive his right to compensation under the Act by settling with a third-party tortfeasor and receiving settlement proceeds and that "either party here may apply to the superior court judge to determine the amount of defendant's lien").

STATE v. GENTLE

[372 N.C. 47 (2019)]

STATE OF NORTH CAROLINA
v.
DARREN WAYNE GENTLE

No. 240A18

Filed 1 February 2019

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. ___, 817 S.E.2d 833 (2018), finding no error in part and dismissing defendant's appeal in part from a judgment and an order for satellite-based monitoring entered on 6 October 2016 by Judge Lindsay R. Davis in Superior Court, Randolph County. Heard in the Supreme Court on 8 January 2019.

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

Richard J. Costanza for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
JERRY GIOVANI THOMPSON

No. 24A18

Filed 1 February 2019

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 340 (2018), vacating and remanding a judgment entered on 3 January 2017 by Judge William R. Bell in Superior Court, Mecklenburg County. Heard in the Supreme Court on 2 October 2018.

Joshua H. Stein, Attorney General, by Derrick C. Mertz, Special Deputy Attorney General, and Robert T. Broughton, Assistant Attorney General, for the State-appellant.

Erik R. Zimmerman and Travis S. Hinman 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. Wilson*, ___ N.C. ___, ___ S.E.2d ___ (Dec. 21, 2018) (No. 295PA17).

VACATED AND REMANDED.

Justice EARLS did not participate in the consideration or decision of this case.

SCIGRIP, INC. F/K/A IPS STRUCTURAL ADHESIVES HOLDINGS, INC., AND IPS INTERMEDIATE HOLDINGS CORPORATION	)	
v.	)	Durham County
SAMUEL B. OSAE AND SCOTT BADER, INC.	)	

No. 139A18

SPECIAL ORDER

Plaintiffs' 23 January 2019 Motion to Protect Against Disclosure of Confidential or Trade Secret Information at Oral Argument is ALLOWED only as to plaintiffs' request that the Court prohibit the parties from revealing any alleged confidential or trade secret information during oral argument. To the extent the parties need to do so, they may utilize the key referenced in plaintiffs' motion.

In all other respects, plaintiffs' motion is DENIED.

By order of the Court in Conference, this the 30th day of January, 2019.

s/Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of February, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. J.C.

[372 N.C. 50 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Onslow County
	)	
J.C.	)	

No. 405PA17

ORDER

The Motion to Restrict Electronic Access, Place Case "Under Seal," and Redact Superior Court Case Numbers from All Published Materials filed by petitioner in this case is decided as follows: the motion is allowed to the extent that the materials filed in this case, such as the record, briefs, motions, orders, and other filings in this case will not be posted upon the North Carolina appellate court electronic filing site and that any opinion, orders, or similar documents published by the Court in this case will, from and after the date of the entry of this order, omit petitioner's name (as compared to his initials or a pseudonym) and the Onslow County file number(s) relevant to this case. The motion is denied to the extent that the Court declines to remove the Court of Appeals case number(s) from any opinions, orders, or similar documents published by the Court in this case.

By order of the Court in conference, this the 30th day of January, 2019.

s/Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of February, 2019.

AMY 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

30 JANUARY 2019

001P19	Teressa B. Rouse v. Forsyth County Department of Social Services	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA17-884) 2. Respondent's Conditional PDR Under N.C.G.S. § 7A-31 3. Respondent's Motion to Stay Reinstatement of Employee	1. 2. 3. Allowed **01/14/2019**
002A19	State v. John Thomas Coley	1. State's Motion for Temporary Stay (COA18-234) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **01/04/2019** 2.
003P19	State v. Eric Wilson Taylor	1. State's Motion for Temporary Stay (COA17-1284) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/09/2019** Dissolved **01/30/2019** 2. Denied 3. Denied
007P19	Melinda Finan and Robert Quin v. Child Protective Service	1. Plt's (Melinda Finan) *Pro Se* Motion for Appeals 2. Plt's (Melinda Finan) *Pro Se* Motion for Stay 3. Plt's (Melinda Finan) *Pro Se* Motion for Change of Venue	1. Denied **01/07/2019** 2. Denied **01/07/2019** 3. Dismissed **01/07/2019**
011A19	State v. Tyler Deion Greenfield	1. Def's NOA Based Upon a Dissent (COA17-802) 2. State's PDR Under N.C.G.S 3. State's Motion for Temporary Stay 4. State's Petition for *Writ of Supersedeas* 5. Joint Motion to Stay Briefing	1. --- 2. 3. Allowed **01/23/2019** 4. Allowed **01/23/2019** 5. Allowed **01/29/2019**
013P19	In the Matter of the Estate of Johnnie Edward Harper v. Kim L. Harper	1. Def's *Pro Se* Emergency Motion to Stay (COAP18-859) 2. Def's Pro Se Petition for *Writ of Certiorari* to Review Order of COA	1. Denied **01/10/2019** 2. Denied **01/10/2019**

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

30 JANUARY 2019

016P19	In the Matter of the Foreclosure of a Deed of Trust Executed by Michael D. Radcliff and Margene K. Radcliff Dated May 23, 2003 and Recorded in Book 1446 at Page 2024 and Rerecorded in Book 1472 at Page 2465 in the Iredell County Public Registry, North Carolina	1. Appellant's Motion for Temporary Stay (COA18-419) 2. Appellant's Petition for *Writ of Supersedeas* 3. Appellant's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/11/2019** 2. 3.
020P18-2	Vincent J. Mastanduno, Employee v. National Freight Industries, Employer and American Zurich Insurance Company, Carrier	1. Plt's Motion for Temporary Stay (COA17-1058) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's Petition for *Writ of Certiorari* to Review Order of COA 4. Plt's PDR Under N.C.G.S § 7A-31	1. Denied **11/05/2018** 2. Denied **11/05/2018** 3. Denied 4. Denied
020P19	State v. Utaris Mandrel Reid	1. State's Motion for Temporary Stay (COAP18-888) 2. State's Petition for *Writ of Supersedeas*	1. Denied **01/18/2019** 2. Denied **01/18/2019**
030P19	State v. Robert Paul Delair	1. Def's Motion for Temporary Stay (COA18-124) 2. Def's Petition for *Writ of Supersedeas* 3. Def's Notice of Appeal Based Upon a Constitutional Question 4. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/23/2019** 2. 3. 4.
035P19	State v. Keven Anthony Morgan	1. Def's *Pro Se* Petition for *Writ of Mandamus* (COA18-575) 2. Def's *Pro Se* Motion for Dismissal of Charges 3. Def's *Pro Se* Motion for Immediate Release from the North Department of Corrections	1. Dismissed **01/23/2019** 2. Dismissed **01/23/2019** 3. Dismissed **01/23/2019**
040P18-2	Amy S. Grissom v. David I. Cohen	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-66)	Denied
041P17-5	Arthur O. Armstrong v. Wilson County, et al.	Plt's *Pro Se* Motion for Petition for Rehearing	Dismissed

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

30 JANUARY 2019

047P02-18	State v. George W. Baldwin	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Alamance County	Denied **12/21/2018**
054P18-2	State v. Carnell Lavance Calhoun	Def's *Pro Se* Motion for PDR (COAP18-799)	Dismissed **Ervin, J., recused**
056PA17	Dr.Robert Corwin, as Trustee for the Beatrice Corwin Living Irrevocable Trust on behalf of class of those similarly situated v. British American Tobacco PLC , et al.	Plt's Petition for Rehearing	Denied
069A06-4	State v. Terraine Sanchez Byers	1. State's Motion for Temporary Stay (COA18-250) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **01/15/2019** 2. Allowed **01/16/2019** 3. ---
70PA16-3	State v. Nicolas Olivares Pineda	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Wake County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
093P18-2	Latonya A. Taylor, Individually, and as the Administratrix of the Estates of Sylvester Taylor and Angela Taylor; and as Guardian ad Litem of J.T., N.H., and A.H., Minor Children v. Wake County d/b/a the Division of Social Services	1. Plt's Motion for Reconsideration 2. Def's Motion to Strike Motion for Reconsideration	1. Dismissed 2. Dismissed as moot
123A95-3	State v. Ervy L. Jones, Jr.	Def's *Pro Se* Motion to Appoint Counsel	Dismissed
131P01-15	State v. Anthony Dove	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Lenoir County	Dismissed **Ervin, J., recused**

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

30 JANUARY 2019

139A18	SciGrip, Inc., et al. v. Osae, et al.	Tobias S. Hampson's Motion to Withdraw as Appellate Counsel	Allowed **01/02/2019**
139A18	SciGrip, Inc., et al. v. Osae, et al.	Plts' Motion to Close Courtroom During Oral Argument and to Seal Oral Argument Recording	Denied **01/14/2019**
139A18	SciGrip, Inc., et al. v.Osae, et al	Plts's Motion to Protect Against Disclosure of Confidential or Trade Secret Information at Oral Argument	Special Order
178P18	Elizabeth E. LeTendre v. Currituck County, North Carolina	1. Plt's Motion for Temporary Stay (COA17-1108) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's Notice of Appeal Based Upon a Constitutional Question 4. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/23/2019** Dissolved **01/30/2019** 2. Denied 3. Dismissed *ex mero motu* 4. Denied
201PA12-5	Margaret Dickson, Plaintiff v. Robert Rucho, et al., Defendants ——————— North Carolina State Conference of Branches of the NAACP, Plaintiffs v. The State of NC, Defendants	Consent Motion to Dismiss Appeal	Allowed **01/04/2019** **Earls, J., recused**
217PA17-2	State v. Marvin Everett Miller, Jr.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-1206-2) 2. State's Motion to Deem Response Timely Filed	1. Denied 2. Dismissed as moot
219P18	Greater Harvest Global Ministries, Inc. v. Blackwell Heating & Air Conditioning, Inc.	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA17-630) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
230P17-4	State v. Anthony Lee McNair	Def's *Pro Se* Motion for All Writs Act	Dismissed

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

30 JANUARY 2019

233P12-2	State v. Montrez Benjamin Williams	1. State's Motion for Temporary Stay (COA16-178) 2. State's Petition for *Writ of Supersedeas* 3. Def's Motion for Temporary Stay 4. Def's Petition for *Writ of Supersedeas* 5. Def's Motion to Remove from Electronic Site	1. Allowed **10/05/2018** 2. 3. Allowed **10/05/2018** 4. 5. Dismissed without prejudice to refile with more specificity **01/30/2019**
235P18-2	State v. Ty Rayshun Davis	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **12/14/2018**
248A18	Sykes, et al. v. Blue Cross and Blue Shield of North Carolina, et al.	1. Def's (Cigna Healthcare of North Carolina, Inc.) Motion to Admit Joshua B. Simon *Pro Hac Vice* 2. Def's (Cigna Healthcare of North Carolina, Inc.) Motion to Admit Warren Haskel *Pro Hac Vice* 3. Def's (Cigna Healthcare of North Carolina, Inc.) Motion to Admit Dmitriy Tishyevich *Pro Hac Vice* 4. Def's (Blue Cross and Blue Shield of North Carolina) Motion to Admit Peter M. Boyle *Pro Hac Vice* 5. Def's (Blue Cross and Blue Shield of North Carolina) Motion to Admit Christina E. Fahmy *Pro Hac Vice*	1. Allowed 2. Allowed 3. Allowed 4. Allowed 5. Allowed
253P18-2	In re Webster Waller	Petitioner's *Pro Se Petition* for *Writ of Habeas Corpus*	Denied **01/28/2019**
255A17	Billie Bruce Justus as Administrator of the Estate of Pamela Jane Justus v. Rosner, et al.	Tobias S. Hampson's Motion to Withdraw as Appellate Counsel	Allowed **01/02/2019**

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

30 JANUARY 2019

259P18	Aisha D. Flood, Administrator of the Estate of Maurice A. Harden v. Jonathan Henry Crews, Individually, and Jonathan Henry Crews, in his capacity as a member of Raleigh Police Department, and City of Raleigh	Def's PDR Under N.C.G.S. § 7A-31 (COA17-740)	Denied
264PA18	In the Matter of B.O.A.	1. North Carolina Association of Social Service Attorneys' Motion to Allow Access to Record on Appeal 2. North Carolina Association of Social Service Attorneys' Motion for Extension of Time to File Amicus Brief	1. Allowed **01/02/2019** 2. Allowed **01/02/2019**
266P18-3	State v. Charles Antonio Means	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Johnston County 2. Def's *Pro Se* Petition for *Writ of Mandamus* 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed 3. Allowed
282P18	State v. Christopher Jamme Whitfield and State v. Corey Levi Banner	1. State's Motion for Temporary Stay (COA17-184) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's (Corey Levi Banner) *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Allowed **08/31/2018** Dissolved **01/30/2019** 2. Denied 3. Denied 4. Denied
294A18	State v. Jeffery Daniel Waycaster	1. Def's Notice of Appeal Based Upon a Dissent (COA17-1249) 2. Def's PDR Under N.C.G.S. § 7A-31	1. --- 2. Allowed
296P15-3	Ernest James Nichols v. Brian Pulley, Assistant Superintendent for Custody – Nash Correctional; Erik Hooks, Secretary of the North Carolina Department of Public Safety	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **01/11/2019**

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

30 JANUARY 2019

301P16-3	Michael Anthony Taylor v. Carlos Hernandez, Superintendent of Avery-Mitchell Correctional Institution	1. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Petitioner's *Pro Se* Motion for Notice of Constitutional Challenge 3. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied **01/22/2019** 2. Dismissed as moot **01/22/2019** 3. Allowed **01/22/2019**
304P18	State v. Maurice McKinnon	Def's *Pro Se* Motion for PDR (COAP18-494)	Denied
305P97-8	Egbert Francis, Jr. v. Municipal Court of Wake County, et al.	Petitioner's *Pro Se* Motion for Civil Contempt	Dismissed
311P18	State v. Shakita Necole Walton	1. State's Motion for Temporary Stay (COA17-1359) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/21/2018** 2. Allowed 3. Allowed
313P18	Dunhill Holdings, LLC, Plaintiff/ Counter-Defendant v. Tisha L. Lindberg, Defendant/Counter-Plaintiff and Wes Massey, Craig Herndon, Hardee Merritt, and Derek Boone, Defendants ——————— Tisha L. Lindberg, Third-Party Plaintiff v. Greg Lindberg, Third-Party Defendant	1. Plaintiff/Counter- Defendant and Third-Party Def's Motion for Temporary Stay (COAP18-613) 2. Plaintiff/Counter-Defendant and Third-Party Def's Petition for *Writ of Supersedeas* 3. Defendant/ Counter-Plaintiff and Third-Party Plaintiff's Motion for Expedited Consideration	1. Allowed **09/24/2018** Dissolved **01/30/2019** 2. Denied 3. Denied
318P18	Patricia M. Brady v. Bryant C. Van Vlaanderen; Renee M. Van Vlaanderen; Marc S. Townsend; Linda M. Townsend; United Tool & Stamping Company of North Carolina, Inc.; United Realty of North Carolina, LLC; Enterprise Realty, LLC; and Waters Edge Town Apartments, LLC	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-61)	Denied

