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STATE BAR OFFICERS; STATE BAR STANDING COMMITTEES AND BOARDS; MODEL BYLAWS FOR JUDICIAL DISTRICT BARS; DISCIPLINE AND DISABILITY OF ATTORNEYS; JUDICIAL DISTRICT GRIEVANCE COMMITTEES; PRACTICAL TRAINING OF LAW STUDENTS; FEE DISPUTE RESOLUTION; CONTINUING LEGAL EDUCATION; RULES OF PROFESSIONAL CONDUCT

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

MAY 20, 2020

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

THE SUPREME COURT
OF
NORTH CAROLINA

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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

28 FEBRUARY 2020

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Misappropriation—choice of law—application of lex loci test—Applying the lex loci test to plaintiff's misappropriation of trade secrets claim, the trial court properly determined that North Carolina law did not apply. All of the evidence tended to show that any misappropriation of plaintiff's trade secrets by defendants occurred outside North Carolina. The fact that there was sufficient evidence to determine that defendants violated a North Carolina consent order did not render the North Carolina Trade Secrets Protection Act applicable. **SciGrip, Inc. v. Osae, 409.**

Summary judgment—confidentiality of information—public knowledge—The trial court did not err in a misappropriation of trade secrets action related to specialty adhesives by concluding that there was no genuine issue of material fact concerning the extent to which the relevant component was publicly known before defendants used it for their own products. **SciGrip, Inc. v. Osae, 409.**

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SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA SUPREME COURT

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

January 6, 7, 8
February 3, 4
March 9, 10, 11, 12
April 6, 7, 20
May 4, 5, 6, 7
August 31
September 1, 2, 3
October 12, 13, 14, 15

THOMAS ACCARDI
v.
HARTFORD UNDERWRITERS INSURANCE COMPANY

No. 42A19

Filed 28 February 2020

Insurance—policy—homeowners—definitions—actual cash value—depreciation for labor costs and materials

The term "actual cash value" (ACV) in a homeowners insurance policy unambiguously included depreciation for labor costs in addition to depreciation for material costs even though the "definitions" section of the policy did not provide a definition for ACV. The roof coverage addendum did not distinguish between depreciation of labor costs and depreciation of material costs and should be read in harmony with the remainder of the policy. The Supreme Court affirmed the Business Court's dismissal of plaintiff insured's breach of contract claim.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order and opinion entered on 22 October 2018 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 pursuant to N.C.G.S. § 7A-45.4(a). Heard in the Supreme Court on 2 October 2019.

Whitfield Bryson & Mason, LLP, by Daniel K. Bryson, J. Hunter Bryson, Gary E. Mason, Daniel R. Johnson, and Gary M. Klinger, for plaintiff-appellant.

Wiggin and Dana LLP, by Kim E. Rinehart and David R. Roth; Ellis & Winters LLP, by Stephen D. Feldman, for defendant-appellee.

Sigmon Law, PLLC, by Mark R. Sigmon; and Amy Bach for United Policyholders, amicus curiae.

Robinson & Cole LLP, by Roger A. Peters II, for American Property Casualty Insurance Association, amicus curiae.

BEASLEY, Chief Justice.

In this case, the Court is asked to consider whether terms of an insurance policy are ambiguous when the policy fails to explicitly provide that labor depreciation will be deducted when calculating the actual cash value (ACV) of the damaged property. Because we conclude that the term "ACV" is not susceptible to more than one meaning and unambiguously includes the depreciation of labor, we affirm the ruling below.

Facts and Procedural History

Plaintiff is a resident of Wake County, North Carolina, and defendant is a Connecticut corporation licensed to sell homeowners insurance in the State of North Carolina. Plaintiff owns a home in Fuquay Varina, North Carolina that was damaged in a hailstorm on or about 1 September 2017. The storm caused damage to the roof, siding and garage of plaintiff's home and required repair and restoration. At the time of the damage, the home was insured by defendant.

Plaintiff submitted a claim to defendant requesting payment for the damage to the home. Defendant confirmed the damage was covered under plaintiff's policy and sent an adjuster to inspect the home on or about 26 September 2017. The adjuster inspected the property and prepared an estimate of the cost to repair or replace the damaged property. According to the estimate, plaintiff's home suffered $10,287.28 in loss and damages. This estimate included costs for materials and labor to repair the home, as well as sales tax on the materials.

The North Carolina Department of Insurance consumer guide to homeowner's insurance provides that when selecting homeowner's insurance, homeowners can choose to insure their home on either an ACV basis or a replacement cost value (RCV) basis. N. C. Dep't of Ins., *A Consumer's Guide to Homeowner's Insurance (2010)*, https://files.nc.gov/doi/documents/consumer/publications/consumer-guide-to-homeowners-insurance_cho1.pdf. The guide further provides that ACV is "the amount it would take to repair or replace damage to your home after depreciation," and RCV is "the amount it would take to replace or rebuild your home or repair damages with materials of similar kind and quality [at today's prices], without deducting for deprecation." *Id.* Plaintiff's insurance policy is a hybrid of the two. The terms of the policy provided that defendant would initially pay plaintiff the ACV. Once the item was repaired or replaced, defendant would settle the claim at RCV. In other words, defendant would reimburse plaintiff for any extra money paid to repair or replace the item, up to the RCV. While not defined in the base policy, the term ACV was defined in a separate endorsement limited to roof damage, which provided the following:

> You will note your policy includes Actual Cash Value (ACV) Loss Settlement for covered windstorm or hail losses to your Roof. This means if there is a covered windstorm or hail loss to your roof, [defendant] will deduct depreciation from the cost to repair or replace the damaged roof. In other words, [defendant] will reimburse for the actual cash value of the damaged roof surfacing less any applicable policy deductible.

In the current action, defendant calculated the ACV by reducing the estimated cost of repair by depreciation of property and labor, as provided in the limited endorsement. Thus, plaintiff's total estimated cost of repair for the dwelling and other structures, $10,287.28, was reduced by the $500 deductible and depreciation in the amount of $3,043.92—which included the depreciation of both labor and materials. This resulted in plaintiff being issued an ACV payment of $6,743.36. According to plaintiff, in determining the ACV, defendant was required to separately calculate the materials and labor costs of repairing or replacing his damaged property and depreciate only the material costs, not the labor costs, from the total repair estimate. Based on this argument, plaintiff sought to represent a class of all North Carolina residents to whom defendant paid ACV payments, where the cost of labor was depreciated.

Defendant moved to dismiss for failure to state a claim under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, contending that the plain meaning of ACV includes the depreciation of both labor and materials. In ruling on the motion to dismiss, the Business Court concluded that "the term ACV as used in [t]he [p]olicy is not 'reasonably susceptible to more than one interpretation,' and that the term ACV unambiguously includes depreciation for labor costs." The Business Court determined that while the "definitions" section of the insurance policy does not provide a definition of the term "ACV," the definition used in the roof coverage addendum sufficed. Thus, the definition from the roof coverage addendum should be read in harmony with the use of the term "ACV" throughout the policy. Regarding the term "depreciation," as used in calculating ACV, the court determined that the term was unambiguous because the policy did not distinguish between depreciation of labor and depreciation of material costs.

To hold otherwise, the court stated, would be to read a nonexistent provision into the policy that excludes labor costs. In the court's view, "it does not make logical sense to separate the cost of labor from that of physical materials when evaluating the depreciation of a house or its component parts," when the value of a house is more than simply the

costs of the materials used. As such, the Business Court found that the policy was unambiguous and that plaintiff's claim for breach of contract should be dismissed. We agree.

Legal Standard

When interpreting an insurance policy, courts apply general contract interpretation rules. *See, e.g.*, *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 172 S.E.2d 518 (1970). "As in other contracts, the objective of construction of terms in an insurance policy is to arrive at the insurance coverage intended by the parties when the policy was issued." *Id.* at 354, 172 S.E.2d at 522 (citing *McDowell Motor Co. v. N.Y. Underwriters Ins. Co.*, 233 N.C. 251, 63 S.E.2d 538 (1951); *Kirkley v. Merrimack Mut. Fire Ins. Co.*, 232 N.C. 292, 59 S.E.2d 629 (1950)). In North Carolina, determining the meaning of language in an insurance policy presents a question of law for the Court. *Id.*

When interpreting the relevant provisions of the insurance policy at issue, North Carolina courts have long held that any ambiguity or uncertainty as to the words used in the policy should be construed against the insurance company and in favor of the policyholder or beneficiary. *Id.* If a court finds that no ambiguity exists, however, the court must construe the document according to its terms. *Id.* (citing *Williams v. Nationwide Mut. Ins. Co.*, 269 N.C. 235, 238, 152 S.E.2d 102, 105 (1967)).

Ambiguity is not established by the mere fact that the insured asserts an understanding of the policy that differs from that of the insurance company. *Wachovia Bank & Tr. Co.*, 276 N.C. at 354, 172 S.E.2d at 522. Rather, ambiguity exists if, in the opinion of the court, the language is "fairly and reasonably susceptible to either of the constructions for which the parties contend." *Id.* The court may not remake the policy or "impose liability upon the company which it did not assume and for which the policyholder did not pay." *Id.*

If the policy contains a definition of a term, the court applies that meaning unless the context requires otherwise. *Id.* However, if the policy fails to define a term, the court must define the term in a manner that is consistent with the context in which the term is used, and the meaning accorded to it in ordinary speech. *Id.* (citing *Peirson v. Am. Hardware Mut. Ins. Co.*, 249 N.C. 580, 107 S.E.2d 137 (1959)).

Analysis

Here, plaintiff contends that the policy is ambiguous because it fails to provide a definition for "ACV" and "depreciation." In response, defendant argues that the policy is not ambiguous despite the lack of a

detailed, explicit definition, because the definition provided in the limited endorsement should be read in harmony with the remainder of the policy. Plaintiff disagrees, arguing that language in the limited endorsement should be confined to the situations addressed therein.

Courts outside of North Carolina are split on whether the term "depreciation" includes both labor and materials. *See Arnold v. State Farm Fire & Cas. Co.*, 268 F. Supp. 3d 1297, 1304 (S.D. Ala. 2017) (holding that defendant had not shown that the term "ACV," which was undefined, could only be interpreted to include depreciation of labor costs); *see also Hicks v. State Farm Fire & Cas. Co.*, 751 F. App'x 703, 708 (6th Cir. 2018) (holding that even though Kentucky law defines ACV as replacement cost minus depreciation, the policy is ambiguous because it does not specifically address what can be depreciated). *But see Papurello v. State Farm Fire & Cas. Co.*, 144 F. Supp. 3d 746, 770 (W.D. Pa. 2015) (holding that labor cost was baked into the roof and, therefore, the policy insured "the finished product in issue—the result or physical manifestation of combining knowhow, labor, physical materials (including attendant costs, e.g., the incurrence of taxes), and anything else required to produce the final finished roof itself.") (emphasis omitted); *Redcorn v. State Farm Fire and Cas. Co.*, 2002 OK 15, 55 P.3d 1017 (holding that the general principle of indemnity supports including depreciation of labor). Decisions from other jurisdictions, however, provide little guidance to this Court because the policy language in each case differs meaningfully, as do the insurance laws of each state.

Upon thorough review of the policy at issue and consideration of our state's principles of contract interpretation, we concur with the Business Court's rationale and conclusion in this case. "Actual Cash Value," as used in the policy, is not susceptible to more than one reasonable interpretation and the term unambiguously includes costs for the depreciation of labor. Although the base policy fails to define the term, the roof coverage addendum provides a definition that must be read in harmony with the remainder of the policy. *See Rouse v. Williams Realty Bldg. Co.*, 143 N.C. App. 67, 70, 544 S.E.2d 609, 612 (2001) (determining that when an insurance policy "contains a definition of a term used in it, this is the meaning which must be given to that term wherever it appears in the policy, unless the context clearly requires otherwise.").

Neither is the term "depreciation" ambiguous. The policy language provides no justification for differentiating between labor and materials when calculating depreciation, and to do so makes little sense. The value of a house is determined by considering it as a fully assembled whole, not as the simple sum of its material components. To conclude

that labor is not depreciable in this case would "impose liability upon the company which it did not assume," and provide a benefit to plaintiff for which he did not pay. *Wachovia*, 276 N.C. at 354, 172 S.E.2d at 522. We will not do so.

Because we hold that the insurance policy at issue unambiguously allows for depreciation of the costs of labor and materials, we affirm the decision of the Business Court.

AFFIRMED.

BEEM USA LIMITED-LIABILITY LIMITED PARTNERSHIP AND STEPHEN STARK
v.
GRAX CONSULTING LLC

No. 360A18

Filed 28 February 2020

Jurisdiction—personal—specific—minimum contacts—nonresident company—banking and business meetings

A nonresident company was subject to personal jurisdiction in North Carolina pursuant to the doctrine of specific jurisdiction where the nonresident company executed an agreement with a North Carolina resident to create a Limited-Liability Limited Partnership (LLLP) and the nonresident company's sole representative traveled to North Carolina multiple times to conduct the LLLP's business. The nonresident company's contacts with North Carolina related to the LLLP agreement and its implementation, and the lawsuit was concerned with the nonresident company's conduct under that agreement.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from orders entered on 13 August 2018 and 4 September 2018, by Judge Michael L. Robinson, Special Superior Court Judge for Complex Business Cases, in Superior Court, Orange County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(a). Heard in the Supreme Court on 27 August 2019.

Williams Mullen, by Camden R. Webb and Lauren E. Fussell, for plaintiffs-appellants.

No brief for defendant-appellee Grax Consulting, LLC.

DAVIS, Justice.

In this case, we consider the question of whether a nonresident company's contacts with North Carolina were sufficient to permit the exercise of personal jurisdiction over it in the courts of our state. Because we conclude that the exercise of personal jurisdiction over defendant does not trigger due process concerns, we reverse the orders of the Business Court and remand for further proceedings.

Factual and Procedural Background

The complaint in this action alleges the following facts: Grax Consulting LLC (Grax) is a limited liability company organized and existing under the laws of the State of South Carolina with its principal place of business in Fort Mill, South Carolina. Stephen Stark is a resident of Chapel Hill, North Carolina. On or about 22 February 2015, Grax and Stark signed an agreement to form Beem USA, Limited-Liability Limited Partnership (Beem), an entity created under the laws of the State of Nevada for the purpose of providing information technology services.

On 1 January 2016, Stark and Grax executed a "First Amended and Restated Limited-Liability Limited Partnership Agreement" (the partnership agreement) that set forth the rights, duties, and obligations of the parties and established that the partnership would terminate on 31 December 2016, unless terminated sooner pursuant to the provisions of the partnership agreement.