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

30 JANUARY 2019

321P18	Rebecca R. Davis and Matthew M. Davis, Individually and on behalf of Jeanette B. Davis, Trustor of the Jeanette B. Davis Revocable Trust Dated March 11, 2002; and Matthew M. Davis, on behalf of his children, Mallory Fay Davis and Matthew McCabe Davis, Jr. v. Janet D. Rizzo, Individually and as Trustee of the Jeanette B. Davis Revocable Trust Dated March 11, 2002; Anne Page Watson, and Intervenor Jeanette B. Davis	Plts' Petition for *Writ of Certiorari* to Review Decision of COA (COA17-1153)	Denied
326P17-2	State v. Ricky D. Wagoner	1. Def's *Pro Se* Motion for Notice of Appeal (COAP17-575) 2. Def's *Pro Se* Motion for PDR	1. Dismissed *ex mero motu* 2. Denied
328A11	State v. Tony Savalis Summers	Motion to Withdraw as Counsel and Allow the Office of Appellate Defender to Appoint Substitute Counsel	Allowed **01/16/2019**
331A18	Craig Franklin Smith v. North Carolina Board of Funeral Service	1. Petitioner's Notice of Appeal Based Upon a Constitutional Question (COA17-996) 2. Respondent's Motion to Dismiss Appeal	1. Allowed **12/05/2018** 2. Allowed
334P18	Janice Thompson v. Christopher Lee Bass and Donald Wayne Boyd	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-1194)	Denied
337P18	In the Matter of C-R.D.G.	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA18-148)	Denied

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

30 JANUARY 2019

339A18	Francis X. De Luca and the New Hanover County Board of Education, Plaintiff v. Josh Stein, in his capacity as Attorney General of the State of North Carolina, Defendant, and North Carolina Coastal Federation and Sound Rivers, Inc., Intervenors	1. Def's Notice of Appeal Based Upon a Dissent (COA17-1374) 2. Def's PDR as to Additional Issues 3. Plt's (New Hanover County Board of Education) PDR Under N.C.G.S. § 7A-31 4. Intervenors' Notice of Appeal Based Upon a Dissent 5. Intervenors' PDR as to Additional Issues	1. --- 2. Allowed 3. Allowed 4. --- 5. Allowed
342P18	State v. Hector Tepox Maldonado	Def's PDR Under N.C.G.S. § 7A-31 (COA17-643)	Denied
346P18	Pamela C. Barrett, Individually and as Executor of the Estate of Donald Collins Clements, Jr. v. Nancy Coston	Plt's PDR Under N.C.G.S § 7A-31 (COA18-16)	Denied
348P18	State v. John Scott Hudson	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, New Hanover 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
352P18	Elizabeth E. LeTendre v. Currituck County, North Carolina and Michael Long and Marie Long, Proposed Intervenors	1. Plt's Motion for Temporary Stay (COA18-163) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/18/2018** Dissolved **01/30/2019** 2. Denied 3. Denied
354P18	AVR Davis Raleigh, LLC v. Triangle Construction Company, Inc.	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA17-958) 2. Plt's PDR Under N.C.G.S. §7A-31 3. Def's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
355P18	State v. Shelly Anne Osborne	1. State's Petition for *Writ of Supersedeas* (COA18-9) 2. State's Application for Temporary Stay 3. State's PDR	1. Allowed 2. Allowed **10/22/2018** 3. Allowed

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

30 JANUARY 2019

356P17-2	State v. Brandon Lee	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **12/28/2018**
357P18	Thorsten Blumenschein v. Nicole Blumenschein	Plt's PDR Under N.C.G.S. §7A-31 (COA17-1299)	Denied
367P18	State v. Trejuan Marice White	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA18-136) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
368P18	In the Matter of V.P.M.A.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA17-1386)	Denied
375A15-2	Dabeeruddin Khaja v. Fatima Husna	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-763) 2. Def's Motion to Amend	1. Denied 2. Denied
380P18	State v. John Douglas Huckabee	Def's *Pro Se* Motion For Dismissal	Dismissed as moot
385P18	State v. Daryll Lamar Brooks	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-64)	Denied
391P18-2	Joseph Lee Ham v. Supt. David Millis, et al.	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **12/07/2018**
394P18	State v. Jasmine L. Burton	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Person 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 for Leave to File Documents Under Seal	Allowed
402P18	Denise Guidotti v. Donald Mac Moore, Sr.	1. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-221) 2. Plt's *Pro Se* Motion to Amend the Petition	1. Denied 2. Allowed

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

30 JANUARY 2019

405PA17	State v. J.C.	1. State's Motion for Temporary Stay (COA17-207-2) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. State's Petition for *Writ of Certiorari* to Review Order of COA 5. Petitioner's Motion to Proceed Under a Pseudonym 6. Petitioner's Motion to Restrict Electronic Access, Place Case "Under Seal," and Redact Superior Court Case Numbers from All Published Materials	1. Allowed **11/27/2017** 2. Allowed **08/14/2018** 3. Special Order **08/14/2018** 4. Denied **08/14/2018** 5. Allowed 6. Special Order
412P18	Annette Baker, PH.D. v. The North Carolina Psychology Board	1. Plt's PDR Under N.C.G. S. § 7A-31 (COA18-264) 2. Plt's Motion for Temporary Stay 3. Plt's Petition for *Writ of Supersedeas*	1. 2. Allowed **01/23/2019** 3.
418P18	State v. Jonathan Adrian Fuller	1. Def's *Pro Se* Motion for PDR (COA17-495) 2. Def's *Pro Se* Petition for *Writ of Certiorari*	1. Dismissed 2. Denied
421P18	Gregory H. Jones v. Supt. Mike Slagle, et al.	1. Petitioner's *Pro Se* Motion for *Certiorari* 2. Petitioner's *Pro Se* Motion for *Mandamus* and Change of Venue	1. Dismissed 2. Dismissed
422P18	State v. Samuel Eugene Geddie	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-332) 2. Def's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA	1. Denied 2. Denied
425A18	Hamlet H.M.A., LLC d/b/a Sandhills Regional Medical Center v. Pedro Hernandez, M.D.	1. Plt's Notice of Appeal Based Upon a Dissent (COA17-744) 2. Plt's PDR as to Additional Issues 3. Def's PDR Under N.C.G.S. § 7A-31	1. — 2. Denied 3. Denied
429P18	State v. James Opleton Bradley	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1391)	Denied
431P18	State v. Raymond Craig Johnson	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP18-798)	Dismissed

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

30 JANUARY 2019

436P18	State v. Joshua Shane Baker	Def's PDR Under N.C.G.S. § 7A-31 (COA18-70) Denied	
438P09-2	State v. Darron Jermaine Jones	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Dismissed as moot **Beasley, J., recused**
441A18	State v. Rontel Vincae Royster	1. State's Motion for Temporary Stay (COA18-2) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **12/18/2018** 2. ----- 3.
442P18	The Grande Villas at The Preserve Condominium Homeowners Association, Inc. v. Indian Beach Acquisition LLC and Thomas P. Ryan	Defs' PDR Under N.C.G.S. § 7A-31	Denied
443P18	Pender Cowan Cates, Jr. v. Peter Bucholtz, Administrator	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Dismissed without prejudice **01/09/2019**
448P18	State v. Justin Delane Kraft	1. State's Motion for Temporary Stay (COA18-330) 2. State's Petition for *Writ of Supersedeas* 3.State's PDR Under N.C.G.S. §7A-31	1. Allowed **12/21/2018** 2. 3.
450P18	State v. Ron Cornelius Johnson	Def's PDR Under N.C.G.S. § 7A-31 (COA18-241)	Denied
514PA11-3	State v. Harry Sharod James	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* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot

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

30 JANUARY 2019

518P98-2	State v. Christopher Mosby	1. Def's *Pro Se* Motion for Extension of Time 2. Def's *Pro Se* Motion for Notice of Appeal	1. Dismissed as moot 2. Dismissed *ex mero motu*
542P97-3	State v. Terrence L. Wright	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **01/15/2019**

COUNTY OF DURHAM, BY AND THROUGH DURHAM DSS, EX REL. SHARON L. WILSON AND TIFFANY A. KING

v.

ROBERT BURNETTE

No. 404A18

Filed 29 March 2019

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. ___, 821 S.E.2d 840 (2018), vacating orders entered on 23 November 2016 by Judge Fred Battaglia in District Court, Durham County, and remanding for entry of new orders. Heard in the Supreme Court on 6 March 2019.

Office of the County Attorney, by Geri Ruzage, Senior Assistant County Attorney, for plaintiff-appellant.

Mary McCullers Reece for defendant-appellee.

PER CURIAM.

AFFIRMED.

Justice DAVIS did not participate in the consideration or decision of this case.

PREISS v. WINE & DESIGN FRANCHISE, LLC

[372 N.C. 65 (2019)]

EMILY N. PREISS AND WINE AND DESIGN, LLC
v.
WINE AND DESIGN FRANCHISE, LLC, HARRIET E. MILLS, PATRICK MILLS, AND CAPITAL SIGN SOLUTIONS, LLC

No. 390A18

Filed 29 March 2019

Appeal pursuant to N.C.G.S. § 7A-27(a) from an order on motion for sanctions dated 19 July 2018 entered by Judge Gregory P. McGuire, 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 under N.C.G.S. § 7A-45.4. Heard in the Supreme Court on 6 March 2019.

Law Offices of Hayes Hofler, P.A., by R. Hayes Hofler, III, pro se, appellant.

Batten Lee, PLLC, by Kari R. Johnson, Gloria T. Becker, and Matthew D. Mariani, for defendant-appellees Harriet E. Mills, Patrick Mills, and Capital Sign Solutions, LLC.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 17 CVS 11895
EMILY N. PREISS and WINE AND DESIGN, LLC Plaintiffs, v. WINE AND DESIGN FRANCHISE, LLC; HARRIETT E. MILLS; PATRICK MILLS; and CAPITAL SIGN SOLUTIONS, LLC, Defendants.	**ORDER ON MOTION FOR SANCTIONS AND TO COMPEL DEPOSITION**

THIS MATTER comes before the Court upon Defendants Harriett E. Mills, Patrick Mills, and Capital Sign Solutions, LLC's ("the Mills Defendants") Motion for Sanctions and to Compel Deposition, ("Motion", ECF No. 93), and a memorandum in support of the Motion. (ECF No. 94.) The Mills Defendants seek sanctions pursuant to Rule 37 of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 37 (hereinafter, references to the General Statutes will be to "G.S." and references to the Rules of Civil Procedure will be to "Rule(s)"). On June 11, 2018, Plaintiffs filed a response in opposition to the Motion. (Pl. Resp. Opp. Mot. for Sanctions and Compel Depo., ECF No. 107.)

On July 6, 2018, the Court held a hearing on the Motion. At the hearing, the Court advised counsel that it would grant the Motion and asked counsel for the Mills Defendants to file with the Court an affidavit in support of her request for attorneys' fees and costs. Thereafter, counsel for the Mills Defendants, Gloria T. Becker ("Becker"), filed two affidavits in support of her request for attorneys' fees. (ECF Nos. 114 and 115.)

THE COURT, having carefully considered the Motion, the briefs filed in support of and in opposition to the Motion, the arguments of counsel at the hearing, and other appropriate matters of record, concludes, in its discretion, that the Motion should be GRANTED for the reasons set forth below.

I. FACTUAL BACKGROUND

On February 12, 2018, the Court filed the Case Management Order ("CMO") in this action. (CMO, ECF No. 49.) The CMO provided that "[t]he depositions of Plaintiffs Emily Preiss and Wine and Design, L.L.C.

shall take place . . . no later than April 16, 2018. Defendants shall be permitted to take Plaintiffs' deposition before any other party is deposed." (ECF No. 49, at p. 4.)

On March 16, 2018, Defendants noticed the deposition of Emily Preiss ("Preiss") for April 11, 2018, after confirming that date and time of was agreeable to all Parties. (Pl. Mot. for Protective Order, ECF No. 62, at ¶ 1.)

On April 4, 2018, Plaintiffs filed a Motion for Protective Order pursuant to Rule 26(c) requesting that the Court "disallow" the Mills Defendants from taking Preiss's noticed deposition on April 11, 2018 because "the notices of deposition [were] interposed on Ms. Preiss to annoy, confuse, harass and oppress her [and] [e]ven if not for those purposes, Ms. Preiss cannot be expected to give a coherent deposition under her present mental incapacities." (ECF No. 62, at p. 3.) Also on April 4, 2018, Plaintiffs filed a Motion for Extension of Discovery Deadlines (ECF No. 64) requesting a 30-day extension of the time allowed to complete fact discovery. On April 5, 2018, the Mills Defendants filed written responses to the Motion for Protective Order (ECF No. 65) and the Motion for Extension of Discovery Deadlines (ECF No. 66) in which they catalogued the various ways counsel for Plaintiffs had utilized motions practice to avoid participating in the discovery process.

The Court issued an Order that expedited the briefing schedule for the Motions. (Order Expediting Briefing, ECF No. 67.) The Court was unable to hold a hearing on Plaintiffs' motions until April 11, 2018, effectively preventing the Mills Defendants from taking the noticed depositions of Preiss on that date. (Notice of Hearing and Or. To Appear, ECF No. 71.)

At the hearing on April 11, 2018, the Court orally notified counsel that the depositions of Preiss and Wine and Design, L.L.C. would thereafter be Ordered to take place on April 25, 2018, starting at 9:00 a.m., at the offices of counsel for the Mills Defendants in Raleigh, North Carolina.

On April 12, 2018, the Court issued an Order on Plaintiffs' Motion for Extension of Discovery Deadlines. (ECF No. 73.) The Order stated that "[t]he depositions of Plaintiffs Emily Preiss and Wine and Design, L.L.C. **shall take place on April 25, 2018** . . . starting at **9:00 a.m.**" (ECF No. 73, at p. 2 (emphasis in original).)

Also on April 12, 2018, the Court issued an Order on Plaintiff's Motion for Protective Order (ECF No. 74) that contained a second explicit statement that "the depositions of Plaintiffs Emily Preiss and

Wine and Design, L.L.C. shall take place at 4141 Parklake Avenue, Suite 350, Raleigh, North Carolina 27612 on April 25, 2018 beginning at 9:00 a.m." (ECF No. 74, at p. 2 n. 1.)

On April 25, 2018 at 9:00 a.m. Becker and counsel for Defendant Wine and Design Franchise, LLC were present at the designated location for the deposition, had a court reporter present, and were prepared to take Preiss's deposition. However, neither Preiss nor Plaintiff's counsel, R. Hayes Hofler ("Hofler") appeared at the designated location. At 9:30 a.m. neither Preiss nor Hofler had yet appeared, and Becker released the court reporter to leave. Shortly thereafter, Hofler telephoned Becker and claimed that he mistakenly believed the deposition was scheduled to begin at 10:00 a.m. (Br. Supp. Mot. for Sanctions, ECF No. 94, at p. 2.) When Becker asked if Hofler was on his way to Raleigh from his Durham office[1], Hofler responded that he had not yet left his office. (*Id.*) Becker advised Hofler that, under the circumstances, she would not recall the court reporter and wait indefinitely for Hofler and Preiss to appear.[2]

II. LEGAL ANALYSIS

A. Rule 37(d) justifies an award of sanctions against Hofler, in this case

Rule 37 provides that

> If a party . . . fails [ ] to appear before the person who is to take his deposition, after being served with proper notice, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subdivisions a, b, and c of subsection (b)(2) of this rule. **In lieu of any order or in addition thereto**, the court shall require the party failing to act to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

1. Mills Defendants contend, and Hofler does not dispute, that Hofler's offices are at least 30 minutes away from the location designated for the depositions.