Grax, acting through its owner Mason Shane Boyd, was named the general partner and an initial limited partner of Beem, possessing a ten percent ownership interest in the partnership. Stark, individually, was named an initial limited partner with a ninety percent ownership interest in Beem. Stark and Grax were the only limited partners of Beem during its existence.

The partnership agreement provided, in part, that in the event the general partner took action, or failed to take action, so as to cause material, adverse consequences to Beem and the act or omission was fraudulent, in bad faith, or in breach of the general partner's fiduciary duty, the limited partner or partners holding a majority of the ownership interests in Beem could remove the general partner and elect a new one.

Throughout the short lifespan of Beem, Grax and Stark would frequently collaborate on matters relating to the partnership. Boyd traveled

to North Carolina on three separate occasions to meet with Stark to discuss the business of Beem and, on at least one of those occasions, to meet with Beem's banker. These meetings occurred on 28 September 2015, 26 August 2016, 27 August 2016, and 9 November 2016.

In addition, in February 2015, Boyd—acting on behalf of Grax—drove to Charlotte to open a bank account for Beem at Bank of America. Using this account, Grax would regularly deposit checks received by Beem and initiate wire transfers on behalf of the partnership. Over the course of 2016, while living in North Carolina, Stark received approximately fifteen e-mails, fifteen text messages, and seven phone calls per month from Grax relating to the partnership. Grax also mailed Stark financial records, tax documents, and other correspondence relating to Beem.

On or about 5 December 2016, Stark removed Grax as the general partner of Beem pursuant to the terms of the partnership agreement and assumed the role himself. Grax was given notice of its removal as general partner by means of both electronic communication and a letter sent to its principal place of business.

The partnership agreement expressly stated that no limited partner, unless also serving as general partner, was permitted to act on behalf of or bind Beem. Nevertheless, despite its removal as general partner, Grax—through Boyd—continued to act on Beem's behalf. Specifically, Grax (1) continued to bill and charge Beem for services that Grax purportedly provided for Beem after its removal as general partner; (2) changed the online bank account access information for Beem's Bank of America partnership account and prevented Stark, the new general partner, from accessing the account; (3) acquired a cashier's check for $3,500 from the Bank of America account without Stark's permission; and (4) filed tax documents with the Internal Revenue Service on behalf of Beem. Furthermore, Grax repeatedly failed to provide Stark with Beem's financial, accounting, banking, tax, and other records, despite requests from Stark for this information.

Following the partnership's dissolution on 31 December 2016, Stark attempted to wind up the business affairs of Beem but was unable to do so due to Grax's failure to provide Stark with the partnership's business records. Stark was also precluded from filing accurate and complete tax documents on behalf of the partnership for 2016 because Grax withheld necessary information.

On 28 December 2017, Stark, on behalf of himself and Beem (collectively, plaintiffs), filed a complaint in Superior Court, Orange County,

asserting claims against Grax for breach of contract and breach of fiduciary duty. The breach of contract claim was based on plaintiffs' allegation that Grax acted on behalf of Beem following its removal as general partner on 5 December 2016 despite lacking the authority to do so and in violation of the partnership agreement. The breach of fiduciary duty claim was premised on plaintiffs' assertion that Grax engaged in misconduct as the general partner of Beem and breached its duty of care to the partnership—namely, that Grax failed to adequately maintain financial statements of the partnership from July 2016 until the date of Grax's removal as general partner and refused to relinquish to plaintiffs those statements that existed upon its removal as general partner.

In the complaint, plaintiffs sought an injunction, in part, directing Grax to turn over the documents and information necessary for plaintiffs to wind up the affairs of Beem and file tax documents on behalf of both Beem and Stark. The case was designated a mandatory complex business case pursuant to N.C.G.S. § 7A-45.4(a) and was assigned to the Honorable Michael L. Robinson, Special Superior Court Judge for Complex Business Cases.

After repeated failed attempts to personally serve Boyd, who was the registered agent for Grax, service of process was eventually effected on 3 February 2018. Plaintiffs filed a motion for entry of default on 6 March 2018 based on Grax's failure to file a responsive pleading to plaintiffs' complaint. On 23 April 2018, a default was entered against Grax. Plaintiffs subsequently filed a motion for default judgment on 10 May 2018.

N.C.G.S. § 1-75.11 provides, in relevant part, that before a trial court can enter a judgment against a defendant who fails to appear, it "shall require proof by affidavit or other evidence . . . of the existence of any fact not shown by verified complaint which is needed to establish grounds for personal jurisdiction over the defendant." *See* N.C.G.S. § 1-75.11(1) (2017). In an effort to comply with the statute, plaintiffs filed an affidavit from Stark on 10 August 2018 that listed Grax's contacts with North Carolina.

On 13 August 2018, the Business Court issued an order denying plaintiffs' motion for default judgment based on its finding that plaintiffs had failed to satisfy their burden of proving that the court possessed personal jurisdiction over Grax. As an initial matter, the court found that Stark's affidavit was improper because it lacked "any vow of truthfulness on penalty of perjury." Moreover, the court further determined that the information contained in the affidavit was insufficient to satisfy

N.C.G.S. § 1-75.11. In support of its ruling, the Business Court stated the following:

> Plaintiffs' claims arise out of Grax's conduct after he was removed as the general partner on December 5, 2016. Thus, Grax's contacts with North Carolina prior to this date do not create a basis for exercising specific jurisdiction over Grax. . . . The record shows that the only contacts Grax had with North Carolina from which Plaintiffs' claims arise are two letters from Grax addressed to Stark at his North Carolina address. These two letters do not amount to sufficient minimum contacts with North Carolina to support the exercise of personal jurisdiction over Grax.

On 22 August 2018, plaintiffs filed a document captioned "Plaintiffs' Motion for Reconsideration and for Amended and Additional Findings of Fact" along with a properly sworn version of Stark's previously filed affidavit and a new affidavit that provided additional information about Grax's contacts with North Carolina. The Business Court entered an order on 4 September 2018 containing additional findings but once again denying plaintiffs' motion.

The court ruled that plaintiffs' breach of fiduciary duty claim did not "ar[ise] out of Grax's conduct in traveling to North Carolina to open Beem's bank account or depositing checks in or initiating wire transfers from North Carolina bank branches." Similarly, the court found that the "breach of fiduciary duty does not appear to have arisen from Grax's trips to North Carolina to discuss Beem's business with Stark or his phone calls, e-mails, and text messages to Stark in North Carolina." The Business Court concluded that "Plaintiffs' breach of fiduciary duty claim is premised on Grax's failures to maintain proper records beginning in July 2016—and nothing in the record reflects how such a breach arose out of any conduct directed at the forum state of North Carolina." Pursuant to N.C.G.S. § 7A-27(a)(2), plaintiffs gave notice of appeal from the Business Court's 13 August 2018 and 4 September 2018 orders.

Analysis

The sole question for review in this appeal is whether Grax had sufficient minimum contacts with this state such that a North Carolina court could constitutionally exercise personal jurisdiction over it. Based on our thorough review of the record, we conclude that the orders of the Business Court must be reversed.

In examining whether a nonresident defendant is subject to personal jurisdiction in our courts, we engage in a two-step analysis. *Skinner v. Preferred Credit*, 361 N.C. 114, 119, 638 S.E.2d 203, 208 (2006). First, jurisdiction over the defendant must be authorized by N.C.G.S. § 1-75.4—North Carolina's long-arm statute. *Id.* Second, "if the long-arm statute permits consideration of the action, exercise of jurisdiction must not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution." *Id.*

I. Long-Arm Statute

North Carolina's long-arm statute states, in pertinent part, that a court may exercise jurisdiction over a party if it "[i]s engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise." N.C.G.S. § 1-75.4(1)(d) (2017). This Court has held that this statute is "intended to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process." *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 676, 231 S.E.2d 629, 630 (1977) (citation omitted).

Here, it is clear that Grax's contacts with North Carolina are sufficient to satisfy the long-arm statute. Thus, we must proceed to the second step of the analysis.

II. Due Process

"The Due Process Clause of the Fourteenth Amendment operates to limit the power of a State to assert *in personam* jurisdiction over a nonresident defendant." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413–14, 80 L. Ed. 2d 404, 410 (1984) (citing *Pennoyer v. Neff*, 95 U.S. 714, 24 L. Ed. 565 (1878)). The primary concern of the Due Process Clause as it relates to a court's jurisdiction over a nonresident defendant is the protection of "an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.' " *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72, 85 L. Ed. 2d 528, 540 (1985) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319, 90 L. Ed. 95, 104 (1945)). The United States Supreme Court has made clear that the Due Process Clause permits state courts to exercise personal jurisdiction over an out-of-state defendant so long as the defendant has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Int'l Shoe*, 326 U.S. at 316, 90 L. Ed. at 102 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L. Ed. 278, 283 (1940)).

Personal jurisdiction cannot exist based upon a defendant's "random, fortuitous, or attenuated" contacts with the forum state, *Walden v. Fiore*, 571 U.S. 277, 286, 188 L. Ed. 2d 12, 21 (2014) (quoting *Burger King*, 471 U.S. at 475, 85 L. Ed. 2d at 543), but rather must be the result of "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Skinner*, 361 N.C. at 133, 638 S.E.2d at 217 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 1298 (1958)). As such, a defendant's contacts with the forum state must be such that a defendant "should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501 (1980); *see also Skinner*, 361 N.C. at 133, 638 S.E.2d at 217 ("A crucial factor is whether the defendant had reason to expect that he might be subjected to litigation in the forum state.").

The United States Supreme Court has recognized two types of personal jurisdiction that can exist with regard to a foreign defendant: general (or "all-purpose") jurisdiction and specific (or "case-based") jurisdiction. *See Daimler AG v. Bauman*, 571 U.S. 117, 126–27, 187 L. Ed. 2d 624, 633–34 (2014) (citing *Helicopteros*, 466 U.S. at 414 nn.8–9, 80 L. Ed. 2d at 411 nn.8–9). General jurisdiction is applicable in cases where the defendant's "affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 180 L. Ed. 2d 796, 803 (2011) (quoting *Int'l Shoe*, 326 U.S. at 317, 90 L. Ed. at 102). Specific jurisdiction, conversely, encompasses cases "in which the suit 'aris[es] out of or relate[s] to the defendant's contacts with the forum.' " *Daimler*, 571 U.S. at 127, 187 L. Ed. 2d at 633–34 (2014) (alteration in original) (quoting *Helicopteros*, 466 U.S. at 414 n.8, 80 L. Ed. 2d at 411 n.8).

In the present case, plaintiffs do not assert that Grax is subject to suit in North Carolina based upon a theory of general jurisdiction. We therefore confine our analysis to whether personal jurisdiction exists in this case under the doctrine of specific jurisdiction.

Specific jurisdiction is, at its core, focused on the "relationship among the defendant, the forum, and the litigation." *Daimler*, 571 U.S. at 133, 187 L. Ed. 2d at 637 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204, 53 L. Ed. 2d 683, 698 (1977)). Some "affiliatio[n] between the forum and the underlying controversy" is required. *Walden*, 571 U.S. at 283 n.6, 188 L. Ed. 2d at 20 n.6 (alteration in original) (quoting *Goodyear*, 564 U.S. at 919, 180 L. Ed. 2d at 803). The United State Supreme Court has emphasized that "specific jurisdiction is confined to adjudication of

issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Bristol-Myers Squibb Co. v. Sup. Ct. of Cal., San Francisco Cty.*, 137 S. Ct. 1773, 1780 (U.S. 2017) (quoting *Goodyear*, 564 U.S. at 919, 180 L. Ed. 2d at 803).

This Court applied the doctrine of specific jurisdiction in *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 348 S.E.2d 782 (1986). In that case, the plaintiff, a North Carolina clothing manufacturer, sued the defendant, a clothing distributor based in New York and New Jersey, for breach of contract in Superior Court, Wake County, due to defendant's refusal to pay for repairs to shirts it had purchased and subsequently returned to plaintiff. *Id.* at 362–63, 348 S.E.2d at 784–85. The defendant moved to dismiss based on lack of personal jurisdiction. On appeal, this Court held that the trial court could exercise specific jurisdiction over the defendant based on its contacts with North Carolina. *Id.* at 368, 348 S.E.2d at 787. We observed that "[a]lthough a contractual relationship between a North Carolina resident and an out-of-state party alone does not automatically establish the necessary minimum contacts" required for personal jurisdiction, "a single contract may be a sufficient basis for the exercise of [specific] jurisdiction if it has a substantial connection with this State." *Id.* at 367, 348 S.E.2d at 786 (emphasis omitted).

In support of our holding in *Tom Togs* that personal jurisdiction existed, this Court noted that the contract was "made in North Carolina" and "substantially performed" here. *Id.* at 367, 348 S.E.2d at 786–87. We also found relevant the fact that the defendant was aware the shirts were to be cut in North Carolina and even sent its personal labels to the plaintiff in North Carolina so that they could be attached to the shirts. *Id.* at 367, 348 S.E.2d at 787. Furthermore, we observed that the shirts were manufactured in, shipped from, and eventually returned to North Carolina. Thus, we concluded that the defendant's connections with North Carolina relating to the contract satisfied the minimum contacts inquiry and established the existence of specific jurisdiction. *Id.* at 368, 348 S.E.2d at 787.

The United States Supreme Court has applied the doctrine of specific jurisdiction in two recent cases. While these cases—like *Tom Togs*—involved very different factual circumstances than the matter currently before us, they are nonetheless instructive. In *Bristol-Myers*, the defendant, a company incorporated in Delaware and headquartered in New York, contested personal jurisdiction in California for tort claims related to pharmaceuticals manufactured by the defendant that allegedly harmed plaintiffs, some of whom lived in states other than California. 137 S. Ct. at 1777–78. In analyzing whether the California court could

exercise specific jurisdiction over the defendant, the Supreme Court stated that a link was required between the forum state and the nonresident plaintiffs' underlying cause of action against the defendant—an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum." *Id.* at 1780 (alteration in original) (quoting *Goodyear*, 564 U.S. at 919, 180 L. Ed. 2d at 803). Because the Supreme Court determined that the claims of the non-California plaintiffs were not affiliated with the forum state—the "nonresidents were not prescribed [the drug] in California, did not purchase [the drug] in California, did not ingest [the drug] in California, and were not injured by [the drug] in California"—it held that California lacked the necessary connection with the cause of action to establish personal jurisdiction over the defendant in that state under a theory of specific jurisdiction. *Id.* at 1781.

In *Walden*, the plaintiffs, Nevada residents, sued the defendant, a Georgia-based Drug Enforcement Administration (DEA) agent, in a Nevada federal district court for damages arising out of a seizure that plaintiffs alleged violated their Fourth Amendment rights. *Walden*, 571 U.S. at 281, 188 L. Ed. 2d at 18. While returning to Las Vegas from a gambling trip in Puerto Rico with nearly $100,000 in cash, the plaintiffs' flight was scheduled to make a layover in Atlanta, Georgia. Puerto Rico authorities notified the defendant's DEA task force at the Hartsfield-Jackson Atlanta International Airport that the plaintiffs were traveling to Atlanta with large amounts of cash. When the plaintiffs arrived in Atlanta, they were stopped by defendant and another DEA agent, and their funds were seized by the defendant. The money was ultimately returned to the plaintiffs approximately six months later. In response to the plaintiffs' complaint, the defendant filed a motion to dismiss for lack of personal jurisdiction, which was granted by the district court. *Id.* at 280–81, 188 L. Ed. 2d at 17–18.

The Supreme Court held that the defendant lacked minimum contacts with Nevada such that the Nevada court could not exercise personal jurisdiction over him. *Id.* at 288, 188 L. Ed. 2d at 22. The Supreme Court observed that the defendant "never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada. In short, when viewed through the proper lens—whether the *defendant's* actions connect him to the *forum*—[he] formed no jurisdictionally relevant contacts with Nevada." *Id.* at 289, 188 L. Ed. 2d at 23. The Supreme Court also recognized that although the injury to the plaintiffs—the lack of access to their funds—was suffered in Nevada, this fact was irrelevant to the minimum contacts analysis because it "is not the sort of

effect that is tethered to Nevada in any meaningful way." *Id.* at 290, 188 L. Ed. 2d at 24.

* * *

Having reviewed these principles, we must now apply them to the facts presently before us. In so doing, it is clear that Grax's contacts with North Carolina—which all relate to its status as a partner in Beem—are sufficient to permit North Carolina courts to exercise specific jurisdiction over it, given that this litigation is concerned exclusively with the acts and omissions of Grax in connection with Beem's affairs.

It is undisputed that Grax purposefully availed itself of the benefits of North Carolina law for the specific purpose of carrying out the business of Beem. Grax's sole representative came to North Carolina to open a bank account on behalf of the partnership that Grax subsequently used for Beem's business activities, and he also traveled to this state on three separate occasions to discuss Beem's affairs with Stark. By virtue of its representative engaging in such conduct, Grax established an ongoing relationship with persons and entities located within this state such that it could reasonably anticipate being called into court here. *See Burger King*, 471 U.S. at 475–76, 85 L. Ed 2d at 543 ("Thus where the defendant . . . has created 'continuing obligations' between himself and residents of the forum he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." (citations omitted)).

Additionally, Grax contacted Stark—who lived in North Carolina—numerous times each month for approximately a year in order to discuss Beem's affairs and sent mail related to Beem to Stark in Chapel Hill, North Carolina. *See Walden*, 571 U.S. at 285, 188 L. Ed. 2d at 21 ("[A]lthough physical presence in the forum is not a prerequisite to jurisdiction, physical entry into the State—either by the defendant in person or through an agent, goods, mail, or some other means—is certainly a relevant contact." (citations omitted)).

The record makes abundantly clear the existence of numerous contacts by Grax with North Carolina that it made in its capacity as a partner of Beem, which goes to the heart of the present case. As a result, plaintiffs' claims alleging breach of the partnership agreement and breach of fiduciary duty "arise out of" or, at the very least, "relate to" Grax's contacts with North Carolina such that the doctrine of specific jurisdiction applies here. *Helicopteros*, 466 U.S. at 414, 80 L. Ed. 2d at 411.

Although the Business Court acknowledged Grax's contacts with North Carolina, it engaged in an exceedingly narrow analysis of the sufficiency of those contacts that finds no support in the caselaw of either the United States Supreme Court or this Court. The Business Court's inquiry required too strict a temporal connection between Grax's contacts with North Carolina and the specific claims asserted by plaintiffs in this case.[1] While the Business Court correctly recognized the need to examine Grax's contacts with North Carolina to ensure that they related to plaintiffs' claims against defendant, its orders aptly demonstrate the danger of missing the forest for the trees. Given that (1) Grax's contacts with North Carolina all related to Beem's partnership agreement and the implementation thereof, and (2) this case is wholly concerned with the conduct of Grax pursuant to that agreement, it simply cannot be said that subjecting Grax to suit in North Carolina would trigger due process concerns.

Our holding today that personal jurisdiction exists in this case pursuant to the doctrine of specific jurisdiction is faithful to the United States Supreme Court's characterization of specific jurisdiction as being based on "case-linked" contacts. *See Bristol-Myers*, 137 S. Ct. at 1785–86. As discussed above, each of Grax's contacts with North Carolina concerned its status as a partner of Beem, which is the subject of the specific claims asserted by plaintiffs in this case.

Conclusion

For the reasons set out above, we hereby reverse the 13 August 2018 and 4 September 2018 orders of the Business Court and remand this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

1. Consideration of the entirety of Grax's contacts with North Carolina relating to Beem is particularly appropriate here given the relatively brief period of time in which Beem existed as a legal entity.

BOBBY G. BOLES, ET AL.
v.
TOWN OF OAK ISLAND

No. 290A19

Filed 28 February 2020

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 830 S.E.2d 878 (N.C. Ct. App. 2019), reversing and remanding an order granting defendant's motion for summary judgment entered on 2 May 2018 by Judge James Ammons Jr. in Superior Court, Brunswick County. Heard in the Supreme Court on 4 February 2020.

Norman B. Smith, Steven B. Fox, and Mallory G. Horne for plaintiff-appellees.

Parker, Poe, Adams & Bernstein LLP, by Charles C. Meeker and Stephen V. Carey, and Crossley, McIntosh & Collier, by Brian E. Edes, for defendant-appellant.

Craige & Fox, PLLC, by Charlotte Noel Fox, for Town of Holden Beach, a North Carolina Municipality, amicus curiae.

John M. Phelps II, Gregory F. Schwitzgebel III, and Monica Langdon Jackson for North Carolina League of Municipalities, amicus curiae.

PER CURIAM.

We reverse the decision of the Court of Appeals for the reasons stated in the dissenting opinion.

REVERSED.

CARDIORENTIS AG
v.
IQVIA LTD. AND IQVIA RDS, INC.

No. 168A19

Filed 28 February 2020

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) from an order and opinion on defendants' motion to stay all proceedings on *forum non conveniens* grounds entered on 31 December 2018 by Judge Adam M. Conrad, Special Superior Court Judge for Complex Business Cases, in Superior Court, Durham County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(a). Heard in the Supreme Court on 6 January 2020.

Robinson, Bradshaw & Hinson, P.A., by J. Dickson Phillips III and Jonathan C. Krisko; and Hogan Lovells US LLP, by Catherine E. Stetson, for plaintiff.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Charles F. Marshall and Shepard D. O'Connell; Cooley LLP, by Michael J. Klisch, Joshua M. Siegel, and Robert T. Cahill for defendants.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA DURHAM COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 18 CVS 2313
CARDIORENTIS AG, Plaintiff, v. IQVIA LTD. AND IQVIA RDS, INC., Defendants.	**ORDER AND OPINION ON DEFENDANTS' PRE-ANSWER MOTIONS**

1. Plaintiff Cardiorentis AG is a Swiss biopharmaceutical company. Its flagship drug, Ularitide, is a treatment for heart failure. In 2012, Cardiorentis enlisted IQVIA Ltd. ("IQVIA UK"), an English contract research organization, to perform a worldwide clinical trial of Ularitide with a view toward obtaining the regulatory approvals needed to market the new drug. The trial was not successful. According to Cardiorentis, the results were invalid, compromised by the inclusion of hundreds of ineligible patients. Cardiorentis blames both IQVIA UK and its North Carolina-based parent, IQVIA RDS, Inc. ("IQVIA NC"), asserting claims for breach of contract and fraud, among others.

2. Neither IQVIA UK nor IQVIA NC has answered the complaint, instead opting to file several pre-answer motions. Defendants first ask the Court to stay all proceedings under N.C. Gen. Stat. § 1-75.12 on *forum non conveniens* grounds. (ECF No. 19.) IQVIA UK separately asks the Court to dismiss the claims against it for lack of personal jurisdiction. (ECF No. 17.) In the alternative, Defendants also seek to dismiss all claims on the merits pursuant to North Carolina Rule of Civil Procedure 12(b)(6). (ECF No. 21.)

3. For the following reasons, the Court **GRANTS** Defendants' motion to stay all proceedings under section 1-75.12. The Court **DENIES** as moot all other requested relief.

Robinson, Bradshaw & Hinson, P.A., by J. Dickson Phillips III, Jonathan C. Krisko, and Morgan P. Abbott, and Hogan Lovells US LLP, by Dennis H. Tracey III and Allison M. Wuertz, for Plaintiff Cardiorentis AG.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Charles F. Marshall, Charles E. Coble, and Shepard D. O'Connell, and Cooley LLP, by Michael J. Klisch and Robert T. Cahill, for Defendants IQVIA Ltd. and IQVIA RDS, Inc.

Conrad, Judge.

I.
BACKGROUND[1]

4. It is not clear when Cardiorentis began developing Ularitide, but by April 2010, the regulatory-approval process was underway. (*See* Compl. ¶¶ 18, 19, ECF No. 3.) Though based in Switzerland, Cardiorentis hoped to market the drug widely. It sought approvals from two of the world's key regulatory agencies, the United States Food and Drug Administration and the European Medicines Agency. (Compl. ¶ 19.) Cardiorentis completed two preliminary clinical trials before selecting IQVIA UK, an English company, to manage a Phase III trial designed to demonstrate Ularitide's safety and efficacy. (Compl. ¶¶ 1, 4, 20.)

5. In August 2012, Cardiorentis and IQVIA UK (named Quintiles Ltd. at that time) entered into a General Services Agreement ("Services Agreement") that set out the terms for a global, multi-year trial. (Compl. ¶¶ 1, 6, 21; Mem. in Supp. Mot. Stay Ex. 2, ECF No. 20.3 ["Services Agreement"].) IQVIA UK agreed to design and run the trial in its entirety. (Compl. ¶ 22.) Its duties included developing the protocol that established the essential criteria for determining a patient's eligibility to participate. (Compl. ¶¶ 22(a), 30.) IQVIA UK was also required to select all trial sites, to monitor each site to ensure compliance with the protocol, and to perform full source data verification to ensure that reported data matched the patient's original medical records. (*See* Compl. ¶¶ 22(b), 22(f), 22(f), 37, 39; Defs.' Reply Br. in Supp. Mot. Stay Ex. 3 ¶¶ 18–19, ECF No. 81.4.) Other duties included data management, statistical analysis, and medical advisory services. (*See* Mem. in Supp. Mot. Stay Ex. 5 ¶¶ 7, 9–12, ECF No. 20.6.) The Services Agreement is governed by English law and allows IQVIA UK to use the services of its corporate affiliates, including its parent IQVIA NC. (Services Agreement §§ 20.0; 28.0; Defs.' Mem. in Supp. Mot. Stay 4, ECF Nos. 20, 61 ["Mem. in Supp."].)

6. Eight months after executing the Services Agreement, Cardiorentis entered into a Clinical Quality Agreement ("Quality Agreement") with IQVIA NC (named Quintiles, Inc. at that time). (Compl. ¶ 24.) The Quality Agreement functioned as an extension of the Services Agreement, outlining processes for effective communication during the trial. (*See* Mem. in Supp. Ex. 3 § 1, ECF No. 20.4 ["Quality Agreement"].)

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1. In this section, the Court draws from the allegations in the complaint, along with the briefs and affidavits in support of and opposition to Defendants' motion to stay.

If the Services Agreement and Quality Agreement conflicted in any way, the Services Agreement would control. (Quality Agreement § 1.)

7. The trial appears to have been a mammoth undertaking, involving more than a hundred trial investigators, thousands of patients, and hospitals in 23 countries. (*See* Compl. ¶¶ 7, 8, 34; Defs.' Reply Br. in Supp. Mot. Stay 6, ECF No. 81 ["Reply Br."].) Over a three-year period, IQVIA UK trained the investigators and then collected, managed, and reviewed the trial data. (Compl. ¶¶ 22(c), 22(g).) Yet the trial was unsuccessful. (Compl. ¶¶ 8, 82, 84.)

8. Cardiorentis now seeks to hold Defendants responsible for the failed trial, claiming that both Defendants breached the Services Agreement and that IQVIA NC breached the Quality Agreement. (Compl. ¶¶ 91, 99.) Cardiorentis alleges, among other things, that Defendants provided inadequate training, failed to monitor the trial sites, allowed hundreds of ineligible patients to enroll, and then concealed deviations from the protocol. (*See* Compl. ¶¶ 46–49, 51.) These violations, Cardiorentis alleges, were intentional—a conscious choice to withhold resources and reduce trial costs for the purpose of inflating Defendants' stock price before a merger. (*See* Compl. ¶¶ 54–56.) In addition to its claims for breach of contract, Cardiorentis asserts claims for fraud, tortious misrepresentation, and violations of North Carolina's Unfair and Deceptive Trade Practices Act. (Compl. ¶¶ 106, 120, 130.)

9. In their pre-answer motions, Defendants contend that this case has little connection to North Carolina. They jointly seek a stay on *forum non conveniens* grounds, and IQVIA UK separately contends that this Court lacks personal jurisdiction over it. In the event North Carolina is a proper venue, Defendants contend that the case should be dismissed anyway because the complaint fails to state a claim for relief.

10. Before responding to the motions, Cardiorentis served discovery requests geared toward venue and personal jurisdiction. (*See* ECF No. 50.) Defendants objected to those requests. After full briefing, the Court denied Cardiorentis's motion for venue-related discovery, noting that courts typically do not permit discovery before deciding *forum non conveniens*. *See Cardiorentis AG v. IQVIA Ltd.*, 2018 NCBC LEXIS 96, at *3–4, 8 (N.C. Super. Ct. Sept. 14, 2018).

11. Defendants' pre-answer motions are now fully briefed, and the Court held a hearing on November 13, 2018. (ECF No. 71.) The motions are ripe for decision.