2. Preiss apparently appeared at the deposition location, alone, at 10:30 a.m.

Rule 37(d)(emphasis added). The available sanctions under Rule 37(b)(2)(a)–(c) include:

> a. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> b. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> [and]
>
> c. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

Although the Court would be inclined to consider more severe sanctions, Becker made clear at the hearing that she seeks only an award of fees in this situation.

There is no dispute that Preiss and Hofler did not appear at the designated time and location for the Court-ordered deposition of Preiss. Instead, Hofler contends that he mistakenly thought that the deposition was scheduled to begin at 10:00 a.m., and was willing to proceed with the deposition at a later time after he and Preiss arrived at the deposition location. Hofler argues that he should not be required to pay attorneys' fees because Preiss did not fail to appear at her deposition, she merely arrived late, and her late arrival was the result of Hofler's mistake. (ECF No. 107, at pp. 6–8.) Such mistake, Hofler contends, is a "circumstance[ ] mak[ing] an award of expenses unjust." (*Id* (citing Rule 37(d)).)

The Court is not persuaded by Plaintiffs' argument, considering the factual and procedural background of this Motion and this case. The time set for the deposition was noted clearly in open court, featured in bold-face type in the Order on the Motion for Extension of Discovery Deadlines, and cross-referenced in the Order on the Motion for Protective Order issued that same day. There was no excuse that substantially justified Hofler's mistake as to the time for the deposition.

B. Counsel for the Mills Defendants has presented sufficient evidence to justify an award of attorneys' fees in the amount requested

"[A]n award of attorney's fees usually requires that the trial court enter findings of fact as to the time and labor expended, skill required, customary fee for like work, and experience or ability of the attorney based on competent evidence." *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 672, 554 S.E.2d 356, 366 (2001).

The Mills Defendants seek a total of $4,100.00 in fees for services and costs. Mills Defendants submitted affidavits in support of the attorneys' fees and costs incurred from Preiss and Hofler's failure to appear at the deposition. (Becker Affs., ECF Nos. 114 and 115.) The Mills Defendants seek fees in the amount of $3,770.00 for: 10.3 hours of legal services performed by Becker at an hourly rate of $225.00; 5.9 hours of legal services performed by Matthew D. Mariani at an hourly rate of $175.00; and 5.6 hours of paralegal work at an hourly rate of $75.00. (ECF No. 115, at ¶ 6.) The Mills Defendants also seek costs for Superior Court Reporting (appearance and deposition fee) of $330.00. (*Id.*)

The hourly fees charged by Becker and Mariani are discounted to the Mills Defendants, and are substantially below the hourly rates they typically charge. (ECF No. 115, at ¶¶ 3 and 4.) The hourly rates charged by the two attorneys and the paralegal also are lower than rates charged by comparably skilled and experienced attorneys practicing complex business litigation law in North Carolina. The Mills Defendants submitted evidence that the standard and customary rates charged for such services "range from $250.00/hour to $400.00/hour for a Partner; $200.00/hour to $300.00/hour for associates; and $100/hour to $150[.00]/hour for paralegals." (ECF No. 115, at ¶ 5.)

The Mills Defendants also submitted evidence that the professional services performed as a result of Preiss and Hofler's failure to appear at the deposition included "drafting and serving of the amended Notices of Deposition . . . ; attendance of the actual depositions where [P]laintiffs and counsel failed to appear; drafting and filing of the [Motion]; researching case law, drafting and filing of the Memorandum of Law in Support of the [Motion]; preparation for the hearing on the [Motion]; travel to/from and attendance of hearing on [the Motion]; and drafting of" the first evidentiary affidavit. (ECF No. 115, at ¶ 7.) The Court concludes that each of the tasks described in Becker's affidavit are attributable, and were reasonably necessary, to respond Preiss and Hofler's failure to appear at the noticed deposition.

The Mills Defendants have provided sufficient evidence of the time and labor required to litigate this discovery violation and the costs incurred. The Mills Defendants' counsel are experienced civil litigation attorneys, and the Court concludes that the skill needed to perform the services attributable to Preiss and Hofler's failure to appear at the noticed deposition required attorneys with such experience. The Court finds the rates charged by counsel in the present matter are lower than those charged by other attorneys with similar experience, skill, and ability to that of the Mills Defendants' counsel.

Accordingly, the Court finds that the amount of fees and costs requested by counsel for the Mills Defendants is reasonable, and the Court must award such reasonable fees and expenses pursuant to Rule 37(d).

III. CONCLUSION AND ORDER

THE COURT, having considered the Motion, the briefs filed in support of and in opposition to the Motion, and other appropriate matters of record in this case including the fact that the April 25, 2018 deposition was Court-ordered after Plaintiffs filed motions in an attempt to avoid the previously scheduled depositions of Preiss, CONCLUDES in its discretion that the Motion for Sanctions should be GRANTED.

THEREFORE, IT IS ORDERED that R. Hayes Hofler, as Plaintiffs' Counsel, is hereby sanctioned pursuant to Rule 37(d), is individually liable to counsel for the Mills Defendants for $4,100.000, the amount Mills Defendants' counsel incurred as a result of Plaintiffs' failure to attend a Court-ordered deposition.

Hofler must pay such amount to Mills Defendants' counsel **on or before Friday, August 3, 2018**.

The Court reserves, for consideration at a later date, the Mills Defendants' motion to compel the deposition of Plaintiffs.

SO ORDERED, this the 19th day of July, 2018.

/s/ Gregory P. McGuire
Gregory P. McGuire
Special Superior Court Judge for
Complex Business Cases

STATE OF NORTH CAROLINA
v.
NOUI PHACHOUMPHONE

No. 65PA18

Filed 29 March 2019

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 810 S.E.2d 748 (2018), finding no prejudicial error after appeal from judgments entered on 22 September 2016 by Judge Eric L. Levinson in Superior Court, Cleveland County. Heard in the Supreme Court on 4 March 2019.

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

William D. Spence for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justice DAVIS did not participate in the consideration or decision of this case.

STATE v. TART

[372 N.C. 73 (2019)]

STATE OF NORTH CAROLINA
v.
JERMAINE ANTWAN TART

No. 427PA17

Filed 29 March 2019

1. Indictment and Information—indictment and Information—attempted first-degree murder—kill and murder—malice aforethought

A short-form indictment was sufficient to charge defendant with attempted first-degree murder even though it replaced the statutory language "kill and murder" with "kill and slay." The "malice aforethought" language provided certainty of the offense charged.

2. Criminal Law—prosecutor's arguments—clarifying issues of mental state—permissible hyperbole

The trial court did not err by declining to intervene ex mero motu during the State's closing argument in defendant's trial for attempted first-degree murder. The challenged statements served to clarify issues regarding defendant's mental state and also contained permissible hyperbole.

Justice DAVIS did not participate in the consideration or decision of this case.

Justice EARLS concurring in part and dissenting in part.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 808 S.E.2d 178 (2017), vacating in part and finding no error in part in judgments entered on 26 August 2016 by Judge V. Bradford Long in Superior Court, Forsyth County. On 9 May 2018, the Supreme Court allowed defendant's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 8 January 2019.

Joshua H. Stein, Attorney General, by Michael T. Henry, Assistant Attorney General, for the State-appellant/appellee.

Sarah Holladay for defendant-appellee/appellant.

MORGAN, Justice.

This criminal appeal presents two issues for the Court to resolve: whether a short-form indictment sufficiently charged attempted first-degree murder when the wording of the indictment did not precisely duplicate the language of the relevant statute and whether a prosecutor's remarks during closing argument were so grossly improper that the trial court should have intervened *ex mero motu*. While we agree with the Court of Appeals that the State's characterizations during its closing argument do not entitle defendant to a new trial, we reject the lower appellate court's determination regarding the short-form indictment and hold that the indictment was sufficient to vest the trial court with subject-matter jurisdiction to try defendant for attempted first-degree murder. Accordingly, we affirm in part and reverse in part the decision of the Court of Appeals.

Factual and Procedural Background

In late February 2014, defendant Jermaine Antwan Tart was residing at a homeless shelter in Winston-Salem where the victim in this case, Richard Cassidy, was a volunteer worker. On 2 March 2014, Cassidy was leading a group of shelter residents, including defendant, as they walked to an overflow location of the shelter. During the walk to this area, defendant made several inappropriate comments and began to speak incoherently. Defendant suddenly began to assault Cassidy from behind, stabbing Cassidy in the head and knocking him to the ground. Defendant then got on top of Cassidy and continued to attack him, striking Cassidy's head, neck, shoulder, and back with a knife. Even after another shelter resident attempted to intervene in order to try to stop the attack, defendant persisted in his assault of Cassidy. A law enforcement officer arrived on the scene and was able to stop defendant's attack on Cassidy. Although the injuries that Cassidy sustained were serious and life-threatening, he survived the assault. Defendant subsequently stated during interviews with law enforcement officers and mental health professionals that he was upset with Cassidy because Cassidy had allowed others to steal from him, had disrespected defendant, and had shot defendant when defendant was a child.

Defendant was charged with the offenses of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. At trial, there was no dispute that defendant had stabbed Cassidy. The sole contested question concerned defendant's mens rea, namely, whether defendant had the specific intent to attempt to commit first-degree murder.

The State introduced testimony from Richard Blanks, M.D., an expert in the field of forensic psychiatry, who opined that an individual can have a specific intent and a delusion at the same time. Also in his testimony, Dr. Blanks offered defendant's belief that Cassidy had allowed others to steal from defendant as an example of defendant's non-delusional reasons for being angry with Cassidy, even if defendant's beliefs were actually inaccurate. Dr. Blanks testified that these beliefs constituted identifiable non-delusional reasons that could cause defendant to be angry with Cassidy and would further evidence defendant's specific intent to kill Cassidy.

Dr. Christine Herfkens, a psychologist and expert in forensic and clinical neuropsychology who was a witness for the defense, testified that defendant had a long history of mental illness, including schizoaffective disorder and antisocial personality disorder, which is a disorder formerly known as sociopathy. Defendant's medical records indicated that he had been admitted to state hospitals at least twelve times between 2002 and 2014, each time exhibiting homicidal ideation, which Herfkens defined as the desire to kill another person. In addition, defendant was dependent on both alcohol and marijuana.

At the close of the State's evidence and again at the close of all of the evidence, defendant moved to dismiss both charges against him, arguing that he had demonstrated diminished capacity and the absence of the specific intent to kill. The trial court denied these motions. The jury subsequently found defendant guilty of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. The trial court sentenced defendant to concurrent terms totaling 207 to 261 months of imprisonment.

Defendant appealed to the Court of Appeals and raised two arguments, neither of which was presented to the trial court. First, defendant challenged the indictment that purported to charge him with attempted first-degree murder, claiming that it was insufficient to confer subject-matter jurisdiction on the trial court. Specifically, defendant noted that the short-form indictment utilized for the attempted first-degree murder charge included one word from the statutorily approved language for charging manslaughter along with the prescribed wording for a murder offense. Second, defendant contended that certain remarks in the prosecutor's closing argument at trial were so grossly improper that the trial court committed reversible error in failing to intervene *ex mero motu*. In a unanimous, unpublished opinion issued on 5 December 2017, the North Carolina Court of Appeals agreed with defendant's indictment

argument and vacated his attempted first-degree murder conviction, but found no error in the trial court's silence during the State's closing argument and therefore upheld the assault conviction. *See State v. Tart*, ___ N.C. App. ___, 808 S.E.2d 178, 2017 WL 6002771 (2017) (unpublished).

On 14 December 2017, the State filed a petition for *writ of supersedeas* and application for temporary stay in this Court. The following day, this Court stayed the decision of the Court of Appeals. On 11 January 2018, the State filed a petition seeking discretionary review of the Court of Appeals' decision regarding sufficiency of the indictment for attempted first-degree murder, and on 22 January, defendant filed a conditional petition for discretionary review of the Court of Appeals' resolution of the closing argument issue. This Court allowed both petitions for discretionary review on 9 May 2018.

Analysis

I. Facial Sufficiency of the Short-form Attempted First-degree Murder Indictment

[1] North Carolina General Statutes section 15-144 sets out the appropriate phrasing which can be utilized in indictments for the criminal offenses of murder and manslaughter. The statute reads in pertinent part:

> [I]t is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law; and it is sufficient in describing manslaughter to allege that the accused feloniously and willfully did kill and slay (naming the person killed), and concluding as aforesaid . . . .

N.C.G.S. § 15-144 (2017). The indictment in the case at bar, in charging defendant with the criminal offense of attempted first-degree murder, states in pertinent part: "the defendant [Jermaine Antwan Tart] unlawfully, willfully and feloniously did attempt to *kill and slay* Richard Cassidy with malice aforethought." (Emphasis added).

A comparison of the statutory requirements to sufficiently charge a person in an indictment for an offense pertaining to murder under N.C.G.S. § 15-144 and the challenged indictment in the instant case offers two notable observations: (1) the phrase "malice aforethought" appears in both the statutory requirements and the current indictment, and (2) the phrase "kill and murder," which is statutorily associated with an offense pertaining to murder in an indictment, is replaced in the current indictment with the phrase "kill and slay," which is statutorily

associated with an offense pertaining to manslaughter in an indictment. Therefore, the indictment that this Court evaluates for its sufficiency to charge defendant with the offense of attempted first-degree murder contains language associated not only with an offense pertaining to murder—namely, "malice aforethought"—but also with an offense pertaining to manslaughter—namely, "kill and slay"—as designated in N.C.G.S. § 15-144.

The State argues that the Court of Appeals erred by employing a new "interchangeability" analysis with respect to the construction of indictments that do not adhere verbatim to their authorizing statutes. In considering the indictment charging defendant with attempted first-degree murder in the present case, the Court of Appeals concluded:

> The indictment in question fails to comply with the short form indictment authorized by N.C.G.S. § 15-144. It states the following: "[t]he jurors for the State upon their oath present that on or about [the dates of offense shown and in the county named above] the defendant named above unlawfully, willfully and feloniously did attempt to *kill and slay* Richard Cassidy with malice aforethought." (emphasis added). It does not allege Defendant attempted to "kill and murder"—the requisite language for murder. Instead it contains the phrase "kill and slay"—the requisite language for manslaughter. The terms "murder" and "slay" are not interchangeable. Thus, this indictment is insufficient to charge attempted murder and the trial court lacked jurisdiction to enter judgment on this charge.