II.
ANALYSIS

12. Defendants argue that North Carolina is an inconvenient forum and that Cardiorentis's claims should be heard, if at all, in England.[2] On that basis, they ask the Court to stay this case under section 1-75.12. Cardiorentis responds that North Carolina is not only a convenient forum but also the forum with the most substantial connection to the case.

13. Section 1-75.12 codifies the doctrine of *forum non conveniens*. If a trial court finds "that it would work substantial injustice for [an] action to be tried in a court of this State, the judge on motion of any party may enter an order to stay further proceedings in the action in this State." N.C. Gen. Stat. § 1-75.12(a). Put another way, when it appears that this State "is an inconvenient forum and that another is available which would better serve the ends of justice and the convenience of [the] parties, a stay should be entered." *Motor Inn Mgmt., Inc. v. Irvin-Fuller Dev. Co.*, 46 N.C. App. 707, 713, 266 S.E.2d 368, 371 (1980) (citing *Silver v. Great Am. Ins. Co.*, 29 N.Y.2d 356, 361 (N.Y. 1972)).

14. In deciding whether to grant a stay, our courts usually consider a series of convenience factors and policy considerations, including

> (1) the nature of the case, (2) the convenience of the witnesses, (3) the availability of compulsory process to produce witnesses, (4) the relative ease of access to sources of proof, (5) the applicable law, (6) the burden of litigating matters not of local concern, (7) the desirability of litigating matters of local concern in local courts, (8) convenience and access to another forum, (9) choice of forum by plaintiff, and (10) all other practical considerations.

Lawyers Mut. Liab. Ins. Co. of N.C. v. Nexsen Pruet Jacobs & Pollard, 112 N.C. App. 353, 356, 435 S.E.2d 571, 573 (1993) (citing *Motor Inn*, 46 N.C. App. at 713, 266 S.E.2d at 371). These factors parallel the public and private interest factors that federal courts use to decide motions premised on *forum non conveniens*. *See*, *e.g.*, *Gulf Oil Corp. v. Gilbert*,

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2. In the alternative, Defendants argue that this case should be heard in Switzerland where Cardiorentis maintains its principal place of business. (Compl. ¶ 11; Mem. in Supp. 2.) The Court need not address this alternative position because it finds, based on the parties' briefs and affidavits, that England is "a convenient, reasonable and fair place of trial." N.C. Gen. Stat. § 1-75.12(a).

330 U.S. 501, 508–09 (1947); *DiFederico v. Marriott Int'l, Inc.*, 714 F.3d 796, 804–08 (4th Cir. 2013); *see also Motor Inn*, 46 N.C. App. at 713, 266 S.E.2d at 371.

15. It is not necessary to consider each factor or to find that every factor weighs in favor of a stay. *See Muter v. Muter*, 203 N.C. App. 129, 132–33, 689 S.E.2d 924, 927 (2010); *Wachovia Bank v. Deutsche Bank Tr. Co. Ams.*, 2006 NCBC LEXIS 10, at *12 (N.C. Super. Ct. June 2, 2006). Rather, the trial court must be able to conclude that (1) a substantial injustice would result in the absence of a stay, (2) the stay is warranted by the factors that are relevant and material, and (3) the alternative forum is convenient, reasonable, and fair. *See Bryant & Assocs., LLC v. ARC Fin. Servs., LLC*, 238 N.C. App. 1, 5, 767 S.E.2d 87, 91–92 (2014).

16. With these principles in mind, the Court turns to the relevant factors, beginning with Cardiorentis's choice of forum.

A. Plaintiff's Choice of Forum

17. Our courts generally begin with the presumption that a plaintiff's choice of forum deserves deference. *See Wachovia Bank*, 2006 NCBC LEXIS 10, at *18; *see also Wordsworth v. Warren*, 2018 NCBC LEXIS 107, at *10 (N.C. Super. Ct. Oct. 15, 2018); *La Mack v. Obeid*, 2015 NCBC LEXIS 24, at *16–17 (N.C. Super. Ct. Mar. 5, 2015). The amount of deference due, though, varies with the circumstances.

18. When a plaintiff elects to sue outside its home forum, its "choice deserves less deference." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981). This is not to disfavor foreign litigants; there is simply less reason to believe that a litigant would choose a foreign forum for reasons of convenience. As the United States Supreme Court has observed, "[w]hen the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable." *Id.* at 255–56.

19. That is the case here. Cardiorentis, a Swiss company, brought this suit thousands of miles from its home. Absent a contrary showing, it is not reasonable to assume that Cardiorentis chose North Carolina because of its convenience.

20. Cardiorentis argues that it was faced with a choice between two inconvenient forums, North Carolina and England, and that it chose North Carolina as the more convenient of the two. (*See* Opp'n 2.) The Court is not persuaded. It appears that Cardiorentis conducted its pre-suit communications through English counsel. (*See* Mem. in Supp. Ex. 7 ¶ 1.8, ECF No. 20.8.) The decision to handle pre-suit activity in

England but then to bring suit in North Carolina hints at forum shopping rather than convenience. Indeed, in other filings, Cardiorentis itself has complained about the inconvenience that results from a six-hour time difference and the associated complexity of cross-Atlantic communications. (*See* Pl.'s Resp. Defs.' Mot. Extend Time ¶ 3, ECF No. 78.)

21. The Court therefore gives reduced deference to Cardiorentis's choice of forum. This factor weighs against granting a stay, but only slightly.

B. Location of Witnesses and Evidence

22. The clinical trial for Ularitide was a global undertaking, involving doctors, patients, and hospitals around the world. As a result, this litigation is likely to involve a number of witnesses and reams of evidence from a variety of locations—an important consideration because "the touchstone of *forum non conveniens* analysis is convenience." *La Seguridad v. Transytur Line*, 707 F.2d 1304, 1307 (11th Cir. 1983).

1. Convenience of Witnesses and Convenience and Access to Another Forum

23. The location of witnesses is "always a key factor in forum non conveniens cases." *Manu Int'l, S.A. v. Avon Prods., Inc.*, 641 F.2d 62, 66 (2d Cir. 1981). The Court must consider not only the number of witnesses but also the materiality and importance of the witnesses. *See, e.g.*, *Bos. Telecomms. Grp., Inc. v. Wood*, 588 F.3d 1201, 1209 (9th Cir. 2009); *Reid-Walen v. Hansen*, 933 F.2d 1390, 1396 (8th Cir. 1991).

24. Materiality turns on the nature of Cardiorentis's allegations. In its complaint, Cardiorentis attributes the trial's failure primarily to the enrollment (and subsequent concealment) of patients who did not meet the trial protocol. (*See* Compl. ¶¶ 7, 8, 49, 51.) This protocol established the criteria by which a patient was included in or excluded from the trial. (Compl. ¶¶ 31–32.) Enrollment of ineligible patients could affect the validity of the trial data, and IQVIA employees and affiliates were required to report any protocol deviations to Cardiorentis. (*See* Compl. ¶¶ 33, 35; Reply Br. Ex. 3 ¶¶ 12, 15.) IQVIA UK also performed source data verification to ensure that the reported data matched patient records. (*See* Reply Br. Ex. 3 ¶¶ 18–19.) Defendants' alleged failure to identify and report protocol deviations and perform source data verification forms the basis of this suit.

25. These duties were largely performed by three groups of potential witnesses: the trial investigators, the Clinical Research Associates ("CRAs"), and the Clinical Project Management Team ("CPM team"). (Reply Br. 5–6.) The investigators are the doctors who treated the

patients at each study site. (Reply Br. Ex. 3 ¶ 7.) They screened potential trial participants and determined a patient's eligibility. (Compl. ¶¶ 30, 34; Reply Br. Ex. 3 ¶ 7.) The CRAs, in turn, had responsibility for training the investigators, overseeing them, and monitoring the trial sites, along with identifying protocol deviations and performing source data verification. (Reply Br. Ex. 3 ¶¶ 12, 15, 18–19.) The CPM team had overall responsibility for managing and operating the trial, including oversight responsibility for training investigators, monitoring sites, and addressing protocol deviations. (Mem. in Supp. Ex. 5 ¶ 8; Reply Br. Ex. 3 ¶¶ 7, 14.) In short, these individuals have personal knowledge of the conduct giving rise to the allegations in the complaint. Not all will be called as witnesses, but the key witnesses are likely to come from their ranks.

26. These witnesses are scattered across the globe, but with significant concentrations in Europe. Of the 179 investigators, forty-four percent were located in the European Union. Only one was located in North Carolina. (Mem. in Supp. Ex. 4 Suppl. 5–9, ECF No. 20.5.) Of the roughly 100 CRAs, seventy-two were in Europe and two were in North Carolina. (Reply Br. Ex. 1 ¶ 6, ECF No. 81.2.) Twenty-two of the twenty-nine CPM team members were located in Europe while only two members were in North Carolina. (Reply Br. Ex. 1 ¶ 5.)

27. These witnesses and the work they performed were also managed from Europe. Three of the five Global Clinical Project Managers ("Global CPMs"), who were responsible for the overall operation of the study sites, were in Europe. (Reply Br. Ex. 3 ¶¶ 8–10.) None were located in North America. (Reply Br. Ex. 3 ¶ 10.) The Global CPMs were supervised by two Line Managers, one located in England and the other in France. (Reply Br. Ex. 3 ¶ 9.)

28. Other teams that played relevant roles in the trial also appear to be concentrated in Europe. By way of example, a fifteen-member Executive Committee designed the trial protocol. (Mem. in Supp. Ex. 4 1957.) Eight of these team members were in Europe, none in North Carolina. (Mem. in Supp. Ex. 4 Suppl. 2.) When the investigators and CRAs ran into medical issues, including issues of protocol interpretation, the Medical Advisors provided guidance. (Mem. in Supp. Ex. 5 ¶ 9.) Two of the seven were in North Carolina, but four were in Europe. (Reply Br. Ex. 1 ¶ 7.) The investigators collected and processed patient data using a system developed by the Data Management team, every member of which was located in France. (Mem. in Supp. Ex. 5 ¶ 11; Reply Br. Ex. 1 ¶ 8.) The Biostatistician team was in charge of designing the trial's statistical analysis plan and had seven members located in Europe. (Mem. in Supp. Ex. 5 ¶ 12; Reply Br. Ex. 1 ¶ 9.) It seems clear that some

of these individuals will be material witnesses; Cardiorentis has sought extensive information about their roles in the trial in its discovery requests. (Mem. in Supp. Ex. 8 ¶¶ 4, 5, 20(g), 44, ECF No. 20.9.)

29. Cardiorentis says little about these potential witnesses, instead emphasizing Defendants' quality assurance operations. Cardiorentis points to the Clinical Event Validation and Adjudication ("CEVA") system, a North Carolina-based team that Cardiorentis alleges trained the investigators and assisted with reporting protocol deviations. (Opp'n Ex. A ¶ 14(c)–(d), ECF No. 75.1.) But Defendants have supplied evidence showing that the CPM team, CRAs, and investigators performed these duties, not CEVA. (Reply Br. Ex. 3 ¶¶ 7–12.) In addition, a separate Quality Assurance team conducted all of the trial's audits (thirty in Europe, two in North Carolina), and its members were located in Finland, Belgium, and Texas. (Reply Br. Ex. 2 ¶¶ 1, 3, 9–10, 12, ECF No. 81.3.)

30. CEVA appears to be an administrative data compilation tool that provided information to the Clinical Events Committee ("CEC") and Data Safety Monitoring Board ("DSMB"). These two teams played a role in ensuring patient safety. When a patient suffered a certain medical event, including death, the CEC analyzed the cause. (Reply Br. Ex. 4 ¶¶ 4–6, ECF No. 81.5.) The DSMB also evaluated patient safety data and was the body that ultimately recommended discontinuing the trial. (Reply Br. Ex. 4 ¶¶ 10–12.) The CEC team members are located entirely in Scotland, and three of the four DSMB team members were located in Europe. (Mem. in Supp. Ex. 4 Suppl. 3.)

31. Cardiorentis also alleges that ten other witnesses, all high-level IQVIA NC officers and employees, are located in North Carolina. (*See* Compl. ¶ 45(a)–(j); Opp'n 7, 12, 14.) According to Cardiorentis, these employees made or approved every medical and financial decision throughout the course of the trial. (Opp'n 7; Opp'n Ex. A ¶¶ 24, 25.) But the complaint does not clearly tie any of its allegations of wrongdoing to these IQVIA NC employees. In addition, IQVIA NC has supplied affidavits demonstrating that several of the witnesses had no day-to-day role in the trial. (*See* Mem. in Supp. Ex. 10 ¶¶ 10–13, ECF No. 20.11.)

32. The Court concludes, based on the complaint's allegations, that the more material witnesses are the trial personnel who were involved in drafting the protocol, training investigators, monitoring trial sites, identifying and reporting protocol deviations, and performing source data verification. As discussed above, most of these witnesses are located in Europe and few are located in North Carolina. It is therefore clear that England would be a far more convenient forum than North Carolina for the majority of the relevant witnesses.

33. Cardiorentis observes, correctly, that England and Europe are not synonymous and that most of these witnesses are not located in England. (Opp'n 9–10.) But the weight of authority holds that a European forum is more convenient when the preponderance of witnesses is concentrated in Europe. *See*, *e.g.*, *Schertenleib v. Traum*, 589 F.2d 1156, 1165 (2d Cir. 1978); *Vivendi S.A. v. T-Mobile USA*, *Inc.*, 2008 U.S. Dist. LEXIS 118529, at *34–35 (W.D. Wash. June 5, 2008); *Delta Brands*, *Inc. v. Danieli Corp.*, 2002 U.S. Dist. LEXIS 24532, at *25–26 (N.D. Tex. Dec. 19, 2002). Practically speaking, it is certainly easier for witnesses residing in Europe to travel to England than it is for the same witnesses to travel to North Carolina.

34. This is bolstered by the fact that many of the most material witnesses are third parties. The investigators, CEC team, and DSMB team members are not employees of IQVIA UK or IQVIA NC. (*See* Mem. in Supp. Ex. 4 Suppl. 5–9; Reply Br. 6; Reply Br. Ex. 4 ¶¶ 5, 10.) These witnesses are more likely to participate in the case if it proceeds in a European forum. *See Marnavi Splendor GmbH & Co. KG. v. Alstom Power Conversion*, *Inc.*, 706 F. Supp. 2d 749, 757 (S.D. Tex. 2010). And courts often give greater weight to the convenience of nonparty witness. *See Morris v. Chem. Bank*, 1987 U.S. Dist. LEXIS 8031, at *13–14 (S.D.N.Y. Sept. 10, 1987); *see also Banco de Seguros del Estado v. J.P. Morgan Chase & Co.*, 500 F. Supp. 2d 251, 262 (S.D.N.Y. 2007); *Mohamed v. Mazda Motor Corp.*, 90 F. Supp. 2d 757, 775 (E.D. Tex. 2000).