Tart, 2017 WL 6002771, at *3 (second set of brackets in original). We agree with our colleagues at the lower appellate court that "[t]he terms 'murder' and 'slay' are not interchangeable," *id.*; however, the usage of the word "slay" in place of the word "murder" in the indictment here is a distinction without a difference because the indictment against defendant also charged that the killing was done "with malice aforethought." *Id.* Under such circumstances as those present in the case at bar, the words that appear in the short-form indictment are sufficient to charge attempted first-degree murder.

The plain language of N.C.G.S. § 15-144, coupled with consideration of the constitutional purpose of indictments, dictates our determination that the indictment here effectively withstands challenge. An indictment is "a written accusation of a crime drawn up by the public prosecuting attorney and submitted to the grand jury, and by them found and presented on oath or affirmation as a true bill." *State v. Thomas*, 236 N.C.

454, 457, 73 S.E.2d 283, 285 (1952) (citations omitted). "Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment." N.C. Const. art. I, § 22. This constitutional provision is intended

> (1) [to provide] such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty[,] to pronounce sentence according to the rights of the case.

State v. Greer, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953) (citations omitted).

N.C.G.S. § 15-144 is clear that a short-form indictment for *murder* is sufficient if it alleges "the accused person feloniously, willfully, and of his *malice aforethought*, did *kill and murder* (naming the person killed)," while a short-form indictment for *manslaughter* is sufficient if it alleges "the accused feloniously and willfully did *kill and slay* (naming the person killed)." N.C.G.S. § 15-144 (emphases added). An examination of this statutory language reveals that there are two express differences in the terminology utilized by the General Assembly to establish short-form indictments for the offenses of murder and manslaughter that are critical to the case at bar: (1) the reference in manslaughter offenses that the named defendant did slay an individual, compared with the reference in murder offenses that the defendant did "murder" an individual; and (2) the mandated inclusion in an indictment for a murder offense of the essential element of "malice aforethought," while the allegation of "malice aforethought" is not required to charge manslaughter. The critical and dispositive difference between short-form indictments for murder offenses and manslaughter offenses is the substantive allegation of the element of "malice aforethought" in murder offense short-form indictments, rather than the employment of the synonyms "slay" in manslaughter offense short-form indictments or "murder" in murder offense short-form indictments upon which the Court of Appeals chose to focus.

Black's Law Dictionary defines the noun "murder" as "[t]he killing of a human being with malice aforethought,"[1] *murder*, *Black's Law*

1. *Black's Law Dictionary* does not supply a definition for the word "murder" when used as a verb.

Dictionary (10th ed. 2014) [hereinafter *Black's*], and defines the verb "slay" as "[t]o kill (a person), esp. in battle," *slay*, *Black's*. It is evident from the plain legal definitions of the words "murder" and "slay" that there is no meaningful distinction between the two terms for the purpose of ascertaining the sufficiency of the description of the attempted first-degree murder offense as alleged in the current case that defendant had attempted to kill a human being or person named Richard Cassidy. While it may have been a better practice for the prosecution here to replicate the specific language of N.C.G.S. § 15-144 in alleging defendant's commission of the offense of attempted first-degree murder, the prosecution's failure to do so did not render the indictment fatally defective. The prosecution's proper and necessary inclusion of the legal element "malice aforethought" in the present indictment's charge of attempted first-degree murder substantively and constitutionally distinguishes this charge from an alleged manslaughter offense—despite the usage of the term "slay" instead of the term "murder"—because, as required by *Greer* in its construction of the pertinent provisions of the Constitution of North Carolina, the short-form indictment under review provided such certainty in the statement of the accusation as would identify the offense with which defendant was charged, protected defendant from being put in double jeopardy for the same alleged offense, enabled defendant to prepare for trial, and enabled the trial court to pronounce a sentence upon defendant's conviction of attempted first-degree murder. *Greer*, 238 N.C. at 327, 77 S.E.2d at 919. Therefore, the short-form indictment was sufficient to vest the trial court with subject-matter jurisdiction over this charge.

We hold that the use of the term "slay" instead of "murder" in an indictment that also includes an allegation of "malice aforethought" complies with the relevant constitutional and statutory requirements for valid murder offense indictments and serves its functional purposes with regard to both the defendant and the court. *See id.* at 327, 77 S.E.2d at 919; *see also State v. Rankin*, ___ N.C. ___, ___, 821 S.E.2d 787, 790-91 (2018) ("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."). Accordingly, we reverse the Court of Appeals' decision on this issue and reinstate the judgment entered upon defendant's conviction for attempted first-degree murder.

II. Remarks during the State's Closing Argument

[2] Defendant contends that the Court of Appeals erred in failing to find that the trial court should have intervened *ex mero motu* during the State's closing argument. Specifically, defendant draws our attention

to comments made to the jury by the prosecutor that defendant "had the specific intent to kill many people, over a 20-year period of time," and that if the jury did not convict, defendant would be "unleashed, yet again, onto our streets." Defendant also argues that there was gross impropriety in the State's claims to the jury that defendant's potentially delusional beliefs were a valid foundation upon which the jury could find that defendant possessed the requisite specific intent for the commission of the offense of attempted first-degree murder. Defendant asserts that these statements were so grossly improper and prejudicial that he is entitled to a new trial. After careful consideration, we cannot fault the trial court in declining to interject itself into the State's closing argument when defendant himself chose to refrain from objecting to these remarks at trial. Accordingly, we affirm the Court of Appeals on this issue.

This Court noted in *State v. Jones*, 355 N.C. 117, 127, 558 S.E.2d 97, 103 (2002):

> A lawyer's function during closing argument is to provide the jury with a summation of the evidence, *Herring v. New York*, 422 U.S. 853, 861-62, 45 L. Ed. 2d 593, 599-600 (1975), which in turn "serves to sharpen and clarify the issues for resolution by the trier of fact," *id.* at 862, 45 L. Ed. 2d at 600, and should be limited to relevant legal issues. *See State v. Allen*, 353 N.C. 504, 508-11, 546 S.E.2d 372, 374-76 (2001).

Regarding closing arguments made to the jury during criminal trials, the North Carolina General Statutes provide that "an attorney may not: (1) become abusive, (2) express his personal belief as to the truth or falsity of the evidence, (3) express his personal belief as to which party should prevail, or (4) make arguments premised on matters outside the record." *Jones*, 355 N.C. at 127, 558 S.E.2d at 104 (discussing N.C.G.S. § 15A-1230(a) (1999)). Through our precedent, this Court has elaborated on the statutory provisions governing closing arguments and emphasized that closing arguments "must: (1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passions or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial." *Id.* at 135, 558 S.E.2d at 108.

Nonetheless,

> [w]here a defendant fails to object to the closing arguments at trial, defendant must establish that the remarks

> were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*. "To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999). " '[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.' " *State v. Hipp*s, 348 N.C. 377, 411, 501 S.E.2d 625, 645 (1998) (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979)), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 114 (1999).

State v. Mitchell, 353 N.C. 309, 324, 543 S.E.2d 830, 839 (2001), *cert. denied*, 534 U.S. 1000, 151 L. Ed. 2d 389 (second alteration in original); *see also State v. Anthony*, 354 N.C. 372, 427, 555 S.E.2d 557, 592 (2001) ("[O]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." (quoting *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996))), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791 (2002). While these cited cases and their progeny do not in any way diminish the professional, ethical expectations for prosecutors in making their final arguments to the fact-finder, they serve to establish the standards and considerations by which the actions or inactions of the neutral trial judge must be measured during the parties' closing arguments in a criminal trial, especially when the party challenging the propriety of the opposing party's closing argument in such a criminal trial is silent during the rendition of the disputed remarks, but on appeal challenges the trial judge's simultaneous silence. In circumstances in which a defendant in his or her role as an obvious interested party in a criminal trial fails to object to the other party's closing statement at trial, yet assigns as error the detached trial judge's routine taciturnity during closing arguments in the absence of any objection, this Court has consistently viewed the appealing party's burden to show prejudice and reversible error as a heavy one. *See Anthony*, 354 N.C. at 427, 555 S.E.2d at 592.

Even when a reviewing court determines that a trial court erred in failing to intervene *ex mero motu*, a new trial will be granted only if "the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Jones*, 355 N.C. at 131, 558 S.E.2d at 106 (citations omitted). "[T]o warrant a new trial, the prosecutor's remarks must have perverted or contaminated the trial such that they rendered the proceedings fundamentally unfair." *State v. Mann*, 355 N.C. 294, 307-08, 560 S.E.2d 776, 785 (citation omitted), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002). In assessing whether this level of prejudice has been shown, the challenged statements must be considered "in context and in light of the overall factual circumstances to which they refer." *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995) (citing *State v. Pinch*, 306 N.C. 1, 24, 292 S.E.2d 203, 221, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *and overruled on other grounds by, inter alia*, *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988)), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996).). Thus, "[o]nly when it finds *both* an improper argument and prejudice will this Court conclude that the error merits appropriate relief." *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017) (emphasis added) (citing *Jones*, 355 N.C. at 134-35, 558 S.E.2d at 108-09).

In applying the analysis enunciated in the cited case law to determine whether or not there was any impropriety in the prosecutor's closing argument, defendant emphasizes the "substantial evidence of [defendant's] mental illness and inability to form specific intent" and contends that the challenged remarks by the prosecution "lacked a reasonable basis in the record and appealed to the passions and prejudices of the jury." Before this Court,[2] defendant identifies three portions of the State's closing argument as grossly improper.

In the first instance, the prosecutor told the jury that defendant's mental health history

> is ripe with examples of violence, and homicidal ideations, the desire and intent to kill other people. The mental illness, if he did in fact suffer one, it didn't prevent him from forming the specific intent to kill. *He had the specific intent to kill many people, over a 20-year period of time.*

2. In the Court of Appeals, defendant challenged additional portions of the State's closing argument, but defendant did not petition this Court for review of the Court of Appeals' ruling on those portions, and therefore we do not address them here.

> That mental illness continued to come back up through all of these diagnoses, through all of these hospitalizations.

(Emphasis added).

Defendant characterizes the Court of Appeals' review of these comments, in which it opined that "each [challenged] term was referenced during testimony and has a basis in the record," *Tart*, 2017 WL 6002771, at 4, as "wrongly conflat[ing]" the legal concept of "specific intent" with the psychiatric concept of "homicidal ideation." The only definition of "homicidal ideation" given to the jury at trial came from Herfkens, who testified as an expert on defendant's behalf about defendant's past mental health issues and who described "homicidal ideation" as "the intent, the desire to kill another person." She then testified that defendant's "homicidal ideation" appeared "throughout his mental health records." Dr. Richard Blanks, an expert in forensic psychiatry who appeared on behalf of the State, testified that defendant's "[t]houghts and desires to kill other people" were a "consistent theme" in his hospital admission records. In addition, defendant told Cassidy during the stabbing that defendant was "going to kill" Cassidy. The mens rea element of specific intent to kill has been defined in our legal system as being existent when a "defendant intended for his action to result in the victim's death." *State v. Phillips*, 365 N.C. 103, 141, 711 S.E.2d 122, 149 (2011) (*State v. Keel*, 333 N.C. 52, 58, 423 S.E.2d 458, 462 (1992)), *cert. denied*, 565 U.S. 1204, 182 L. Ed. 2d 176 (2012). Further, the prosecutor's summation comments must be considered in context and in light of the overall factual circumstances to which they refer, as required by *Alston*, which here equated to the State's rebuttal of defendant's staunchest position at trial that his mental illness precluded him from forming the specific intent to kill Cassidy as required to sustain a conviction for attempted first-degree murder or assault with a deadly weapon with intent to kill or both. Indeed, the prosecutor framed these disputed statements during the State's closing argument in a manner that served to sharpen and clarify the issues for the jury, as characterized in *Herring*, by explaining that any mental illness defendant had "didn't prevent him from forming the specific intent to kill." In this context and in light of the evidence adduced at trial that included references adopted by the prosecutor that were gleaned from expert testimony, the first portion of the State's closing argument challenged by defendant did not constitute gross impropriety so as to require the trial court to intervene *ex mero motu*. This passage from the prosecutor's closing statement was premised on matters contained in the record in compliance with *Jones* and was consistent with the specific guidelines for closing arguments as set out by the General Assembly in N.C.G.S. § 15A-1230(a) and reiterated in *Jones*.

In the second excerpt from the State's closing argument denounced by defendant, the prosecutor argued:

> You are, in a very real way, the conscience of our community. You are the ones who are standing on the wall. You're the ones who are standing up for [the victim, Cassidy], who, for the last 10 years of his life, has stood up for the poor, for the marginalized, for the forgotten, and for the hopeless.
>
> You can stand up for him. You can protect our communities and ensure that a homicidal, manipulative, sociopath, is not unleashed, yet again, onto our streets.
>
> . . . You can protect our communities and ensure that a homicidal, manipulative, sociopath, is *not unleashed*, *yet again*, *onto our streets*.
>
> I'm not asking you to do anything other than follow the law.

(Emphasis added). Defendant contends that the reference to being "unleashed" was inflammatory and prejudicial. In addressing this statement, the Court of Appeals noted that appellate courts "have upheld other similar 'hyperbolic expression[s] of the State's position that a not guilty verdict, in light of the evidence of guilt, would be an injustice.'" *Tart*, 2017 WL 6002771, at *4 (alteration in original) (first quoting *State v. Pittman*, 332 N.C. 244, 262, 420 S.E.2d 437, 447 (1992) (holding, as described by the Court of Appeals, *Tart*, 2017 WL 6002771, at *4, that "the prosecutor's statement indicating if the defendant was not convicted 'justice in Halifax County will be dead' was not improper"); and then citing *State v. Brown*, 177 N.C. App. 177, 189-90, 628 S.E.2d 787, 794-95 (2006)). We agree with the lower appellate court that this type of vivid communication to the jury falls within the realm of permissible hyperbole on the part of the State in line with our precedent. *See State v. Braxton*, 352 N.C. 158, 203, 531 S.E.2d 428, 454 (2000) (opining that the State's argument that the defendant's self-defense claim was "vomit on the law of North Carolina" was permissible hyperbole), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *see also State v. Harvell*, 334 N.C. 356, 363, 432 S.E.2d 125, 129 (1993) (stating that failure to convict the defendant would amount to "a wound that's going to fester" was permissible hyperbole).

The final passage of the State's closing argument which defendant argues is grossly improper and prejudicial concerns the prosecutor's

reference to defendant's potentially delusional, but factually plausible, motives for stabbing Cassidy. This portion of the prosecutor's summation would encompass defendant's claims that Cassidy allowed defendant's medication to be stolen and told defendant to put defendant's belongings away, that Cassidy had disrespected defendant, and that Cassidy had shot defendant when defendant was a child. Defendant posits now that there is no evidence in the trial record to show that these events actually occurred and therefore "[w]holly imagined events cannot create a rational basis for a defendant's actions." Following a competency hearing, the trial court found defendant to be competent to stand trial for the charged offenses. During the trial, references were made to these events through testimonial evidence that is contained in the record. Based on the evidence generated during the trial and the accompanying issues, defendant's mental state was argued to the jury by the State and the defense in their respective closing arguments. Later, the jury was instructed on the concept of diminished capacity and its possible effect on the ability to form the specific intent to kill. As previously noted, the principles espoused by this Court in *Jones*, *Mitchell*, and *Alston* are jointly invoked so as to establish that the prosecutor's closing argument in this arena of the case is substantiated by the trial record's context, that the prosecutor's statements about the existence of defendant's motives to harm Cassidy served to sharpen and clarify the issues for the jurors as the triers of fact, and that ultimately the trial court was not under a duty to intervene *ex mero motu* during the State's closing argument because the summation was not grossly improper.

In light of the facts and circumstances of this case, the trial record, the legal theories presented by the parties, and the applicable law, we cannot conclude that the trial court erred in declining to interject itself into the State's closing argument while defendant chose to sit silently and raise no objection to the now-challenged remarks. The portions of the State's summation that have been addressed before this Court do not rise to the level of those previously found in our case decisions to be so grossly improper as to require *ex mero motu* action by the trial court. Accordingly, we affirm the Court of Appeals' decision on this issue.

Conclusion

In sum, we reverse the determination by the Court of Appeals regarding the sufficiency of the short-form indictment and reinstate the judgment entered upon defendant's conviction for attempted first-degree murder. We affirm the portion of the Court of Appeals' decision which concludes that the trial court did not abuse its discretion in declining to intervene *ex mero motu* during the State's closing argument.

AFFIRMED IN PART; REVERSED IN PART.

Justice DAVIS did not participate in the consideration or decision of this case.

Justice EARLS concurring in part and dissenting in part.

I agree with the majority's holding that "the indictment in this case was sufficient to vest the trial court with subject matter jurisdiction to try defendant for attempted first-degree murder." Nonetheless, a new trial is warranted because the prosecutor's statements to the jury in this case are similar to statements this Court has previously held to be improper and to constitute prejudicial error necessitating a new trial, even when not objected to at trial. In addition, the trial judge should have intervened *ex mero motu* during the prosecutor's closing argument when the prosecutor urged the jury to convict Jermaine Antwan Tart based not on whether Mr. Tart had the requisite mental intent at the time of the offense but rather out of fear that as a "homicidal, manipulative, sociopath" who "had the specific intent to kill many people, over a 20-year period of time," he would be "unleashed, yet again, onto our streets" to kill innocent people. Thus, I would reverse the decision of the Court of Appeals and remand for a new trial.

The prosecutor's closing argument was improper in two significant respects, each one independently sufficient to justify a new trial. Together they assuredly dictate that result. The first impropriety was the prosecutor's inflammatory name-calling and fear mongering, including calling defendant "a homicidal sociopath" four times during the closing argument. The second impropriety was the prosecutor's reliance on events that all the evidence showed never happened as "factual" motivations supposedly leading defendant to decide to kill Mr. Cassidy. Take away these parts of the prosecution's closing argument and all that is left is the prosecutor's appropriate description of the attack itself, summary of defendant's actions immediately after the attack, and discussion of the jury instructions. The improprieties that occurred were not mere throwaway lines in a long and proper argument; they were the heart of the prosecutor's presentation to the jury. The nature of the improper statements "rendered the proceedings fundamentally unfair." *State v. Mann*, 355 N.C. 294, 308, 560 S.E.2d 776, 785 (citation omitted), *cert. denied*, 537 U.S. 1005 (2002).

1. Standard of Review

Two different standards apply when reviewing cases involving improper closing arguments, depending on whether there was an objection at trial. If the defendant made a timely objection, the question is "whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). The standard of review for improper closing arguments when, as in this case, the defendant fails to object is "whether the argument complained of was so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998), *cert. denied*, 528 U.S. 835 (1999).

This Court has explained that "[w]hen the prosecutor becomes abusive, injects his personal views and opinions into the argument before the jury, he violates the rules of fair debate and it becomes the duty of the trial judge to intervene to stop improper argument and to instruct the jury not to consider it." *State v. Smith*, 279 N.C. 163, 166, 181 S.E.2d 458, 460 (1971). In *Smith* the Court concluded that "[i]n these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence." *Id.* at 166, 181 S.E.2d at 460 (quoting *Berger v. United States*, 295 U.S. 78, 89 (1935)). In reviewing statements made during closing arguments, this Court does not examine the statements in isolation but rather "give[s] consideration to the context in which the remarks were made and the overall factual circumstances to which they referred." *State v. Dalton*, 369 N.C. 311, 316, 794 S.E.2d 485, 489 (2016) (quoting *State v. Ward*, 354 N.C. 231, 265, 555 S.E.2d 251, 273 (2001)). "Improper remarks may be prejudicial either because of their individual stigma or because of the general tenor of the argument as a whole." *Jones*, 355 N.C. at 133, 558 S.E.2d at 108.

2. Improper Name-Calling and Appeals to Prejudice

There can be no doubt that in this case the only issue the jury needed to determine was whether Mr. Tart had the requisite mental capacity to intend to kill Mr. Cassidy. There was no dispute over whether Tart was the person who attacked Cassidy; Tart agreed that there should not be a self-defense instruction, and both the prosecution and the defense argued to the jury in closing that the only question for them was Mr. Tart's state of mind at the time of the attack. The only issue for the jury was whether defendant was delusional and unable to form the intent to kill, as the defense contended: "This whole case turns on the capacity of Mr. Tart's mind, around 8 o'clock at night at First Presbyterian Church in downtown Winston-Salem on March 2nd, 2014. Was he capable of

forming the specific intent to kill Mr. Cassidy? . . . [W]as his mind all there enough for him to be able to?" Or was he intending to kill Mr. Cassidy with premeditation, as the prosecution argued: "The intent, his intent to kill Richard Cassidy is written all over this case. It is written in blood. His intent to kill Richard Cassidy is a stain on the sidewalk in front of First Presbyterian Church." Additionally, the court instructed the jury on the issue of lack of mental capacity as it related to both the attempted first-degree murder charge and the charge of assault with a deadly weapon with intent to kill inflicting serious injury.[1]

In these circumstances, the prosecutor's repeated statements that Tart is a "violent, manipulative, homicidal sociopath" were not intended to shed light on whether he was indeed delusional at the time of the attack but rather to make the point that defendant needed to be incarcerated so he would not harm anyone else. The prosecutor's statements "were purposely intended to deflect the jury away from its proper role as a fact-finder by appealing to its members' passions and/or prejudices," causing the remarks to be prejudicial and grossly improper. *Jones*, 355 N.C. at 134, 558 S.E.2d at 108. The prosecutor hammered home this theme by referencing the testimony of Dr. Herfkens who, it must be said, had examined Tart and concluded that "at the time of the crime, Jermaine was acting under the influence of a severe mental illness that did not allow him to properly understand reality and the significance of his alleged actions." Nevertheless, the prosecutor used that evidence to make this argument to the jury:

> But what she did consider is the Defendant's mental health history, a 20-year mental health history.
>
> Members of jury [sic], that is ripe with examples of violence, and homicidal ideations, the desire and intent to kill other people. The mental illness, if he did in fact suffer one, it didn't prevent him from forming the specific intent to kill. He had the specific intent to kill many people, over a 20-year period of time. That mental illness continued to come back up through all of these diagnoses, through all of these hospitalizations.

1. For example, with regard to the attempted murder charge, the jury was instructed, "If, as a result of lack of mental capacity, the Defendant did not have the specific intent to kill Mr. Cassidy, formed after premeditation and deliberation, the Defendant is not guilty of Attempted First Degree Murder."

> Antisocial Personality Disorder, a disorder characterized by violence. By deceit. By manipulation. By an inability to conform your conduct to the confines of the law. . . . You know what a synonym is for someone who suffers from Antisocial Personality Disorder? A sociopath.
>
> So the Defendant is a violent, manipulative, homicidal sociopath. That's his diagnosis. Based on that. They want you to just give him a slap on the wrist for this. Because he's been diagnosed as a homicidal sociopath, we'll let you do this.
>
> . . . .
>
> . . . You can protect our communities and ensure that a homicidal, manipulative, sociopath, is not unleashed, yet again, onto our streets.

The prosecutor set up this argument to use the pejorative term "sociopath" by referencing and asking about the term in his cross-examination of Dr. Herfkens, and in his questioning of Dr. Blanks when called by the State to rebut the testimony of Dr. Herfkens, and he persisted in using the word even though both experts testified that the term is no longer used by medical professionals.

Notably, the prosecutor used a tactic similar to one that this Court found improper in *State v. Dalton*, 369 N.C. at 314, 320, 794 S.E.2d at 488, 491, in which the prosecutor attempted to dissuade the jury from finding the defendant not guilty by reason of insanity because such a verdict could result in the defendant "be[ing] back home in less than two months." (Emphasis omitted.) In *Dalton*, the evidence presented at trial concerning the defendant's severe mental illness did not support the prosecutor's assertions that the defendant would "very possibl[y]" be released in fifty days. *Id.* at 318, 794 S.E.2d at 490. Nevertheless, as in *Dalton*, the statement here that "[y]ou can protect our communities and ensure that a homicidal, manipulative, sociopath, is not unleashed, yet again, onto our streets" is also prejudicial because the remark was not directed at the issue the jury needed to decide under the law but rather was intended to create the fear of future harm. *See*, *e.g.*, *id.* at 319, 794 S.E.2d at 490 (Regarding defendants with mental health issues, prosecutors must remember that "[t]he level of possibility or probability of release is not the salient issue; rather, it is the evidence and all reasonable inferences that can be drawn from that evidence which govern counsel's arguments in closing."). Just as with the insanity defense at issue in *Dalton*, the diminished capacity defense requires the defendant's

own attorney to provide evidence of the defendant's mental illness. *See*, *e.g.*, *id.* at 320, 794 S.E.2d at 491 (Jackson, J., concurring) ("Because the defendant has the burden of proving the affirmative defense of insanity, even the defendant's own attorney may provide evidence that the defendant's mental illness caused him or her to engage in conduct that a jury might find shocking or reprehensible." (citing *State v. Wetmore*, 298 N.C. 743, 746-47, 259 S.E.2d 870, 873 (1979))). Here there is considerable evidence that Mr. Tart was incapable of knowing right from wrong at the time of the crime: for example, his assertions that Mr. Cassidy had killed him in 1989 and more recently arranged for others to kill him again, and his statements to police right after the incident that he heard Mr. Cassidy say he was going to have Mr. Tart killed and that Cassidy had shot him in the head when he was eight years old. Thus, as in *Dalton*, "a juror who believes the evidence of [diminished capacity] might nevertheless be motivated to find the defendant guilty based on fear for the safety of the community." *Id.* at 322, 794 S.E.2d at 492 (citing *State v. Hammonds*, 290 N.C. 1, 224 S.E.2d 595 (1976)).

The prosecutor's rhetoric in his closing argument likely sparked fear in the minds of the jurors that defendant was like a wild animal who, if "unleashed . . . onto [the] streets," would again try to kill someone. "This Court does not condone comparisons between defendants and animals." *State v. Roache*, 358 N.C. 243, 297, 595 S.E.2d 381, 416 (2004). The prosecutor's use of language more identified with an animal, such as "unleashed," dehumanized defendant and was only heightened by the prosecutor's repeated, derogatory name-calling that characterized defendant as a homicidal sociopath. Using this theme of fear, the prosecutor "improperly [led] the jury to base its decision not on the evidence relating to the issues submitted, but on misleading characterizations, crafted by counsel, that [were] intended to undermine reason in favor of visceral appeal." *Id.* at 297-98, 595 S.E.2d at 416 (first alteration in original) (quoting *Jones*, 355 N.C. at 134, 558 S.E.2d at 108). Rather than mere "hyperbole," these statements were improper and highly prejudicial in the circumstances of this case.

The prosecutor's further assertion that defendant had the specific intent to kill many people over a twenty-year period was drawn in part from an expert witness's report that defendant had murderous ideations that could be defined as an intent. The prosecutor then took this information and manipulated it to suggest to the jury that defendant had been roaming the streets looking for someone to kill and would do so again. As this Court observed in *State v. Miller*, 271 N.C. 646, 657, 157 S.E.2d 335, 344 (1967), "[d]efendants in criminal prosecutions should be

convicted upon the evidence in the case, and not upon prejudice created by abuse administered by the solicitor in his argument."

This Court has previously found less derogatory statements about a defendant to be plain error justifying a new trial, even when the defendant did not object at trial. In describing the defendant in *Smith*, the prosecutor stated he was "lower than the bone belly of a cur dog." 279 N.C. at 165, 181 S.E.2d at 459. This Court granted the defendant a new trial and noted that by failing to intervene in the prosecutor's argument, the trial judge "was derelict in his duty." *Id.* at 167, 181 S.E.2d at 461. In *State v. Matthews*, 358 N.C. 102, 111, 591 S.E.2d 535, 542 (2004), this Court concluded that counsel engaged in improper name-calling by referring to the defendant's theory of the case as "bull crap." (Emphasis omitted.)

In *Jones* the prosecutor in his closing argument compared the Columbine school shootings and the Oklahoma City bombing with the defendant's crime, which this Court noted was "a thinly veiled attempt to appeal to the jury's emotions." 355 N.C. at 132, 558 S.E.2d at 107. The Court held the closing arguments to be improper and prejudicial, and vacated the defendant's death sentence because the trial judge failed to intervene. *Id.* at 132-35, 558 S.E.2d at 107-09. Indeed, the Court there noted: "[T]his Court is mindful of the reluctance of counsel to interrupt his adversary and object during the course of closing argument for fear of incurring jury disfavor." *Id.* at 129, 558 S.E.2d at 105; *see also State v. Moss*, 180 W. Va. 363, 368, 376 S.E.2d 569, 574 (1988) (finding that a prosecutor's statements that a defendant was a "psychopath" and needed to be convicted of first-degree murder so that he would "never be released to slaughter women and children" in the community were plain error and denied the defendant his fundamental right to a fair trial).

The statements made by the State in its closing argument here were grossly improper and required the trial court to intervene *ex mero motu*. This Court has long established that a defendant has a "right to a fair and impartial trial . . . . where passion and prejudice and facts not in evidence may have no part." *State v. Smith*, 240 N.C. 631, 636, 83 S.E.2d 656, 659 (1954). It is within the court's power and "is the duty of the judge to interfere when the remarks of counsel are not warranted by the evidence, and are calculated to mislead or prejudice the jury." *Id.* at 635, 83 S.E.2d at 659 (citations omitted). The purpose of this protection is "to safeguard the rights of litigants and to be as nearly sure as possible that each party shall stand before the jury on equal terms with his adversary, and not be hampered in the prosecution or defense of his cause, by extraneous considerations, which militate against a fair hearing." *Id.* at 635, 83 S.E.2d at 659 (quoting *Starr v. S. Cotton Oil Co.*, 165 N.C. 587,

595, 81 S.E. 776, 779 (1914)). It is imperative that the prosecutor remember "that the State's interest 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.' " *Matthews*, 358 N.C. at 112, 591 S.E.2d at 542 (quoting *Berger*, 295 U.S. at 88).