35. In short, the balance of witnesses with pertinent, firsthand information are in Europe, and England is a more convenient forum for those witnesses than North Carolina. The convenience of witnesses favors a stay.

2. Relative Ease of Access to Sources of Proof

36. Given the difficulty and expense associated with gathering evidence in a foreign jurisdiction, the relative ease of access to sources of proof has been considered particularly important in the *forum non conveniens* analysis. *See Ford v. Brown*, 319 F.3d 1302, 1308 (11th Cir. 2003). In analyzing this factor, a court should first consider the evidence required to prove or disprove each claim and then assess the likely location of that evidence. *See J.C. Renfroe & Sons*, *Inc. v. Renfroe Japan Co.*, *Ltd.*, 515 F. Supp. 2d 1258, 1270 (M.D. Fla. 2007).

37. Here, the Court has the benefit of reviewing Cardiorentis's discovery requests, which seek extensive discovery of evidence located largely in Europe. For example, Cardiorentis seeks information about the protocol, along with the identity of personnel involved with, and

documents and communications related to, protocol deviations and the source data verification process. (Mem. in Supp. Ex. 8 ¶¶ 4–7, 13–15, 18, 25; Mem. in Supp. Ex. 9 ¶¶ 4, 5, 8–10, ECF No. 20.10.) Other discovery requests ask for information regarding the trial sites and associated staff, site visits, and site management. (Mem. in Supp. Ex. 8 ¶¶ 8–12, 16–18, 44; Mem. in Supp. Ex. 9 ¶¶ 6, 7, 11.) And Cardiorentis seeks the meeting minutes of the CEC and the DSMB (whose members are primarily in Europe); information about a Blind Data Review Meeting (held in Scotland); and all documents related to inspections by Dutch and Swiss regulatory authorities. (Mem. in Supp. Ex. 5 ¶¶ 5, 14; Mem. in Supp. Ex. 8 ¶¶ 28, 29, 49.) The bulk of this information relates to European locations and personnel. (Reply Br. Ex. 3 ¶¶ 8–10.)

38. It will be much easier for the parties to access relevant sources of proof from England. Importantly, the Services Agreement that gives rise to all of IQVIA UK's trial responsibilities was executed in Reading, England. (Mem. in Supp. Ex. 1 ¶ 5, ECF No. 20.2; Services Agreement at 18.) England is also closer to much of the relevant evidence that will need to be collected from the study sites.

39. Conversely, North Carolina is not likely to be a significant source of evidence. Cardiorentis seeks, for example, discovery of all audits performed by Defendants. (Mem. in Supp. Ex. 8 ¶¶ 31, 32; Mem. in Supp. Ex. 9 ¶ 12.) Only two took place in North Carolina; the other thirty were in Europe. (Reply Br. Ex. 2 ¶¶ 9–10.) Documents related to CEVA may be based in North Carolina, but as discussed earlier, CEVA is likely to be less material than the Europe-centric teams it supported. (Reply Br. Ex. 4 ¶¶ 6, 8, 11.)

40. Additionally, if this case were to proceed in England, the parties may be able to take advantage of European Council Regulation No. 1206/2001. This regulation simplifies the exchange of evidence between members of the European Union. *See In re Air Crash Over the Mid-Atl. on June 1, 2009*, 760 F. Supp. 2d 832, 844 n.8 (N.D. Cal. 2010); *Vivendi S.A.*, 2008 U.S. Dist. LEXIS 118529, at *37. To the extent it is available, this method of obtaining evidence slightly favors an English forum because it is preferable to obtaining evidence through the more "time-consuming and expensive" procedures of the Hague Convention. *Crosstown Songs U.K., Ltd. v. Spirit Music Grp., Inc.*, 513 F. Supp. 2d 13, 17 (S.D.N.Y. 2007); *see also Rabbi Jacob Joseph Sch. v. Allied Irish Banks, P.L.C.*, 2012 U.S. Dist. LEXIS 121438, at *22 (E.D.N.Y. Aug. 27, 2012).[3]

3. Cardiorentis argues that the United Kingdom's anticipated exit from the European Union casts doubt on the availability of European Council Regulations, but this argument

41. Given the worldwide nature of the clinical trial, Cardiorentis and Defendants will be required to undergo extensive and burdensome evidence production from abroad whether the case proceeds in North Carolina or England. But there is little relevant evidence in North Carolina, and England is much closer to important sources of proof. This factor favors a stay.

3. Availability of Compulsory Process

42. Both North Carolina and England allow courts to compel unwilling witnesses to attend trial proceedings. Federal courts have generally found that this factor favors dismissal from an American forum when, as here, a large number of witnesses are located overseas beyond the reach of a court's compulsory process. *See MicroAire Surgical Instruments, LLC v. Arthrex, Inc.*, 2010 U.S. Dist. LEXIS 70191, at *20 (W.D. Va. July 13, 2010).

43. However, where the moving party fails to allege that nonparty witnesses would participate only if compelled to do so, the availability of compulsory process "should be given little weight in the overall balancing scheme" of the *forum non conveniens* analysis. *DiFederico*, 714 F.3d at 806; *see also Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1231 (9th Cir. 2011); *Duha v. Agrium, Inc.*, 448 F.3d 867, 877 (6th Cir. 2006); *Peregrine Myan. Ltd. v. Segal*, 89 F.3d 41, 47 (2d Cir. 1996). Neither side has identified any involuntary witnesses here. In the absence of meaningful evidence of the need for compulsory process, the factor is neutral.

C. Applicable Law

44. State and federal courts alike agree that the need to apply foreign law favors a stay in a *forum non conveniens* analysis. *See, e.g.*, *Manuel v. Gembala*, 2012 N.C. App. LEXIS 359, at *12 (N.C. Ct. App. Mar. 20, 2012) (upholding stay on appeal because, "most notably," the claims were governed by federal law and other States' laws); *see also Piper Aircraft*, 454 U.S. at 260 n.29 (citing cases); *NLA Diagnostics LLC v. Theta Techs. Ltd.*, 2012 U.S. Dist. LEXIS 108779, at *12–13 (W.D.N.C. Aug. 3, 2012).

45. Cardiorentis's claims for breach of contract will be governed by English law. The Services Agreement specifies that it must be construed

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is speculative. (Opp'n 15–16.) The timing and details of the so-called Brexit remain unsettled, and there is uncertainty as to whether the relevant procedural mechanisms (and many other EU regulations) would or would not continue to apply.

and applied "in accordance with the laws of England and Wales," (Services Agreement § 28.0), and North Carolina courts generally honor choice-of-law clauses. *See IPayment, Inc. v. Grainger*, 2017 N.C. App LEXIS 1087, at *9, 808 S.E.2d 796, 800 (2017). The Quality Agreement does not have its own choice-of-law provision but, as an outgrowth of the Services Agreement, will also be governed by the law of England and Wales. (Quality Agreement § 1.) Cardiorentis does not dispute that either agreement is governed by English law.

46. While American courts can and do apply foreign law, they regularly hold that English courts are better equipped to apply English law. *See, e.g., Rabbi Jacob Joseph Sch.*, 2012 U.S. Dist. LEXIS 121438, at *13–14; *Denmark v. Tzimas*, 871 F. Supp. 261, 271 (E.D. La. 1994). Moreover, applying and proving foreign law can impose significant costs on parties in terms of time and money and can also increase the administrative burden on the court. *See Yavuz v. 61 MM, Ltd.*, 576 F.3d 1166, 1181 (10th Cir. 2009); *In re Banco Santander Sec.-Optimal Litig.*, 732 F. Supp. 2d 1305, 1339 (S.D. Fla. 2010); *Stroitelstvo Bulg., Ltd. v. Bulgarian-Am. Enter. Fund*, 598 F. Supp. 2d 875, 889 (N.D. Ill. 2009). Therefore, that the contract claims are governed by English law favors a stay.

47. As to Cardiorentis's remaining claims, the parties vigorously dispute the applicable law. Generally, lex loci delicti "is the appropriate choice of law test to apply to tort claims," including fraud. *Harco Nat'l Ins. Co. v. Grant Thornton LLP*, 206 N.C. App. 687, 692, 698 S.E.2d 719, 722 (2010). The appropriate test for claims asserted under the Unfair and Deceptive Trade Practices Act is unsettled, however. *Compare Harco Nat'l*, 206 N.C. App. at 698, 698 S.E.2d at 726 (applying lex loci), *with Andrew Jackson Sales v. Bi-Lo Stores, Inc.*, 68 N.C. App. 222, 225, 314 S.E.2d 797, 799 (1984) (applying "most substantial relationship" test).

48. To evaluate this factor, the Court need not definitively determine which law governs, particularly when leaving the question open would avoid "unnecessarily addressing an undecided issue of [state] law." *Galustian v. Peter*, 561 F. Supp. 2d 559, 565 (E.D. Va. 2008). It suffices to note that North Carolina law is unlikely to apply to any of the tort claims.

49. Under the lex loci test, tort claims are governed by the law of the place of injury, which is sustained in the jurisdiction where the last act giving rise to the injury occurred. *See Harco Nat'l*, 206 N.C. App. at 694, 698 S.E.2d at 724; *Stetser v. TAP Pharm. Prods. Inc.*, 165 N.C. App. 1, 14, 598 S.E.2d 570, 580 (2004). The last act is often "the suffering of damages." *M-Tek Kiosk, Inc. v. Clayton*, 2016 U.S. Dist. LEXIS

67036, at *49 (M.D.N.C. May 23, 2016) (alterations and quotation marks omitted). There is no bright-line rule that a corporate plaintiff suffers injury in the forum where it maintains its principal place of business. *See Harco Nat'l*, 206 N.C. App. at 697, 698 S.E.2d at 725–26. But in this case, Cardiorentis asserts injury in the form of costs it paid to mount the trial, other costs and expenses associated with the trial, and lost profits. (Compl. ¶¶ 83–84.) Cardiorentis likely suffered these losses at its corporate home in Switzerland. (Compl. ¶ 11.) Therefore, it appears that Swiss law would govern all of Cardiorentis's tort claims if the Court applied lex loci.

50. If the Court were required to apply the most significant relationship test to the unfair trade practices claim, the question would be which forum has the strongest ties to the case. *See*, *e.g.*, *Andrew Jackson*, 68 N.C. App. at 225, 314 S.E.2d at 799. Cardiorentis's claim is primarily fraud-based, essentially alleging that Defendants improperly concealed their breaches of a contract between English and Swiss companies and governed by English law. (*See*, *e.g.*, Compl. ¶¶ 104(b)–(c), 104(e).) Under this test, it seems likely that English or Swiss law would govern, not North Carolina law.

51. At this stage, it is evident there will be substantial questions of English law. It also appears likely that a court will need to apply Swiss law to at least some of Cardiorentis's claims and unlikely that North Carolina law will govern any of the claims. Therefore, this factor favors a stay.

D. Local Concern and Nature of the Case

52. The Court must also consider the nature of the case and whether either forum has a local interest in resolving the controversy. At its root, this case concerns the performance of a global clinical trial pursuant to a contract (the Services Agreement) that is between English and Swiss companies and governed by English law. England therefore has a clear, strong interest. *See NLA Diagnostics*, 2012 U.S. Dist. LEXIS 108779, at *12–13.

53. By contrast, North Carolina has a weaker interest. Most of the conduct giving rise to the claims occurred in Europe, not North Carolina. The sole tie to North Carolina is the fact that IQVIA NC is located in this State. (Compl. ¶ 12.) Although our courts have a general interest in providing a forum to hear disputes involving injuries caused by citizens of the State, *see Reid-Walen*, 933 F.2d at 1400, this interest is diminished when the lion's share of relevant activity occurred abroad and when the controversy is unlikely to be governed by North Carolina law.

54. Thus, the Court concludes that England possesses the stronger interest in resolving this dispute. *See, e.g.*, *Gullone v. Bayer Corp.*, 484 F.3d 951, 959 (7th Cir. 2007); *Pollux Holding, Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 76 (2d Cir. 2003). These factors favor a stay. *See La Mack*, 2015 NCBC LEXIS 24, at *21.

E. Fair and Reasonable Forum

55. As a prerequisite to the entry of a stay, the moving party "must stipulate his consent to suit in another jurisdiction." N.C. Gen. Stat. § 1-75.12(a). This condition is met here. IQVIA UK and IQVIA NC have stipulated their consent to suit in either England or Switzerland. (Mem. in Supp. 23.)

56. Section 1-75.12(a) also requires that the alternative forum be reasonable and fair. This, too, is satisfied. Cardiorentis does not contend that England is an unreasonable or unfair forum. (Opp'n 3.) Indeed, England is "a forum that American courts repeatedly have recognized to be fair and impartial." *Haynsworth v. Corp.*, 121 F.3d 956, 967 (5th Cir. 1997); *see also Tarasewicz v. Royal Caribbean Cruises, Ltd.*, 2015 U.S. Dist. LEXIS 84779, at *39–40 (S.D. Fla. June 30, 2015); *Capital Mkts. Int'l v. Gelderman, Inc.*, 1998 U.S. Dist. LEXIS 12488, at *12 (N.D. Ill. Aug. 7 1998).

III.

CONCLUSION

57. After considering the relevant factors, the Court finds in its sound discretion that this case should be stayed pursuant to section 1-75.12(a). The convenience of witnesses, ease of access to sources of proof, applicable law, and local interest factors significantly favor a stay and outweigh any deference due to Cardiorentis's choice of forum. The balance of all relevant factors shows that it would be more convenient for the parties to litigate these claims in England. Defendants have shown that a substantial injustice would result if this case were to proceed in North Carolina and that England is a convenient, reasonable, and fair place of trial. For these reasons, the Court **GRANTS** Defendants' motion to stay, and this action is **STAYED** until further order of this Court.

58. As a result, the Court need not and does not decide whether it may exercise personal jurisdiction over IQVIA UK or whether Cardiorentis has failed to state its claims for relief. The Court **DENIES** as moot Defendants' motion to dismiss for failure to state a claim and IQVIA UK's motion to dismiss for lack of personal jurisdiction. *See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 425

(2007) (holding that *forum non conveniens* is a threshold issue that may be decided before ruling on personal jurisdiction or other issues).

59. During the pendency of the stay, the Court will hold this case on an inactive docket. The Court **ORDERS** that the parties shall jointly file a status report within six months of the entry of this Order and every six months thereafter. In the event the parties resolve this dispute by settlement or other means, they shall notify the Court within seven days of reaching any resolution.