3. Referring to Delusions as Fact

The second impropriety in the prosecutor's argument occurred when he suggested that delusional thoughts and statements about things that never happened could have rationally led Jermaine Tart to form the requisite specific intent to kill Mr. Cassidy. At two different times in his closing argument, the prosecutor referred to events that Cassidy testified did not happen, and he urged the jury to find that those events explained why Tart's attack on Cassidy was rationally motivated by a premeditated intent to kill untouched by diminished mental capacity. The prosecutor referred to each of these things that never happened as a "factual, non-delusion reason, or motivation for doing what he did." It is improper for counsel to make arguments that are not based on reasonable inferences that may be drawn from the evidence admitted at trial. *See State v. Anderson*, 322 N.C. 22, 37, 366 S.E.2d 459, 468 (1988).

There is simply no support for the proposition that events that never happened, such as Cassidy stealing Tart's medicine, which Cassidy testified never occurred, or Cassidy not giving Tart his telephone number, which again, Cassidy testified never happened, could appropriately be called "factual" and "non-delusional." Wholly imagined events cannot support a reasonable inference that defendant acted rationally. The mere fact that Mr. Tart tragically chose to act on his delusions is not proof of specific intent. *See Roache*, 358 N.C. at 282, 595 S.E.2d at 407. Thus, the prosecutor improperly implied that events that never occurred could be "factual" and could therefore explain a rational intent to kill.

The majority dismisses this argument by pointing out that the trial court found defendant to be competent to stand trial. This is completely beside the point. The issue is whether, at the time of this assault, Mr. Tart was suffering from a mental illness such that he lacked the mental capacity to form the requisite intent to kill with premeditation. Even the prosecution admits that defendant's mental state on the night of 2 March 2014 is what is at issue in this case. That defendant subsequently received treatment, took medications, and ultimately was found competent to stand trial answers a completely different question than whether he suffered from a diminished mental capacity on the night of this incident. For the prosecutor to argue that things which never

happened could be "factual" and could explain Tart's actions was an improper inference from the evidence presented at the trial of this case.

"In sum, improper closing arguments cannot be tolerated." *Matthews*, 358 N.C. at 112, 591 S.E.2d at 542. For all these reasons, and taking into account all the improper statements made here, I must respectfully dissent from the portion of the majority opinion that concludes the trial court did not abuse its discretion in declining to intervene *ex mero motu* during the State's closing argument. The trial court should have stopped the prosecutor's use of improper and prejudicial statements in closing argument that were designed to inflame the jury's fears, direct its attention away from the issue to be decided, and cause jurors to infer facts contrary to those in evidence. A new, fair trial is warranted.

STATE OF NORTH CAROLINA, UPON RELATION OF [ROY A. COOPER, III], INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA	)	
v.	)	WAKE COUNTY
PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; CHARLTON L. ALLEN, IN HIS OFFICIAL CAPACITY AS CHAIR OF NORTH CAROLINA INDUSTRIAL COMMISSION; AND YOLANDA K. STITH, IN HER OFFICIAL CAPACITY AS VICE-CHAIR OF THE NORTH CAROLINA INDUSTRIAL COMMISSION	)	

No. 21P19

ORDER

Upon consideration of the Petition for Writ of Certiorari, Petition for Writ of Supersedeas, and Motion for Temporary Stay filed by plaintiff on the 17th day of January 2019, the Petition for Writ of Certiorari and the Petition for Writ of Supersedeas are ALLOWED for the limited purpose of vacating the order entered by the Court of Appeals on the 9th day of January 2019 and reinstating in part the order and judgment of the Superior Court in Wake County, entered on the 3rd day of December 2018. As provided in part in the order and judgment of the superior court, "Conclusion" paragraph four, Part V of Session Law 2016-125 is enjoined until the appeal pending in the Court of Appeals has been concluded and the mandate issued, or until further order of this Court. The order of the Court of Appeals, dated the 9th day of January 2019, allowing in part defendants' petition for writ of supersedeas is hereby vacated. This case is remanded to the Court of Appeals for a determination on the merits of the underlying constitutional and other issues, if any, in the appeal. As a result of the foregoing, plaintiff's Motion for Temporary Stay to this Court is DISMISSED AS MOOT.

By order of this Court in Conference, this 6th day of February, 2019.

s/Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of February, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
Clerk

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

27 MARCH 2019

Justice Davis did not participate in any of these cases.

004P19	State v. Carlos Devito Payne	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-1132)	Dismissed
005P19	State v. Ludlow Ray Daw, Jr.	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-117)	Denied
014P19	Shallotte Partners, LLC v. Berkadia Commercial Mortgage, LLC and Samet Corporation	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-1288)	Denied
016P19	In the Matter of the Foreclosure of a Deed of Trust Executed by Michael D. Radcliff and Margene K. Radcliff Dated May 23, 2003 and Recorded in Book 1446 at Page 2024 and Rerecorded in Book 1472 at Page 2465 in the Iredell County Public Registry, North Carolina	1. Appellant's Motion for Temporary Stay (COA18-419) 2. Appellant's Petition for *Writ of Supersedeas* 3. Appellant's PDR Under N.C.G.S. § 7A-31 4. Appellant's Motion to Withdraw Petition for *Writ of Supersedeas* and PDR	1. Allowed **01/11/2019** Dissolved **02/28/2019** 2. --- **02/28/2019** 3. --- **02/28/2019** 4. Allowed **02/28/2019**
017P19	Joseph Earl Clark, II v. Carlton Joyner, Deputy Director, North Carolina Department of Public Safety, Division of Adult Corrections	Petitioner's *Pro Se* Motion for PDR (COAP18-251)	Denied
019P19	Bank of America, N.A. v. Gary W. Schmitt and May L. Schmitt	1. Defs' Notice of Appeal Based Upon a Constitutional Question (COA18-222) 2. Defs' PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied **Ervin, J., recused**
021P19	Roy Cooper v. Philip Berger, et al.	1. Motion for Temporary Stay (COAP18-865) 2. Petition for *Writ of Supersedeas* 3. Petition for *Writ of Certiorari* to Review Order of COA	1. Dismissed as moot **02/06/2019** 2. Special Order **02/06/2019** 3. Special Order **02/06/2019**

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

27 MARCH 2019

022P19	State v. Jennifer Jimenez/April Myers	1. Def's *Pro Se* Motion for Notice of Appeal 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
024P19	In re Samuel Shuford	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied
026P19	State v. Carico Rodriquez Hayward	Def's PDR Under N.C.G.S. § 7A-31 (COA18-650)	Denied
027P19	State v. Ernie Donnell Pinnix, II	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1199)	Denied
028P19	State v. Karlos Antonio Holmes	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1237)	Denied
035P19-2	State v. Keven Anthony Morgan	Def's *Pro S*e PDR Under N.C.G.S. § 7A-31 (COA18-575)	Denied
039P19	State v. John Henry Williams	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Harnett County	Dismissed
042A19	Accardi v. Hartford Underwriters Insurance Company	1. Motion to Admit Kim E. Rinehart *Pro Hac Vice* 2. Motion to Admit David R. Roth *Pro Hac Vice*	1. Allowed **02/21/2019** 2. Allowed **02/21/2019**
043P19	Phillip Ray Mahler, Employee v. Smithfield, Employer, Self-Insured (ESIS, Third-Party Administrator)	Plt's *Pro Se* Motion for Notice of Appeal	Dismissed
046P19	In the Matter of E.M.	1. State's Motion for Temporary Stay (COA18-685) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Respondent's Motion for Extension of Time to File Response to PDR	1. Allowed **01/31/2019** 2. 3. 4. Allowed **03/04/2019**
047P19	State v. Michael R. Solomon	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Warren County	Dismissed

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

27 MARCH 2019

048P19	State v. Cameron Lee Hinton	1. Def's *Pro Se* Motion for Temporary Stay 2. Def's *Pro Se* Petition for *Writ of Supersedeas*	1. Denied **02/06/2019** 2. Denied **02/06/2019**
049P19	State v. Shemar Frost	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **02/04/2019**
052P19	In re Judge Ridgeway Wake County Senior Resident Superior Court Judge	Petitioner's (Bruce L. Gorham) Motion for Appeal from NC Judicial Standards Commission	Dismissed
054P19	State v. Rogelio Albino Diaz Tomas	Def's Petition for *Writ of Mandamus*	Denied **02/26/2019**
056P19	State v. William David Gibson	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-454)	Denied
060P19	George Reynold Evans v. Ernie Lee, Onslow County District Attorney and State of North Carolina	1. Petitioner's *Pro Se* Petition for *Writ of Mandamus* 2. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
066P19	State v. Montise A. Mitchell	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-333) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
067P19	State v. Steven Wayne Powers	1. Def's *Pro Se* Motion for Notice of Appeal (COAP19-97) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA 4. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Watauga County	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed
075P19	State v. Adam Warren Conley	1. State's Motion for Temporary Stay (COA18-305) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **03/06/2019** 2.
090P19	State v. Orlando Cooper	1. State's Motion for Temporary Stay (COA18-637) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **03/20/2019** 2.

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

27 MARCH 2019

094P19	State v. James A. Cox	1. State's Motion for Temporary Stay (COA18-692) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **03/22/2019** 2.
100P19	Linda Byrd-Russ v. Nefertiti Byrd	1. Def's *Pro Se* Motion for Temporary Stay (COAP19-142) 2. Def's *Pro Se* Petition for *Writ of Supersedeas* 3. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	1. Denied **03/27/2019** 2. Denied **03/27/2019** 3. Denied **03/27/2019**
109P17-6	In re Olander R. Bynum	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
115A04-2	State v. Scott David Allen	1. Def's *Pro Se* Motion for Temporary Stay 2. Def's *Pro Se* Petition for *Writ of Supersedeas*	1. Denied **03/25/2019** 2. Denied **03/25/2019**
130A03-2	State v. Quintel Martinez Augustine	Amici Curiae's (Former State and Federal Prosecutors) Motion for Withdrawal and Substitution of Counsel	Allowed **03/14/2019** **Ervin, J., recused**
131P01-16	State v. Anthony Dove	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed **Ervin, J., recused**
132P18-2	Beth Desmond v. The News and Observer Publishing Company, McClatchy Newspapers, Inc., and Mandy Locke	1. Defs' (The News and Observer Publishing Company and Mandy Locke) Notice of Appeal Based Upon a Constitutional Question (COA18-411) 2. Defs' (The News and Observer Publishing Company and Mandy Locke) PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Dismiss Appeal 4. Professor William Van Alystyne's Motion for Leave to File Amicus Brief 5. The Reporter Committee for Freedom of Press, et al.'s Motion for Leave to File Amicus Brief	1. --- 2. Allowed 3. Allowed 4. Allowed 5. Allowed

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

27 MARCH 2019

133A09-2	State v. Timothy Ray Casey	1. State's Motion for Temporary Stay 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 Motion to Dismiss Appeal	1. Allowed **02/06/2019** Dissolved **03/27/2019** 2. Denied 3. --- 4. Denied 5. Allowed
140PA18/ 141PA18	State v. Robert Dwayne Lewis	State's Motion to Amend Brief	Allowed **03/12/2019**
142PA17-2	State v. Terance Germaine Malachi	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas*	1. Denied **03/26/2019** 2.
147P18	Christopher Chambers, on behalf of himself and all others similarly situated v. The Moses H. Cone Memorial Hospital; The Moses H. Cone Memorial Hospital Operating Corporation d/b/a Moses Cone Health System and d/b/a Cone Health; and Does 1 through 25, Inclusive	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA17-686) 2. North Carolina Justice Center, Center for Responsible Lending, and North Carolina Advocates for Justice's Conditional Motion for Leave to File Amicus Brief 3. Plt's Motion to Amend PDR	1. Allowed 2. Allowed 3. Allowed
156P09-2	Wadell Bynum v. Mecklenburg County School Board	Plt's *Pro Se* Motion for Notice of Appeal	Dismissed
174P18-2	State v. Robert Harold Johnson	Def's *Pro Se* Motion for a Rehearing	Dismissed
176P11-4	State v. Floyd Calvin Cody	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-503) 2. Def's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA	1. Dismissed 2. Denied

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

27 MARCH 2019

181A93-4	State v. Rayford Lewis Burke	1. Amicus Curiae's Motion to Admit W. Kerrel Murray *Pro Hac Vice* 2. Amicus Curiae's Motion to Admit Jin Hee Lee *Pro Hac Vice* 3. NAACP Legal Defense & Educational Fund, Inc.'s Motion for Leave to File Amicus Brief 4. NAACP Legal Defense & Educational Fund, Inc.'s Motion for Leave to Participate in Oral Argument 5. Def's Motion for Leave to File Supplemental Brief	1. Allowed **02/19/2019** 2. Allowed **02/19/2019** 3. Allowed **02/19/2019** 4. Allowed **02/19/2019** 5. Allowed **02/19/2019** **Ervin, J., recused**
183PA16-2	The City of Charlotte v. University Financial Properties, LLC, et al.	Def's (University Financial Properties, LLC) Motion for Withdrawal of Issues Presented in the Conditional Petition	Allowed
210P16-4	Dale Patrick Martin v. State of North Carolina, Mike Slagle (Supt.)	Petitioner's *Pro Se* Motion for Notice of Appeal	Dismissed
233P12-2	State v. Montrez Benjamin Williams	1. State's Motion for Temporary Stay (COA16-178) 2. State's Petition for *Writ of Supersedeas* 3. Def's Motion for Temporary Stay 4. Def's Petition for *Writ of Supersedeas* 5. Def's Motion to Remove from Electronic Site 6. Def's Motion to Remove from Electronic Site	1. Allowed **10/05/2018** 2. 3. Allowed **10/05/2018** 4. 5. Dismissed without prejudice to refile with more specificity **01/30/2019** 6. Denied **02/07/2019**
238A18	In the Matter of T.T.E.	Juvenile-Appellee's Motion to Withdraw as Private Assigned Counsel and to Appoint the Appellate Defender	Allowed **03/06/2019**

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

27 MARCH 2019

244A18	Town of Nags Head v. William W. Richardson and Wife, Martha W. Richardson	1. Plt's Notice of Appeal Based Upon a Dissent (COA17-498) 2. Defs' Notice of Appeal Based Upon a Dissent 3. Defs' Amended Notice of Appeal Based Upon a Dissent 4. Defs' PDR Under N.C.G.S. § 7A-31 5. Defs' Petition for *Writ of Certiorari* to Review Decision of COA 6. Plt's Motion to Dismiss and Strike Defs' Cross-Appeal and PDR 7. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. --- 2. --- 3. --- 4. 5. 6. 7. Denied **03/27/2019**
251PA18	Sykes, et al. v. Health Network Solutions, Inc., et al.	Plts' Motion to Seal Portions of the Reply Brief	Allowed **02/13/2019**
263P17-2	NNN Durham Office Portfolio 1, LLC, et al. v. Highwoods Realty Limited Partnership, et al.	Attorney Jeremy M. Falcone's Motion to Withdraw as Counsel	Allowed **03/12/2019**
263P18	State v. Cedric Theodis Hobbs, Jr.	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-1255) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Allowed 3. Allowed
272A14	State v. Jonathan Douglas Richardson	Motion to Withdraw as Counsel and Allow the Appellate Defender to Appoint New Counsel	Allowed **03/13/2019**
273P18	State v. Gregory Charles Baskins	1. State's Motion for Temporary Stay (COA17-1327) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR	1. Allowed **08/27/2018** Dissolved **03/27/2019** 2. Denied 3. Denied

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

27 MARCH 2019

277P18-3	State v. Gabriel A. Ferrari	1. Def's *Pro Se* Motion for Freedom of Information Act to Reveal the Name of the Judges	1. Dismissed
		2. Def's *Pro Se* Motion to Obtain Copies of the Judges' Oath of Office	2. Dismissed
		3. Def's *Pro Se* Motion for Reconsideration	3. Dismissed
		4. Def's *Pro Se* Motion to Strike the Judge's Order	4. Dismissed
		5. Def's *Pro Se* Motion to Protest Against Defendant Political Religious Persecution, False Accusation, Coverup Intimidation in the Case of Lee Haney Ret. Army Col. Death by Arson	5. Dismissed
294A18	State v. Jeffrey Daniel Waycaster	Def's Motion to File Amended New Brief	Allowed **03/06/2019**
295P18	State v. Charles Ward Ayers	1. State's Motion for Temporary Stay (COA17-725)	1. Allowed **09/12/2018** Dissolved **03/27/2019**
		2. State's Petition for *Writ of Supersedeas*	2. Denied
		3. State's PDR Under N.C.G.S. § 7A-31	3. Denied
303P18	State v. Gregory Garrison Cole	Def's PDR Under N.C.G.S. § 7A-31 (COA17-732)	Denied
306P18	Hunter F. Grodner v. Andrzej Grodner	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA17-570, 17-813)	1. Dismissed *ex mero motu*
		2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	2. Denied
311PA18	State v. Shakita Necole Walton	Appellate Defender's Motion to Allow Counsel to be Withdrawn and for Appellate Defender to Assign Additional Counsel	Allowed **02/04/2019**
315PA18	Cooper v. Berger, et al.	Joint Motion to Continue Oral Argument of 4 March 2019	Allowed **02/22/2019**
315PA18	Cooper v. Berger, et al.	Joint Motion to Withdraw Appeal	Allowed

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

27 MARCH 2019

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. Denied 2. Allowed **11/07/2018**
327P02-11	State v. Guy Tobias LeGrande	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **02/07/2019** **Ervin, J., recused**
335P18	In the Matter of J.B.	1. State's Motion for Temporary Stay (COA17-1373) 2. State's Petition for *Writ of Supersedeas* 3. Counsel's Motion to Withdraw as Counsel of Record 4. Juvenile's Motion to Appoint the Appellate Defender 5. Juvenile's Motion for Extension of Time to Respond to PDR 6. State's PDR Under N.C.G.S §7A-31	1. Allowed **10/08/2018** Dissolved **03/27/2019** 2. Denied 3. Allowed **10/11/2018** 4. Allowed **10/11/2018** 5. Allowed **10/11/2018** 6. Denied
336P18	State v. Alvin Kenneth Keels	Def's PDR Under N.C.G.S. § 7A-31 (COA18-170)	Denied
339A18	New Hanover Cty. Bd. of Educ. v. Stein	1. Def's and Intervenors' Motion to Designate Parties 2. Def's and Intervenors' Motion to Reset the 30-Day Deadline for Opening Briefs from Date of the Court's Order on this Motion	1. Allowed **02/06/2019** 2. Allowed **02/06/2019**
339A18	New Hanover Cty. Bd. of Educ. v. Stein	Plt's Motion to Amend Caption	Allowed **02/19/2019**

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

27 MARCH 2019

344P18	In the Matter of the Foreclosure of a Deed of Trust Executed by David L. Frucella and Marilyn L. Frucella Dated June 28, 1985 and Recorded in Book 5044 at Page 764 in the Mecklenburg County Public Registry, North Carolina	Respondents' PDR Under N.C.G.S. § 7A-31 (COA18-212)	Denied
355P13-2	State v. Willard Alan Smith	1. Def's *Pro Se* Motion for Notice of Appeal 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Rowan County 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed 3. Dismissed as moot
359P18	State v. Rodney Lee Enoch	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1248)	Denied
363P18	State v. Juan Antonia Miller	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-1130) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
364P18	State v. Ernest Raysean Gray	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-1162) 2. State's Motion to Dismiss Appeal	1. Denied 2. Dismissed as moot
366A10	State v. Michael Patrick Ryan	Def's Motion to Correct Certificate of Service in Defendant-Appellee's Brief	Allowed **03/13/2019**
369P18	Cabarrus County Board of Education v. Department of State Treasurer, Retirement Systems Division; Dale R. Folwell, State Treasurer (in official capacity only); Steven C. Toole, Director, Retirement Systems Division (in official capacity only)	Respondents' PDR Under N.C.G.S § 7A-31 (COA17-1017)	Allowed

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

27 MARCH 2019

371P18	Cabarrus County Board of Education v. Board of Trustees, Teachers' and State Employees' Retirement System; Dale R. Folwell, State Treasurer (in official capacity only); Steven C. Toole, Director, Retirement Systems Division (in official capacity only)	Respondents' PDR Under N.C.G.S. § 7A-31 (COA17-1019)	Allowed
378P18-2	State v. Napier Sandford Fuller	Def's *Pro Se* Motion for an Emergency Injunction for ADA Title II Accommodations for a Court Appearance on 2/25/19	Denied **02/22/2019**
382P18	State v. Flint Fitzgerald Johnson, Jr.	1. Def's *Pro Se* Motion for Notice of Appeal (COAP18-166) 2. Def's *Pro Se* Motion for Appellant Brief	1. Dismissed 2. Dismissed **Ervin, J., recused**
388P09-3	State v. Shayno Marcus Thomas	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP18-196) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot **Ervin, J., recused**
389P18	Desiree Block v. Matthew Block	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-200)	Denied
396P18	State v. William Sakon Parker	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-1226)	Denied **Morgan, J., recused**
404A18	County of Durham v. Burnette	1. Def's Motion to Strike Appellant's Second Argument 2. Plt's Motion for Permission to Provide Supplemental Authority 3. Plt's Motion to Amend Table of Cases and Authorities	1. Dismissed as moot 2. Allowed 3. Allowed
405P18	In the Matter of E.W.P.	Respondent's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-183)	Denied

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

27 MARCH 2019

406P18	State v. Cory Dion Bennett	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-1027)	1. Allowed
		2. State's Conditional PDR Under N.C.G.S. § 7A-31	2. Allowed
407P18	State v. James Daren Sisk	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-211)	1. ---
		2. Def's Motion to Withdraw *Pro Se* PDR	2. Allowed
		3. Def's Motion for Temporary Stay	3. Allowed **11/21/2018** Dissolved **03/27/2019**
		4. Def's Petition for *Writ of Supersedeas*	4. Denied
		5. Def's PDR Under N.C.G.S. § 7A-31	5. Denied
408P18	State v. Maurice Edward Thompson	Def's *Pro Se* Motion to Dismiss	Dismissed *ex mero motu*
409P18	State v. Deshawn Lamar Perry	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1330)	Denied
410P18	Town of Apex v. Beverly L. Rubin	1. Plt's Motion for Temporary Stay (COA17-955)	1. Allowed **11/21/2018** Dissolved **03/27/2019**
		2. Plt's Petition for *Writ of Supersedeas*	2. Denied
		3. Plt's PDR Under N.C.G.S. § 7A-31	3. Denied
411A94-6	State v. Marcus Reymond Robinson	Amici Curiae's (Former State and Federal Prosecutors) Motion for Withdrawal and Substitution of Counsel	Allowed **03/14/2019**
411P18	State v. Craig Deonte Hairston	Def's PDR (COA17-1357)	Denied
415P18	Everett's Lake Corporation v. Lewis Edward Dye, Jr.	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-360)	Denied
416P18	State v. Joseph Gill	1. State's Motion for Temporary Stay (COA18-191)	1. Allowed **11/21/2018** Dissolved **03/27/2019**
		2. State's Petition for *Writ of Supersedeas*	2. Denied
		3. State's PDR Under N.C.G.S. § 7A-31	3. Denied

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

27 MARCH 2019

435P18	Appalachian Materials, LLC v. Watauga County, a North Carolina County, and Terry Covell, Sharen Covell, and Blue Ridge Environmental Defense League, Inc. d/b/a High Country Watch	Respondent's PDR Under N.C.G.S. § 7A-31 (COA18-188)	Denied
437P18	Carlos Chavez v. Irwin Carmichael, Sheriff, Mecklenburg County ——————— Luis Lopez v. Irwin Carmichael, Sheriff, Mecklenburg County	Petitioners' PDR Under N.C.G.S. § 7A-31 (COA18-17)	Allowed
439P18	State v. Gregory Garrison Cole	Def's PDR Under N.C.G.S. § 7A-31 (COA18-286)	Denied
440P18	Wadell Bynum v. Progressive Universal Insurance	Plt's *Pro Se* Motion for Notice of Appeal	Dismissed
441A98-4	State v. Tilmon Charles Golphin	Amici Curiae's (Former State and Federal Prosecutors) Motion for Withdrawal and Substitution of Counsel	Allowed **03/14/2019** **Beasley, C.J., recused**
441A18	State v. Rontel Vincae Royster	1. State's Motion for Temporary Stay (COA18-2) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **12/18/2018** 2. Allowed **03/14/2019** 3. —

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

27 MARCH 2019

445P18	In the Matter of the Appeal of Snow Camp, LLC, from the Decision of the Alamance County Board of Equalization and Review to Deny the Partial Exclusion of Certain Personal Property for Tax Year 2016	Alamance County's PDR Under N.C.G.S. § 7A-31 (COA18-388)	Denied
446P18	In the Matter of the Appeal of Kelford Owner, LLC, from the Decision of the Bertie County Board of Equalization and Review to Deny the Partial Exclusion of Certain Personal Property for Tax Year 2016	Bertie County's PDR Under N.C.G.S. § 7A-31 (COA18-389)	Denied
449P18	Rozina Wadhwania, M.D. v. Wake Forest University Baptist Medical Center	Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-252)	Denied
452A18	In the Matter of William Thomas Duncan, Jr.	Petitioner's Notice of Appeal Based Upon a Constitutional Question (COA18-318)	Dismissed *ex mero motu*
453P18	State v. Barbara Jean Myers-McNeil	Def's Motion to Withdraw as Private Counsel and to Appoint the Public Defender	Allowed **03/13/2019**
454P18	State v. Stanley Demon Dowd	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-491) 2. Def's Petition for *Writ of Certiorari* to Review Decision of COA	1. Denied 2. Denied
456P18	Sadie J. Carter and Helen C. Lytch v. St. Augustine's University	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA17-1008) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
457P18	State v. Antwion Marquette Warren	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-223)	Denied
536P00-9	Terrance L. James v. State of North Carolina	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied **Ervin, J., recused**

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

27 MARCH 2019

548A00-2	State v. Christina Shea Walters	Amici Curiae's (Former State and Federal Prosecutors) Motion for Withdrawal and Substitution of Counsel	Allowed **03/14/2019**
597P01-4	State v. Maechel Shawn Patterson	Def's *Pro Se* Motion for Notice of Appeal (COAP17-245)	Dismissed **Ervin, J., recused**
629P01-7	State v. John Edward Butler	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Robeson 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

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

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

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

27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys

.0113 Proceedings Before the Grievance Committee

(a) **Probable Cause** - The Grievance Committee or any of its panels acting as the Grievance Committee with respect to grievances referred to it by the chairperson of the Grievance Committee will determine whether there is probable cause to believe that a respondent is guilty of misconduct justifying disciplinary action. In its discretion, the Grievance Committee or a panel thereof may find probable cause regardless of whether the respondent has been served with a written letter of notice. The respondent may waive the necessity of a finding of probable cause with the consent of the counsel and the chairperson of the Grievance Committee. A decision of a panel of the committee may not be appealed to the Grievance Committee as a whole or to another panel (except as provided in 27 N.C.A.C. 1A, .0701(a)(3)).

...

(j) **Letters of Warning**

...

(4) In cases in which the respondent refuses the letter of warning, the counsel will prepare and file a complaint against the respondent <u>at the commission</u> ~~for a hearing pursuant to Rule .0114 of this subchapter~~.

(k) **Admonitions, Reprimands, and Censures**

...

(l) **Procedures for Admonitions<u>,</u> ~~and~~ Reprimands<u>, and Censures</u>**

(1) A record of any admonition<u>,</u> ~~or~~ reprimand<u>, or censure</u> issued by the Grievance Committee will be maintained in the office of the secretary.

(2) A copy of the admonition, ~~or~~ reprimand, or censure will be served upon the respondent in person or by certified mail. A respondent who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the admonition, ~~or~~ reprimand, or censure to the respondent's last known address on file with the NC State Bar. Service shall be deemed complete upon deposit of the admonition, ~~or~~ reprimand, or censure 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.

(3) Within 15 days after service the respondent may refuse the admonition, ~~or~~ reprimand, or censure and request a hearing before the commission. Such refusal and request will be in writing, addressed to the Grievance Committee, and served upon the secretary by certified mail, return receipt requested. The refusal will state that the admonition, ~~or~~ reprimand, or censure is refused.

(4) ~~In cases in which the respondent refuses an admonition or reprimand, the counsel will prepare and file a complaint against the respondent pursuant to Rule .0114 of this subchapter.~~ If a refusal and request are not served upon the secretary within 15 days after service upon the respondent of the admonition, ~~or~~ reprimand, or censure, the admonition, ~~or~~ reprimand, or censure will be deemed accepted by the respondent. An extension of time may be granted by the chairperson of the Grievance Committee for good cause shown. A censure that is deemed accepted by the respondent must be filed as provided by Rule .0127(a)(3) of this subchapter.

(5) In cases in which the respondent refuses an admonition, reprimand, or censure, the counsel will prepare and file a complaint against the respondent at the commission.

~~(m) Procedure for Censures~~

~~(1) If the Grievance Committee determines that the imposition of a censure is appropriate, the committee will issue a notice of proposed censure and a proposed censure to the respondent.~~

~~(2) A copy of the notice and the proposed censure will be served upon the respondent in person or by certified mail. A respondent who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the notice and proposed censure to the respondent's last known~~

~~address on file with the NC State Bar. Service shall be deemed complete upon deposit of the notice and proposed censure 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. The respondent must be advised that he or she may accept the censure within 15 days after service upon him or her or a formal complaint will be filed before the commission.~~

~~(3) The respondent's acceptance must be in writing, addressed to the Grievance Committee, and served on the secretary by certified mail, return receipt requested. Once the censure is accepted by the respondent, the discipline becomes public and must be filed as provided by Rule .0123(a)(3) of this subchapter.~~

~~(4) If the respondent does not accept the censure, the counsel will file a complaint against the defendant pursuant to Rule .0114 of this subchapter.~~

~~(n)~~(m) **Disciplinary Hearing Commission Complaints** - Formal complaints will be issued in the name of the North Carolina State Bar as plaintiff and signed by the chairperson of the Grievance Committee. Amendments to complaints may be signed by the counsel alone, with the approval of the chairperson of the Grievance Committee.