SO ORDERED, this the 31st day of December, 2018.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases

THE CITY OF CHARLOTTE, A NORTH CAROLINA MUNICIPAL CORPORATION
v.
UNIVERSITY FINANCIAL PROPERTIES, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY F/K/A/ UNIVERSITY BANK PROPERTIES LIMITED PARTNERSHIP; BANK OF AMERICA, N.A. F/K/A NCNB NATIONAL BANK OF NORTH CAROLINA, TENANT; AND ANY OTHER PARTIES IN INTEREST

No. 183PA16-2

Filed 28 February 2020

On discretionary review under N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 818 S.E.2d 116 (N.C. Ct. App. 2018), reversing an order entered on 29 September 2016 by Judge Daniel A. Kuehnert in Superior Court, Mecklenburg County. Heard in the Supreme Court on 1 October 2019 in session in the Randolph County 1909 Historic County Courthouse in the City of Asheboro pursuant to section 18B.8 of Session Law 2017-57.

Parker Poe Adams & Bernstein LLP, by Charles C. Meeker and DeWitt F. McCarley, for plaintiff-appellant.

Johnston, Allison & Hord, P.A., by R. Susanne Todd, Martin L. White, and David V. Brennan, for defendant-appellee.

PER CURIAM.

Justice DAVIS did not participate in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Piro v. McKeever*, 369 N.C. 291, 291, 794 S.E.2d 501, 501 (2016) (per curiam) (affirming a Court of Appeals opinion without precedential value by an equally divided vote).

AFFIRMED.

CRYSTAL COGDILL AND JACKSON'S GENERAL STORE, INC.
v.
SYLVA SUPPLY COMPANY, INC. A/K/A SYLVA SUPPLY COMPANY,
DUANE JAY BALL, AND IRENE BALL

No. 219A19

Filed 28 February 2020

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 828 S.E.2d 512 (N.C. Ct. App. 2019), affirming an order of summary judgment entered on 16 April 2018 by Judge Mark E. Powell in Superior Court, Jackson County. Heard in the Supreme Court on 7 January 2020.

The Law Firm of Diane E. Sherrill, PLLC, by Diane E. Sherrill, for plaintiff-appellants.

Coward, Hicks & Siler, P.A., by J. K. Coward Jr., for defendant-appellees.

PER CURIAM.

AFFIRMED.

IN RE D.W.P.

[373 N.C. 327 (2020)]

IN THE MATTER OF D.W.P., B.A.L.P.

No. 140A19

Filed 28 February 2020

1. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—findings of fact

Where the trial court terminated a mother's parental rights to her two children for failure to make reasonable progress toward correcting the conditions that led to the removal of her children, the findings challenged by the mother on appeal were supported by competent evidence, including that she had not been honest about, or concealed the truth about, the cause of her younger child's injuries. Respondent-mother provided no medically feasible explanation for the multiple bone fractures suffered by her son while he was under her and her fiance's care, and resumed a relationship with her fiance despite domestic violence incidents.

2. Termination of Parental Rights—grounds for termination—neglect—conclusions of law

The trial court properly terminated a mother's parental rights to her two children on the ground of neglect after concluding that the mother would be likely to neglect her children in the future, based on her failure to provide an explanation for or acknowledge her responsibility for multiple bone fractures suffered by her younger child while he was under her and her fiance's care.

Justice DAVIS took no part in the consideration or decision of this case.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7A-27(a)(5) from an order entered on 23 January 2019 by Judge Angela C. Foster in District Court, Guilford County. Heard in the Supreme Court on 6 November 2019.

Mercedes Chut, for petitioner-appellee Guilford County Department of Health and Human Services.

Coats & Bennett, PLLC, by Gavin Parsons, for appellee Guardian ad Litem.

Michael Spivey for respondent-appellant mother.

BEASLEY, Chief Justice.

Respondent, the mother of D.W.P. (David)[1] and B.A.L.P. (Briana), appeals from the trial court's 23 January 2019 order terminating her parental rights. The issue before the Court is whether the trial court made and relied upon findings of fact that were supported by clear, cogent, and convincing evidence in assessing respondent-mother's reasonable progress to remedy the conditions that led to the removal of her children. After careful consideration of the relevant legal authorities and in light of the record evidence, we affirm the trial court's decision.

I. Facts and Procedural History

On 1 March 2015, the Guilford County Department of Health and Human Services (GCDHHS) received a Child Protective Services (CPS) report that eleven-month old David was being treated at MedCenter Emergency Department in High Point for a broken femur. The doctor examining David had also performed a body scan and the results showed older clavicle, tibia, fibula, and rib fractures that were still in the process of healing. During the GCDHHS investigation, respondent-mother stated that she never noticed any signs that David had been harmed and attributed his fractured femur to the family's seventy-pound dog and suggested that the children's biological father had inflicted the older injures.

On 20 March 2015, based on David's young age and the multiple fractures for which respondent-mother and her fiancé, Mr. Goff, provided no plausible explanation, GCDHHS filed a petition and nonsecure custody motion relating to of David and Briana. On the same date, Judge Betty J. Brown entered an order granting nonsecure custody of both children to GCDHHS. After a hearing held on 26 January 2016, the court adjudicated David an abused and neglected juvenile and adjudicated Briana, although she had no injuries, a neglected juvenile. Legal and physical custody of both children was granted to GCDHHS and a permanency planning hearing was set for 23 March 2016. Respondent-mother appealed the trial court's order.

The COA affirmed David's adjudication as abused and neglected, but reversed Briana's adjudication as being a neglected juvenile. *See In re*

1. A pseudonym is used to protect the juveniles' identities and for ease of reading.

D.P. and B.P., 250 N.C. App. 507, 793 S.E.2d 287 (2016) (unpublished). The court remanded the case to the trial court to make appropriate findings of fact and conclusions of law to determine if Briana was, in fact, a neglected juvenile. *Id.* Respondent-mother later stipulated at the adjudication hearing on 27 October 2017 that Briana was neglected.

As a result of David's injuries, respondent-mother was charged with felony child abuse inflicting serious injury. On 9 November 2017, she entered an *Alford* plea to misdemeanor child abuse and was placed on probation for twelve months. During the allocution, respondent-mother told the court David's injuries may have occurred because he "slept funny." The trial court made a finding from this testimony that respondent-mother provided yet another explanation for the injuries that was inconsistent with previously submitted evidence involving David's injuries. Following respondent-mother's plea, there was a permanency hearing on 30 November 2017.

Following the hearing, the court entered an order ceasing reunification efforts and directing GCDHHS to file a petition for termination of parental rights. GCDHHS did so on 20 March 2018. After an 8 January 2019 termination hearing, the trial court entered its order terminating respondent-mother's parental rights on 23 January 2019. The court acknowledged that respondent-mother had completed many of the requirements set out in the permanency plan, but concluded that she had willfully failed to make reasonable progress to remedy the conditions that led to removal of her children, that her neglect continued, and that she was likely to neglect the children in the future.

Among other things, the court specifically focused on respondent-mother's refusal to honestly report how David's injuries occurred. Because respondent-mother and Mr. Goff were David's only caretakers at the time of the incident, the court identified only three possible causes of the injuries: (1) respondent-mother caused the injures, (2) respondent and Mr. Goff caused the injuries together, or (3) respondent-mother failed to protect David from Mr. Goff causing the injuries. Without knowing the cause of the injuries, the court believed GCDHHS was unable to provide a plan to ensure that injuries would not occur in the future.

Respondent-mother appealed the trial court's order terminating her parental rights, arguing that the trial court made and relied upon findings of fact that were unsupported by clear, cogent, and convincing evidence in assessing her reasonable progress to remedy the conditions that led to the removal of her children.

II. Discussion

Termination of parental rights proceedings consist of two stages: adjudication and disposition. N.C.G.S. §§ 7B-1109, -1110 (2017); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). At the adjudicatory stage, the petitioner must prove by "clear, cogent, and convincing evidence" that one or more grounds for termination exist under section 7B-1111(a) of our General Statutes. N.C.G.S. § 7B-1109(e), (f) (2017). Thus, we review a district court's adjudication "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. at 111, 316 S.E.2d at 253 (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). Unchallenged findings of fact made at the adjudicatory stage, however, are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citing *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962)). If the petitioner proves at least one ground for termination during the adjudicatory stage, "the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110)).

On appeal, respondent-mother challenges several of the trial court's findings of fact as unsupported by clear, cogent, and convincing evidence as well as its conclusions of law regarding her progress in remedying the conditions that led to the removal of her children and the likelihood of future neglect.

A. Challenged Findings of Fact

[1] Findings of fact supported by competent evidence are binding on appeal, despite evidence in the record that may support a contrary finding. *See In re Montgomery*, 311 N.C. at 112-13, 316 S.E.2d at 254. Further, it is the duty of the trial judge to ' "pass[ ] upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom." ' *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 168 (2016) (quoting *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968)). The trial judge's decisions as to the weight and credibility of the evidence, and the inferences drawn from the evidence are not subject to appellate review. *Id.*

"In all actions tried upon the facts without a jury . . . the court shall find the facts specifically and state separately its conclusions of law thereon . . . ." N.C.G.S. § 1A-1, Rule 52(a)(1). Thus, the trial court must,

through "processes of logical reasoning," based on the evidentiary facts before it, "find the ultimate facts essential to support the conclusions of law." *See In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003). The resulting findings of fact must be "sufficiently specific" to allow an appellate court to "review the decision and test the correctness of the judgment." *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982).

1. Respondent-mother has not been honest about, or has concealed the truth about, the cause of David's injuries.

The trial court made several findings of fact about respondent-mother's failure to reveal the source of David's injuries, including:

> Despite her participation and completion of some of the recommended services, [respondent-mother] has not honestly reported how [David] received his injuries. Because she and Mr. Goff were the sole caretakers of the juvenile at the time, there are only three possible scenarios: (1) [respondent-mother] caused the injuries, (2) [respondent-mother] and Mr. Goff caused the injuries together, and (3) [respondent-mother] failed to protect [David] from Mr. Goff causing the injuries. Without knowing which of these scenarios occurred, the Department was unable to put the necessary services in place in order to return the juveniles to a safe and appropriate home.
>
> . . .
>
> Given that [respondent-mother] has refused to admit how [David] received his injuries while in the exclusive care of herself and Mr. Goff, and has refused to accept responsibility for her actions, there is a likelihood of the repetition of neglect by [respondent-mother].
>
> . . .
>
> [Respondent-mother] has not put the best interest of the juveniles ahead of her decision to conceal the truth from the Department and from the Court as to the actual cause of [David's] injuries. She has provided several explanations and none are medically consistent with the injuries. Since [David] has been in the custody of the Department, he has not sustained any more injuries of the sort he presented with on March 1, 2015.

Respondent-mother argues that the trial court's findings were not supported by evidence because the court could not and did not find that she or Mr. Goff had harmed David. We disagree.

Dr. Briggs, the Pediatric Child Abuse Specialist who examined David, reported that David suffered older fractures to the femur, anterior ribs and one posterior rib, lower legs and the clavicle. While she could not provide an exact date for when each injury occurred, she reported that the fractures were in different stages of healing, there was no medical reason for all the fractures, and she did not believe any of the injuries were four or five months old. Respondent-mother reported to the GCDHHS that she and Mr. Goff were David's only caretakers at the time of the most recent injury.

Respondent-mother initially reported that the most recent injury could have been caused by the seventy-pound family dog, and she believed the older injuries occurred while David was with his biological father in November 2014. On 3 March 2015, however, Dr. Briggs observed that while it was not impossible for the dog to have caused one break in David's leg, the incident does not explain the other, older fractures. And while respondent-mother was concerned that David's biological father may have harmed him, Dr. Briggs concluded that many of the fractures were newer than the last reported contact David had with his father.

Respondent-mother fails to offer a medically feasible explanation for the injuries or to take responsibility for the role she and Mr. Goff had in causing them, despite ample evidence that the injuries could not have been caused by any other person. Accordingly, we conclude that the trial court's findings regarding respondent-mother's truthfulness about the source of David's injuries is supported by clear, cogent, and convincing evidence.

2. Respondent-mother violated her probation by failing to obtain a psychiatric evaluation as a condition of probation as required by Dr. Holm.

The trial court found that respondent-mother "ha[d] not completed a psychiatric evaluation. The completion of a psychiatric evaluation was also a condition of her probation[,] yet she has failed to participate in one." Respondent-mother argues that she was not required to have a psychiatric evaluation as a condition of probation and that she was ordered to report only for an initial evaluation by "any state licensed mental health agency specifically for child abuse." We disagree.

A special condition of respondent-mother's probation was to "[r]eport for initial evaluation by any state licensed mental health agency specifically for child abuse, participate in all further evaluation, counseling, treatment, or education programs recommended as a result of that evaluation, and comply with all other therapeutic requirements of those programs until discharged." Thus, respondent-mother was not only required to obtain an initial evaluation, but she was also required to participate in any recommended treatment as a result of the evaluation. Dr. Holms' report recommended that "an assessment by a psychiatrist would be helpful in furthering [respondent-mother's] desire to maintain a stable and loving home for her children with a minimum of disruption and conflict in [respondent-mother's] interactions with other adults."

Respondent-mother made no effort to follow Dr. Holms' recommendation, although doing so was a requirement of her probation. Thus, clear, cogent, and convincing evidence exists to support the trial court's finding as to respondent-mother's probation violation.

3. Respondent-mother resumed a relationship with Mr. Goff and they were working on reestablishing their relationship.

The trial court found that

> [Respondent-mother] resumed a relationship with [Mr. Goff] in June 2017 shortly after the death of her father, but failed to inform the Department as agreed. At that time, she provided [Mr. Goff] with a new key to her home. [Mr. Goff] was providing emotional support to [respondent-mother], and they were working on reestablishing their relationship . . .

Respondent-mother initially ended her relationship with Mr. Goff in September 2016. The record shows, and respondent-mother does not dispute, that she and Mr. Goff reconnected in June 2017. Respondent-mother informed the court that she relied on Mr. Goff for emotional support after the passing of her father. She explained that she was very isolated at the time and could not talk to many people, except Mr. Goff. Several months after the two resumed contact, respondent-mother testified that she provided Mr. Goff with access to her home to fix an electrical problem while she was at work. After the repair, she did not ask him to return the key to her home, even after a domestic violence incident ensued between the two.