.0135, Noncompliance Suspension [NEW RULE]

(a) **Noncompliant and Noncompliance Defined.** Failure to respond fully and timely to a letter of notice issued pursuant to N.C.A.C. 1B, .0112, failure to respond fully and timely to any request from the State Bar for additional information in any pending grievance investigation, failure to respond fully and timely to any request from the State Bar to produce documents or other tangible or electronic materials in connection with a grievance investigation, and/or failure to respond fully and timely to a subpoena issued by the chair of the Grievance Committee or issued by the secretary of the State Bar shall be referred to herein as "noncompliant" or "noncompliance."

(b) **Petition for Noncompliance Suspension**. If a respondent against whom a grievance file has been opened and who has been served with a letter of notice or who has been served with a subpoena issued by the chair of the Grievance Committee or issued by the secretary of the State Bar is noncompliant, the State Bar may petition the chair of the Disciplinary Hearing Commission for an order requiring the respondent to show cause why the chair should not enter an order suspending the respondent's law license.

(c) **Content of Petition**

(1) The petition shall be a verified petition, or shall be supported by an affidavit, demonstrating by clear, cogent, and convincing evidence that the respondent is noncompliant.

(2) The petition shall set forth the efforts made by the State Bar to obtain the respondent's compliance.

(3) Service of Petition

(A) The petition shall be served upon the respondent by mailing a copy of the petition addressed to the last address the respondent provided to the Membership Department of the State Bar pursuant to N.C. Gen. Stat. § 84-34 or addressed to any more recent address that might be known to the State Bar representative who is attempting service.

(B) Service of the petition shall be complete upon mailing.

(d) **Order to Show Cause**

(1) Upon receiving the State Bar's filed petition, the chair of the DHC shall issue to the respondent an order to show cause.

(2) The order to show cause shall notify the respondent that the respondent's noncompliance or failure to respond to the order to show cause may result in suspension of the respondent's law license.

(3) The order to show cause shall be served upon the respondent by mailing a copy of the order addressed to the last address the respondent provided to the Membership Department of the State Bar pursuant to N.C. Gen. Stat. § 84-34, addressed to any more recent address that might be known to the DHC, or addressed to the address where the State Bar served the petition.

(4) Service of the order to show cause shall be complete upon mailing.

(e) **Response to Order to Show Cause**

(1) The respondent shall respond to the order to show cause within 14 days of the date of service of the order upon the respondent.

(2) If the respondent responds to the order to show cause within 14 days of the date of service of the order upon the respondent, the chair of the DHC shall schedule a hearing on the order to show cause

within ten days of the filing of the respondent's response and shall provide notice to the respondent and to the State Bar of such hearing.

(3) If the respondent does not file a response to the order to show cause within 14 days of the date of service of the order to show cause upon the respondent, the chair of the DHC may enter an order suspending the respondent's law license. Such order of suspension will remain in effect until the chair enters an order finding by clear, cogent, and convincing evidence that the respondent fully cured the noncompliance and reinstating the respondent's law license to active status.

(f) **Hearing on Order to Show Cause; Burden of Proof**

(1) The State Bar shall have the burden of proving the respondent's noncompliance by clear, cogent, and convincing evidence.

(2) If the chair of the DHC finds that the State Bar has met its burden of proof, the burden of proof shall shift to the respondent to prove one or more of the following by clear, cogent, and convincing evidence:

(A) That the respondent was and is fully in compliance;

(B) That the respondent has fully cured all noncompliance; or

(C) That there is good cause for the respondent's noncompliance.

(g) **Entry of Order**

If the chair finds that the State Bar has met its burden of proof; finds by clear, cogent, and convincing evidence that the respondent is noncompliant; finds that the respondent has not met the respondent's burden of proof; and fails to find by clear, cogent, and convincing evidence any of the circumstances listed in paragraph 6(b) above, the chair may enter an order suspending the respondent's law license. Such order of suspension shall remain in effect until the chair enters an order finding by clear, cogent, and convincing evidence that the respondent fully cured the noncompliance and reinstating the respondent's law license to active status.

(h) **Wind Down**

Any attorney suspended for noncompliance shall comply with the wind-down provisions for suspended attorneys as set forth in N.C.A.C. 1B .0128.

(i) **Reinstatement from Noncompliance Suspension**

(1) Following entry of a noncompliance suspension order, the respondent may seek reinstatement by filing a verified petition with the chair of the DHC demonstrating by clear, cogent, and convincing evidence that the respondent has become, and is at the time of the petition, fully compliant. The respondent shall simultaneously serve a copy of the verified petition on the State Bar.

(2) The State Bar shall have five days from the date of receipt to file an objection to the respondent's petition. If the State Bar does not object, the chair may enter an order finding by clear, cogent, and convincing evidence that the respondent has become, and is at the time of the petition, fully compliant and reinstating the respondent to the active practice of law.

(3) If the State Bar objects to the petition, the chair shall schedule a hearing within ten days of the filing of such objection. It shall be the respondent's burden to prove by clear, cogent, and convincing evidence that the respondent has become, and remains at the time of the hearing, fully compliant.

(4) At the conclusion of the hearing, if the chair finds that the respondent has met her/his burden of proof and finds by clear, cogent, and convincing evidence that the respondent is fully compliant at the time of the hearing, the chair shall enter an order reinstating the respondent to the active practice of law.

(j) **Subsequent Petitions for Noncompliance Suspension**

The State Bar may file a petition under this rule on the first occasion when a respondent is noncompliant and may file a petition on any subsequent occasions when a respondent is noncompliant.

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 26, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 11th day of March, 2019.

s/Alice Neece Mine
Alice Neece Mine, Secretary

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

This the 27th day of March, 2019.

s/Cheri L. Beasley
Cheri L. Beasley, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 27th day of March, 2019.

s/Earls, J.
For the Court

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

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

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

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

.1721 Minimum Standards for Continued Certification of Specialists

(a) The period of certification as a specialist shall be five years… To qualify for continued certification as a specialist, a lawyer applicant must pay any required fee, must demonstrate to the board with respect to the specialty both continued knowledge of the law of this state and continued competence and must comply with the following minimum standards.

(1) …

(4) The specialist must comply with the requirements set forth in Rules .1720(a)(1) ~~and (4) of this subchapter~~.

(5) The specialist must make a satisfactory showing of qualification in the specialty through peer review. The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in any state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in Rule .1720(a)(4) of this subchapter apply to this standard.

(b) …

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 26, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 11th day of March, 2019.

s/Alice Neece Mine
Alice Neece Mine, Secretary

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

This the 27th day of March, 2019.

s/Cheri L. Beasley
Cheri L. Beasley, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 27 day of March, 2019.

s/Earls, J.
For the Court

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

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

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the legal specialization program, as particularly set forth in 27 N.C.A.C. 1D, Section .2100 through Section .3300, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D

Section .2100, Certification Standards for the Real Property Law Specialty

.2106 Standards for Continued Certification as a Specialist

The period of certification is five years…each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .2105(d) of this subchapter apply to this standard.

(d) Time for Application - …

Section .2200, Certification Standards for the Bankruptcy Law Specialty

.2206 Standards for Continued Certification as a Specialist

The period of certification is five years…each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .2205(d) of this subchapter apply to this standard.

(d) …

Section .2300, Certification Standards for the Estate Planning and Probate Law Specialty

.2306, Standards for Continued Certification as a Specialist

The period of certification is five years…each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .2305(d) of this subchapter apply to this standard.

(d) Time for Application - …

Section .2400, Certification Standards for the Family Law Specialty

.2406, Standards for Continued Certification as a Specialist

The period of certification is five years…each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .2405(d) of this subchapter apply to this standard.

(d) Time for Application - …

Section .2500, Certification Standards for the Criminal Law Specialty

.2506, Standards for Continued Certification as a Specialist

The period of certification is five years…each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. Each applicant also must provide the names and addresses of the following: (i) five lawyers and

judges who practice in the field of criminal law and who are familiar with the applicant's practice, and (ii) opposing counsel and the judge in four recent cases tried by the applicant to verdict or entry of order. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .2505(d) of this subchapter apply to this standard.

(d) Time for Application - …

.2509, Standards for Continued Certification as a Specialist in Juvenile Delinquency Law

The period of certification is five years…each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state, practice in the field of juvenile delinquency law or criminal law or preside over juvenile delinquency or criminal law proceedings, and are familiar with the competence and qualification of the applicant as a specialist. An applicant must receive a minimum of three favorable peer reviews to be considered by the board for compliance with this standard. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .2508(d) of this subchapter apply to this standard.

(d) Time for Application – …

Section .2600, Certification Standards for the Immigration Law Specialty

.2606, Standards for Continued Certification as a Specialist

The period of certification is five years…each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .2605(d) of this subchapter apply to this standard.

(d) Time for Application - …

Section .2700, Certification Standards for the Workers' Compensation Law Specialty

.2706, Standards for Continued Certification as a Specialist

The period of certification is five years… each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers, commissioners or deputy commissioners of the North Carolina Industrial Commission, or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .2705(d) of this subchapter apply to this standard.

(d) Time for Application - …

Section .2800, Certification Standards for the Social Security Disability Law Specialty

.2806, Standards for Continued Certification as a Specialist

The period of certification is five years…each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in a jurisdiction in the United States and are familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .2805(d) of this subchapter apply to this standard.

(d) Time for Application - …

Section .2900, Certification Standards for the Elder Law Specialty

.2906, Standards for Continued Certification as a Specialist

The period of certification is five years…each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .2905(e) of this subchapter apply to this standard.

(d) Time for Application - …

Section .3000, Certification Standards for the Appellate Practice Specialty

.3006, Standards for Continued Certification as a Specialist

The period of certification is five years…each applicant for continued certification as a specialist shall comply with the specific requirements

set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law, have significant legal or judicial experience in appellate practice, and are familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .3005(d) of this subchapter apply to this standard.

(d) Time for Application - …

Section .3100, Certification Standards for the Trademark Law Specialty

.3106, Standards for Continued Certification as a Specialist

The period of certification is five years…each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law, have significant legal or judicial experience in trademark law, and are familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .3105(d) of this subchapter apply to this standard.

(d) Time for Application - …

Section .3200, Certification Standards for the Utilities Law Specialty

.3206, Standards for Continued Certification as a Specialist

The period of certification is five years…each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law, have significant legal or judicial experience in utilities law, and are familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .3205(d) of this subchapter apply to this standard.

(d) Time for Application - …

Section .3300, Certification Standards for the Privacy and Information Security Law Specialty

.3306, Standards for Continued Certification as a Specialist

The period of certification is five years…each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in North Carolina or another jurisdiction in the United States; however, no more than three reference may be licensed in another jurisdiction. References must be familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements

relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .3305(d) of this subchapter apply to this standard.

(d) Time for Application - …

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 26, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 11th day of March, 2019.

s/Alice Neece Mine
Alice Neece Mine, Secretary

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

This the 27th day of March, 2019.

s/Cheri L. Beasley
Cheri L. Beasley, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 27 day of March, 2019.

s/Earls, J.
For the Court

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

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

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

27 N.C.A.C. 2, Rule 1.15, Safekeeping Property

Comment [to Rule 1.15 and All Subparts]

[1] …

Prepaid Legal Fees

[12] …

[13] Client or third-party funds on occasion pass through, or are originated by, intermediaries before deposit to a trust or fiduciary account. Such intermediaries include banks, credit card processors, litigation funding entities, and online marketing platforms. A lawyer may use an intermediary to collect a fee. However, the lawyer may not participate in or facilitate the collection of a fee by an intermediary that is unreliable or untrustworthy. Therefore, the lawyer has an obligation to make a reasonable investigation into the reliability, stability, and viability of an intermediary to determine whether reasonable measures are being taken to segregate and safeguard client funds against loss or theft and, should such funds be lost, that the intermediary has the resources to compensate the client. Absent other indicia of fraud (such as the use of non-industry standard methods for collection of credit card information), a lawyer's diligence obligation is satisfied if the intermediary collects client funds using a credit or debit card. Unearned fees, if collected by an intermediary, must be transferred to the lawyer's designated trust or fiduciary account within a reasonable period of time so as to minimize the risk of loss while the funds are in the possession of another, and to enable the collection of interest on the funds for the IOLTA program or the client as appropriate. *See* 27 N.C.A.C. 1B, Sect. .1300.

Abandoned Property

~~[13]~~ [14] …

[Renumbering remaining paragraphs.]

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 26, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 11th day of March, 2019.

s/Alice Neece Mine
Alice Neece Mine, Secretary

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

This the 27th day of March, 2019.

s/Cheri L. Beasley
Cheri L. Beasley, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 27 day of March, 2019.

s/Earls, J.
For the Court

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

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

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

27 N.C.A.C. 2, Rule 3.5 Impartiality and Decorum of the Tribunal

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

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

(b)…

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

(d) …

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law…

[7] The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, ~~is never justified in making a gift or a loan to~~ shall not give or lend anything of value to a judge, a hearing officer, or an official or employee of a tribunal under circumstances which might give the appearance that the gift or loan is made to influence official action.

[8] All litigants and lawyers should have access to tribunals on an equal basis…

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 26, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 11th day of March, 2019.

s/Alice Neece Mine
Alice Neece Mine, Secretary

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

This the 27th day of March, 2019.

s/Cheri L. Beasley
Cheri L. Beasley, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 27 day of March, 2019.

s/Earls, J.
For the Court

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

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

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

27 N.C.A.C. 2, Rule 5.4, Professional Independence of Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) …

(4) …; ~~and~~

(5) …; and

(6) a lawyer or law firm may pay a portion of a legal fee to a credit card processor, group advertising provider, or online marketing platform if the amount paid is for payment processing or for administrative or marketing services, and there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship.

(b) …

Comment

[1] …

[2] A determination under paragraph (a)(6) of this rule as to whether an advertising provider or online marketing platform (jointly "platform") will interfere with the independent professional judgment of a lawyer requires consideration of a number of factors. These factors include, but are not limited to, the following: (a) the percentage of the fee or the amount the platform charges the lawyer; (b) the percentage of the fee or the amount that the lawyer receives from clients obtained through the platform; (c) representations made to prospective clients and to

clients by the platform; (d) whether the platform communicates directly with clients and to what degree; and (e) the nature of the relationship between the lawyer and the platform. A relationship wherein the platform, rather than the lawyer, is in charge of communications with a client indicates interference with the lawyer's professional judgment. The lawyer should have unfettered discretion as to whether to accept clients from the platform, the nature and extent of the legal services the lawyer provides to clients obtained through the platform, and whether to participate or continue participating in the platform. The lawyer may not permit the platform to direct or control the lawyer's legal services and may not assist the platform to engage in the practice of law, in violation of Rule 5.5(a).

[~~2~~3] …

[Renumbering remaining paragraphs.]

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 26, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 11th day of March, 2019.

s/Alice Neece Mine
Alice Neece Mine, Secretary

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

This the 27th day of March, 2019.

s/Cheri L. Beasley
Cheri L. Beasley, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 27th day of March, 2019.

s/Earls, J.
For the Court

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