Because respondent-mother admits that she did in fact resume contact with Mr. Goff and provided him with a key to her home, the

trial court's finding that respondent-mother resumed a relationship with Mr. Goff and they were working on reestablishing a relationship is supported by clear, cogent, and convincing evidence.

4. Respondent-mother continued a relationship with Mr. Goff despite domestic violence incidents.

Although there were no direct findings that respondent-mother had been abused by Mr. Goff before they separated, her testimony at the termination hearing indicates that one of the reasons they separated was because there was a possibility he could have caused the injuries to David. Despite these concerns, respondent-mother reconnected with Mr. Goff in June 2017. On 26 April 2018, after resuming her relationship with Mr. Goff, respondent-mother called the police because Mr. Goff had followed her to work, barricaded her in her car, and took her phone. Respondent-mother did not ask Mr. Goff to return the key to her home, nor did she change the locks after this incident.

Finally, after an encounter on 19 May 2018, when Mr. Goff entered her house, attempted to suffocate her with a pillow, and strangled her, respondent-mother sought a protective order. From these facts, there is clear, cogent, and convincing evidence that respondent-mother maintained a relationship with Mr. Goff despite domestic violence incidents.

5. Respondent-mother offered a new explanation for David's injuries during her Alford *plea.*

In Briana's adjudication order, the court found by clear, cogent, and convincing evidence that respondent-mother offered a new explanation for David's injuries during his plea allocution: that David may have slept on his side. Respondent-mother did not challenge this finding at the adjudicatory stage; therefore, it is binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

6. Respondent-mother intentionally withheld information concerning her marriage and lied to and evaded a social worker who came to her house.

The court found that

> [Respondent-mother] has maintained that she was not in a relationship with anyone since Mr. Goff. The evidence, however, is to the contrary. [Respondent-mother] began a relationship with Mr. Holyfield in June 2018; she married him on September 1, 2018. [Respondent-mother] was aware that she needed to notify the Department of her

> marriage. At the time of the juveniles' removal from her care, she was engaged to Mr. Goff. Mr. Goff provided the Department with his name, date of birth, and necessary information for the Department to conduct a complete background check. Mr. Holyfield has not been subjected to the same scrutiny and is therefore, not an approved person to have contact with the juveniles or to have the juveniles returned to his home.

Respondent-mother testified that she had known Mr. Holyfield since they were children. They reconnected and began dating in June 2018, Mr. Holyfield moved into respondent-mother's home between July and August 2018, and the two married in September 2018. She further testified that she believed it was relevant to the case that she had married Mr. Holyfield. However, she did not inform her social worker, or any party involved in the case about her relationship with him, either before or after their marriage. Even after being asked questions about her housing arrangement at a family team meeting in December 2018, respondent-mother failed to disclose information about Mr. Holyfield living with her. Until the date of the termination hearing, respondent-mother's case supervisor testified that she had never heard of Mr. Holyfield.

Additionally, respondent-mother had never missed a home visit prior to her husband moving in with her. However, on 20 November 2018, after Mr. Holyfield moved in, she missed her first home visit. The case supervisor testified that she knocked on the door and called out to respondent-mother, but no one answered the door. She observed respondent-mother's car in the driveway along with an unidentified car. She further testified that as she was leaving, she saw respondent-mother peer out the window, and immediately received a voicemail from respondent-mother saying that she was too sick to open the door.

The facts above support, by clear, cogent, and convincing evidence, the trial court's finding that respondent-mother hid her marriage and evaded social workers.

7. Respondent-mother failed to gain insight about David's injuries and make reasonable progress.

The trial court made the following findings of fact regarding respondent-mother's failure to determine the cause of David's injuries:

> Despite her participation in therapeutic services, [respondent-mother] has not gained sufficient insight or made sufficient progress in order to disclose how [David]

received his injuries. Throughout the time the juveniles have been in foster care, [respondent-mother] has offered several explanations for the injuries. In October 2017, [respondent-mother] appeared close to disclosing the cause of [David's] injuries. The Department has had multiple conversations with [respondent-mother] regarding [David's] injuries and how she believed they occurred. [Respondent-mother] shared with Social Worker Haik that she did not cause physical harm to the juvenile, she however, recognizes that as their mother, she was ultimately responsible for their care and supervision and accepts that role, very clearly now; and if the juveniles were returned to her, she would have to take a more cautious approach to allowing other people to care for the juveniles. According to [respondent-mother], she did not know how the injuries were inflicted/caused; so she was looking for an explanation for the injuries. The Department and [respondent-mother] have discussed various options, including, medical reasons, and most recently, on the night that [David's] leg was injured, [David] was in the care of Mr. Goff, the mother's [fiancé] at the time of the injuries, who was bathing him while she was preparing dinner. [Respondent-mother] indicated that during that time, she was primarily working outside the home, and again, she did not know how the injuries occurred, but as their mother, she was responsible, and [David] was in the care of Mr. Goff at the time. [Respondent-mother] has continually indicated that [David's biological father] caused the femur fracture, the ribs and the tibia injuries to [David]; this is contrary to the medical evidence. [Respondent-mother] had no other explanation at the time. However, on November 9, 2017, [respondent-mother] tendered a guilty plea pursuant to *Alford* with regard to [David's] injuries, in Case #15CRS74373. [Respondent-mother] was originally charged with Felony Neglect Child Abuse-Serious Physical Injury, but the charge was reduced to Misdemeanor Child Abuse. [Respondent-mother], during the allocution, offered yet another explanation for the cause of [David's] injuries, to wit that he may have slept funny. This explanation is contrary to the evidence previously submitted at the Adjudicatory Hearing involving [David], and clearly demonstrates [respondent-mother's] failure to make progress.

…

[Respondent-mother] has not made adequate progress within a reasonable period of time under the plan. Although she has addressed some of the components in her service agreement, she has not addressed concerns which led to the filing of the petition, namely how [David] received his injuries which were caused by non-accidental trauma. [Respondent-mother] has completed the Domestic Violence Intervention Program (DVIP) and the Parent Assessment Training and Education Program (PATE), she has made most, if not all her scheduled visits and she was engaging in individual therapy until April 2018. Despite the completion of those services, significant questions remain as to the cause of [David's] injuries, which included: multiple bilateral healing rib fractures - left 5, 6, 7, 8, 9, 10 and right 3, 4, 5, 6, 7 and possibly 8; mid-shaft left clavicle fracture; acute, comminuted left femoral diaphyseal fracture; possible healing fracture of the proximal left humeral metaphysis; healing right tibial fracture; possible healing fracture of the distal right fibula; possible comer fracture of the posterior aspect of the distal left tibial metaphysis; possible healing fracture of the distal right femoral metaphysis.

…

[Respondent-mother] has not put the best interest of the juveniles ahead of her decision to conceal the truth from the Department and from the Court as to the actual cause of [David's] injuries. She has provided several explanations and none are medically consistent with the injuries. Since [David] has been in the custody of the Department, he has not sustained any more injuries of the sort he presented with on March 1, 2015. [Respondent-mother] is the only person who has been criminally charged in this matter: Felony Child Abuse with Serious Injury. And, although she tendered a guilty plea to a Misdemeanor charge pursuant to Alford, she has never admitted that she or anyone else inflicted those injuries on [David]. The juveniles have been in foster care since March 2015, and the Court is still no closer to knowing exactly how [David] sustained his injuries. Because of that, [respondent-mother] has not adequately remedied the conditions that brought the juveniles into custody.

Respondent-mother has maintained that she does not know the cause of David's injuries and has offered explanations that are not medically supported. She acknowledged that she would not rule out the possibility that Mr. Goff committed the injuries to David, but she also admits to resuming contact with him after the children were taken from the home. While we recognize that respondent-mother has taken the proper steps to attend parenting classes and therapy, and has followed the majority of the court's recommendations to become a better parent, she has failed to acknowledge the harm that has resulted from her failure to identify what happened to David. Without recognizing the cause of David's injuries, respondent-mother cannot prevent them from reoccurring. Therefore, the trial court's finding that respondent-mother failed to gain insight and make reasonable progress regarding David's injuries is supported by clear, cogent and convincing evidence.

B. Challenged Conclusions of Law

[2] In termination of parental rights proceedings, this Court reviews trial court orders "by determining whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings support the trial court's conclusions of law." *In re B.O.A.*, 372 N.C. 372, 379, 831 S.E.2d 305, 310 (2019) (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). The trial court found that grounds exist to terminate respondent-mother's parental rights under N.C.G.S. § 7B-1111(a)(1), which provides that:

> (a) The court may terminate the parental rights upon a finding of one or more of the following:
>
> (1) The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101.

N.C.G.S. § 7B-1111(a)(1).

Respondent-mother disputes the trial court's conclusion that she will likely neglect her children in the future. GCDHHS argues that the trial court did not err in its conclusion that the children were neglected. A neglected juvenile is defined, in relevant part, as "[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; . . . or who lives in an environment injurious to the juvenile's welfare" N.C.G.S. § 7B-101(15).

Where, as here, the child has not been in the custody of the parent for a significant period of time, the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect. This is because requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible. *In re Ballard*, 311 N.C. 708, 714, 319 S.E.2d 227, 231 (1984) (overturning the termination of the respondent-mother's parental rights where the court failed to make an independent determination of whether neglect existed at the time of termination hearing). "The determinative factors must be the best interest of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *Id.* at 715, 319 S.E.2d 227, 565.

Thus, when a child has been separated from their parent for a long period of time, the petitioner must prove (1) prior neglect of the child by the parent and (2) a likelihood of future neglect of the child by the parent. *In re M.A.W.*, 370 N.C. 149, 152, 804 S.E.2d 513, 516 (2017) (quoting *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016)). The trial court found that respondent-mother failed to protect David. David's primary caregivers were respondent-mother and Mr. Goff; and the court's findings indicate that either of them, or both of them, caused David's injuries. *See In re Y.Y.E.T.*, 205 N.C. App. 120 (2010) (affirming termination of parental rights on ground of abuse and neglect based on finding that both parents were responsible for child's non-accidental injuries and each parent refused to identify the perpetrator). Even still, our Court has recognized that a termination of parental rights for neglect cannot be based solely on past conditions that no longer exist. *In re M.A.W.*, 370 N.C. at 152, 804 S.E.2d at 516.

In this case, the trial court's order relies upon: past abuse and neglect; failure to provide a credible explanation for David's injuries; respondent-mother's discontinuance of therapy; respondent-mother's failure to complete a psychiatric evaluation; respondent-mother's violation of the conditions of her probation; the home environment of domestic violence; respondent-mother's concealment of her marriage from GCDHHS; and respondent-mother's refusal to provide an explanation for or accept responsibility for David's injuries.

While we recognize the progress respondent-mother has made in completing her parenting plan, including completing parenting classes, attending therapy, and regularly visiting with her children, we are troubled by her continued failure to acknowledge the likely cause of David's injuries. The State of North Carolina has long recognized that the best interests of the child are always treated as the paramount consideration

in termination of parental rights cases. Termination of parental rights proceedings are not meant to be punitive against the parent, but to ensure the safety and wellbeing of the child. *See In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984) (recognizing that the determinative factor in deciding whether a child is neglected is the circumstances and conditions surrounding the child, and not the culpability of the parent).

Here, the findings of fact show that respondent-mother has been unable to recognize and break patterns of abuse that put her children at risk. Despite respondent-mother's acknowledgement that Mr. Goff could have caused David's injuries, she re-established a relationship with him that resulted in domestic violence. Subsequently, respondent-mother, after acknowledging the importance of notifying the GCDHHS that her new husband resided in her home, concealed the relationship from her case supervisors. Respondent-mother acknowledges her responsibility to keep David safe, but she refuses to make a realistic attempt to understand how he was injured or to acknowledge how her relationships affect her children's wellbeing. These facts support the trial court's conclusion that the neglect is likely to reoccur if the children are returned to respondent-mother's care.

Because there is sufficient evidence to support one ground for termination of respondent-mother's parental rights, the Court need not address the second ground for termination—that respondent-mother willfully left her children in foster care for more than twelve months without making reasonable progress. *See B.O.A.*, 372 N.C. at 380, 831 S.E.2d at 311; N.C.G.S. § 7B-1111(a)(2).

The neglect ground for termination is supported by the court's findings that respondent-mother has failed to acknowledge her responsibility for the events leading to her children's removal from the home and due to her inability to pinpoint the cause of David's injuries. As a result, we are fully satisfied that the trial court's findings support its conclusion that respondent-mother has not made reasonable progress in correcting the conditions that led to the children's removal, and the children are likely to suffer neglect in the future. Accordingly, we affirm the trial court's order terminating respondent-mother's parental rights.

AFFIRMED.

Justice DAVIS took no part in the consideration or decision of this case.

Justice EARLS dissenting.

In this case, the trial court's findings of fact concerning whether the mother has been honest about how her son, David, was injured are based on a fallacious logical deduction that ignores the possibility that she was either unwilling to lie in order to keep her children, or that she was unaware that her refusal to lie would result in her losing them. There is no doubt that David was seriously injured on repeated occasions by some person while he was in the custody of his mother and Mr. Goff. The evidence in the record further supports the factual finding that David's mother has, at different times, offered various possible explanations for David's injuries that are not consistent with opinions by David's treating physician about how the injuries might have been caused. The logical fallacy in the trial court's findings is the supposed fact that "[the mother] has not honestly reported how David received his injuries" because, in the trial court's view, only three scenarios are possible: (1) that his mother caused the injuries, (2) that his mother and Mr. Goff together caused the injuries, or (3) that his mother failed to protect David from Mr. Goff. The trial court concludes, and this Court endorses, the logic that therefore David's mother must be lying because she will not say which of these three possibilities is correct. However, those are not the only three possible scenarios and they do not prove she is lying. David's mother has accepted responsibility for failing to protect her son. She has also maintained that she was not aware of the nature and extent of his injuries until he was examined in the emergency room and that she does not know how they occurred. It is entirely possible that Mr. Goff injured David outside of her presence and that she honestly did not know the severity and recurring nature of his injuries until the hospital visit. To terminate her parental rights as to both of her children because she will not say that she knows how her son was injured if, in fact, she does not know that, is unjust.

Absent direct evidence that the mother ever injured David herself, or was ever present in the room when he was injured, and in light of her substantial compliance with virtually every requirement asked of her by DHHS, and further, in light of the fact that there is no evidence of any kind that the mother did anything other than protect her daughter, the termination of her parental rights as to both children was not justified by the evidence in this case.

The termination of parental rights followed determinations by the trial court that the mother had "addressed all of the conditions in her case plan" and that she had "completed the checklist that constituted

her case plan." When a parent is in substantial compliance with a mandated case plan and consistently (1) maintains innocence as to causing harm to a child, (2) maintains that she lacks knowledge as to the cause of the child's injuries, and (3) acknowledges her responsibility as the primary caregiver to protect her children from harm, the parent's inability to identify the cause of the injuries should not alone suffice to support a determination that the parent has not made "adequate progress" or that the parent is likely to neglect her children in the future, absent evidence that the parent is lying.

As noted by the majority, based on David's injuries and the lack of a plausible explanation, the Guilford County Department of Health and Human Services (DHHS) obtained nonsecure custody of David and his four-year-old sister, Brianna, on 20 March 2015. DHHS also filed a juvenile petition alleging that David was an abused and neglected juvenile and a juvenile petition alleging that Brianna was a neglected juvenile. A pre-adjudication, adjudication, and dispositional hearing was originally scheduled to take place on 20 May 2015, but was continued until 6 November 2015. At the 6 November 2015 hearing, the matter was again continued until 26 January 2016. The hearing finally took place on 26 January 2016, over ten months after the juveniles entered DHHS custody. Following the hearing, the trial court filed an order on 19 February 2016, that adjudicated David to be an abused and neglected juvenile and Brianna a neglected juvenile.

The mother appealed. On 15 November 2016, the Court of Appeals affirmed the trial court's order adjudicating David as an abused and neglected juvenile, but reversed and remanded the adjudication of neglect as to Brianna. *In re D.P. & B.P.*, 250 N.C. App. 507, 793 S.E.2d 287 (2016) (unpublished). While the adjudication orders were on appeal, the trial court conducted two permanency planning hearings pursuant to N.C.G.S. § 7B-906.1. Throughout the trial court proceedings, the mother's failure to explain David's injuries was the primary reason for not returning the children to her care. After the first hearing on 23 March 2016, the trial court entered an order, filed 21 April 2016, finding that the mother "has been compliant with her case plan," but determining that the children could not return to her home because "the mother continues to deny how the juvenile, [David], received his injuries. She has indicated that she will not admit to something she did not do, nor will she 'throw [Mr. Goff] under a bus.' " The court also noted the mother's pending criminal charges relating to David's injuries as an additional barrier to reunification. The trial court set the primary permanent plan as adoption with a concurrent secondary plan of reunification, and the mother was ordered to continue complying with her case plan.

A second hearing took place on 2 September 2016. Following the hearing, the trial court entered an order filed 21 October 2016, providing similar reasons for why the children could not be returned to their mother. The trial court also referenced the mother's limited engagement (at that time) in therapy, as well as her social media posts,[1] but focused on her failure to explain David's injuries as the principal reason for not returning the children.[2] Around the end of September 2016, the mother ended her relationship with Mr. Goff.

On 9 November 2017, the mother entered an *Alford* plea to misdemeanor child abuse for the injuries suffered by David. The mother received a suspended sentence and was placed on supervised probation for a period of twelve months. As part of her probation, the trial court ordered her to comply with "all conditions set in DSS court."

The trial court conducted hearings on remand from the Court of Appeals on 27 October 2017 and 30 November 2017. In a combined adjudication, disposition, and permanency planning order filed 18 December 2017, the trial court again adjudicated Brianna to be a neglected juvenile after the mother stipulated to several findings of fact and consented to the adjudication. The trial court's order notes that the mother had "addressed all of the conditions in her case plan." However, the court did not believe the mother had made adequate progress under the plan because she could not explain how David was injured. As barriers to achieving permanence for the juveniles, the court listed the mother's criminal conviction—resulting from her *Alford* plea—for David's injuries, and her resulting probation which would prevent her from having unsupervised contact with David for twelve months. The trial court changed the permanent plan for David and Brianna to a primary

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1. As part of her case plan, the mother was required to refrain from posting pictures of her children on any social media website. This record indicates this issue was subsequently resolved.

2. For example, the trial court stated all of the following in various orders: "Although the mother has completed [programs], DHHS does not consider any progress being made as it has been a year and a half and there are still no answers as to how [David] was injured."; "The mother and father are participating in case plans, although the mother has yet to inform [DHHS] who harmed the juvenile, [David] . . . ."; "The parents are not acting in a manner consistent [with] the health and safety of the juveniles. The mother has failed to acknowledge the severity of the injuries to her son and the need for DHHS to know who harmed him."; "The [c]ourt is concerned that we still do not know what happened to [David] . . . ."; "It is not possible for the juveniles to return to [the] home of a parent within the next six months. The mother continues to deny how the juvenile, David, received his injuries. She has indicated that she will not admit to something she did not do, nor will she 'throw [W.G.] under a bus.'

plan of adoption with a secondary concurrent plan of guardianship. DHHS was ordered to cease reunification efforts with the mother and to file termination petitions within sixty days, in accordance with N.C.G.S. § 7B-906.1(m).

In its termination order filed 23 January 2019, the trial court found that the mother had completed parenting classes and a domestic violence intervention program, that she participated in therapy from March 2016 until April 2018, that she lived in stable housing, and that she had stable employment. However, the court determined both that the children were neglected and there was a likelihood of repetition of neglect, pursuant to N.C.G.S. § 7B-1111(a)(1), and that the mother willfully left her children in foster care or a placement outside the home for more than twelve months without showing reasonable progress under the circumstances in correcting the conditions which led to her children's removal, pursuant to N.C.G.S. § 7B-1111(a)(2). In making both determinations, the trial court seems to have relied almost exclusively on the fact that the mother had been unable to provide a sufficient explanation for David's injuries.

1. The Mother's Honesty About David's Injuries

The trial court's findings that his mother concealed the truth about David's injuries are not supported by competent evidence. The trial court concluded that "[d]espite the completion of those services, significant questions remain as to the cause of [David's] injuries." The court stated that the mother had "not adequately remedied the conditions that brought the juveniles into custody" because the court did not know "exactly how [David] sustained his injuries."

However, there is no record evidence indicating that the mother knew how David was injured. The trial court placed her in the impossible position of having to provide information she claims not to have. However, while the mother says she does not know how David's injuries occurred, she accepted that she was "ultimately responsible" for his injuries as his caretaker.[3] At the termination hearing, when asked

3. The trial court provides conflicting factual findings on the issue of whether the mother accepted responsibility for David's injuries. The trial court states that the mother failed to take full responsibility for David's injuries. However, these statements are based on the mother's inability to provide an explanation for David's injuries. The trial court also states that the mother expressed to DHHS that "she was ultimately responsible for [the juveniles'] care and supervision and accepts that role," and that, while she did not know how David's injuries occurred, "she was responsible" as his mother. Therefore, to the extent that the trial court purports to find that the mother has not accepted responsibility for David's injuries, that finding is not supported by clear, cogent, and convincing evidence.

whether Mr. Goff caused David's injuries, she acknowledged the possibility that Mr. Goff could have caused the injuries, stating "I do not know. I can't rule it out. But, that's—I don't know."

Further, and most importantly, there is no record evidence to suggest that the mother is lying about her ignorance of the cause of David's injuries. This fact distinguishes the instant case from that considered by the Court of Appeals in *In re Y.Y.E.T.*, 205 N.C. App. 120, 695 S.E.2d 517 (2010), cited by the majority. There, the Court of Appeals considered facts similar to the facts in this case. Two parents brought their child to Carolinas Medical Center, where the child was diagnosed with a fractured femur. *Id.* at 121, 695 S.E.2d at 518. Subsequent examination revealed additional injuries, and the Mecklenburg County Department of Social Services took custody of the child. *Id.* The parents provided explanations for the injuries that were inconsistent with the opinions of medical professionals. *Id.* at 121–23, 695 S.E.2d at 518–19.

However, in *In re Y.Y.E.T.*, the parents claimed from the outset that they had witnessed the injury. First, the mother claimed that the child's leg was stuck between the bars of the crib and she removed the child from a crib, causing the injury. *Id.* at 121, 695 S.E.2d at 518. Later, the mother stated that the father removed the child from the crib. *Id.* When questioned, the father "provided different accounts of how he removed the juvenile from the crib," and it "sounded to the evaluator like the respondent-father was fitting the description of his motion to the twisting way that doctors indicated as the likely cause of the break to the femur." *Id.* at 124, 695 S.E.2d at 520. By contrast, the mother in this case has stated consistently that she was not present when she believes David's femur was broken, and does not know how the other injuries occurred. While the difference may be subtle, it is important. Subsection 7B-1109(f) of our General Statutes requires that the petitioner in a termination hearing prove all relevant facts "based on clear, cogent, and convincing evidence." N.C.G.S. § 7B-1109(f) (2017). Where, as here, the termination of parental rights rests so heavily on a parent's inability to explain a child's injuries, the rights cannot be terminated absent "clear, cogent, and convincing evidence" that the parent is actually concealing the cause of the injuries. While that evidence of concealment existed in *In re Y.Y.E.T.*, it does not exist here. It is of particular importance that, as the trial court notes, there is a possible explanation for David's injuries other than abuse by his mother: namely that they were caused by Mr. Goff.

2. Probation Violation for Failing to Obtain a Psychiatric Evaluation

The trial court found that the mother failed to complete a psychiatric evaluation, which the court stated was a requirement of her case plan and a condition of her probation. While the record shows that the mother did not complete a psychiatric evaluation, there is no evidence in the record that a psychiatric evaluation was a clear requirement of her case plan.

As part of her case plan, the mother was required to cooperate with a parenting assessment. She completed the parenting assessment with Dr. Thomas A. Holm on 15 June 2015. Following the assessment, Dr. Holm issued a report dated 3 September 2015 that stated the following in response to questions posed by DHHS: "I believe that an assessment by a psychiatrist would be helpful in furthering [the mother's] desire to maintain a stable and loving home for her children . . . . In addition to a consultation with a psychiatrist, I recommend that [the mother] be referred for individual therapy." The section of the report labeled "Recommendations" contains no reference to a psychiatrist or a psychiatric evaluation.

Nevertheless, the trial court's 18 December 2017 adjudication, disposition, and permanency planning hearing order states that Dr. Holm recommended a psychiatric evaluation be completed. In the same order, the trial court found that the mother "has addressed all of the conditions in her case plan." The trial court also found that "[DHHS] is willing to move forward with unsupervised visitation based on the mother's compliance with her case plan, compliance with [DHHS], addressing the risk that led to the removal of the juveniles, and her accepting responsibility as the mother." The trial court further found that the mother had "completed the checklist that constituted her case plan" and stated that questions remain, "[d]espite the completion of her case plan." It appears, then, that the recommendation that a psychiatric evaluation be completed was not part of the mother's case plan. Moreover, the transcript evidence shows that this alleged requirement was never communicated to the mother and the section of Dr. Holm's report referencing a psychiatric evaluation seems to be directed to DHHS, not the mother. To the extent that the trial court found the mother was required by her case plan to complete a psychiatric evaluation, that finding is not supported by clear, cogent, and convincing evidence.

The trial court also found that the mother violated her probation because she did not complete a psychiatric evaluation. The judgment for the mother's misdemeanor child abuse conviction specifically required

that she "cooperate and follow all conditions set in DSS court" and a box was checked on the form requiring that she "[r]eport for initial evaluation by any state licensed mental health agency specifically for child abuse[,] participate in all further evaluation, counseling, treatment, or education programs recommended as a result of that evaluation." While the language quoted by the majority appears in the thirteen-page single-spaced report from Dr. Holm, it does not appear as one of his five detailed "Recommendations" at the conclusion of the "Parenting Capacity Assessment/Psychological Evaluation." The evidence in the record shows that by the time of the termination hearing, the mother had, over the course of three years, completed twelve sessions of the Crossroads program for victims of domestic violence, completed the ten required sessions of the PATE program, and participated in the Care Coordination for Children Program. She was treated at Restoration Place Counseling between 25 August 2016 and 20 April 2018, and attended a total of 42 counseling sessions there. Put another way, over the course of 23 months she attended 42 counseling sessions. Given the mother's testimony that she was unaware that she was also supposed to complete an evaluation with a psychiatrist, the notion that the mother willfully violated her probation by failing to complete a psychiatric evaluation is not supported by clear, cogent, and convincing evidence.

3. Relationship with Mr. Goff

In its termination order, the trial court found that the mother had "resumed a relationship with [Mr. Goff] in June 2017" and that the two were "working on reestablishing their relationship." The trial court further found that the mother "put herself in the situation of domestic violence incidents with [Mr. Goff]." Respondent argues that none of these findings are supported by clear and convincing evidence, arguing that (1) no evidence supports a finding that the two were involved romantically, and (2) she "did not create a situation that posed a foreseeable or unreasonable risk that she would be the victim of criminal assaults" by Mr. Goff Petitioner argues that the evidence supports a finding that the the mother and Mr. Goff resumed some type of relationship, whether or not it was romantic, and that the mother created the situation leading to her victimization by giving a key to Mr. Goff and not changing her locks.

As to the trial court's finding that the mother "put herself in the situation of domestic violence incidents," the mother is not responsible for the criminal actions of Mr. Goff. She gave Mr. Goff a key to her home so that he could perform electrical work. Months later, the trial court found that Mr. Goff approached the mother at her workplace, "pinned her to her car and took her phone." Less than a month later, Mr.

Goff entered the mother's home while she was sleeping and violently assaulted her. As a result of that assault, the mother obtained an Ex Parte Domestic Violence Protective Order and later obtained a one-year Domestic Violence Order of Protection against Mr. Goff. While it may have been advisable for the mother to exercise better control over access to her home, the evidence does not support a finding that she caused the acts of violence perpetrated against her. Accordingly, the trial court's finding that the mother "put herself in the situation of domestic violence incidents" is not supported by clear, cogent, and convincing evidence.

The trial court's finding that the mother and Mr. Goff had resumed their relationship is also unsupported by the record. Prior to September 2016, the mother and Mr. Goff were involved in a romantic relationship. They were engaged to be married. Their relationship was certainly romantic in nature in the past. While the evidence supports the trial court's finding that Mr. Goff subsequently provided some emotional support to the mother at the time of her father's death, the evidence does not extend beyond that point. Accordingly, the trial court's finding that the mother and Mr. Goff had "resumed a relationship" and "were working on reestablishing their relationship," with the implication that the relationship was romantic, is without clear, cogent, and convincing evidence in the record.

4. New Explanation for David's Injuries during Alford Plea

On 9 November 2017, David's mother entered an *Alford* plea to the charges related to David's injuries, pleading guilty to misdemeanor child abuse without admitting that she actually committed the offense. The trial court found that, at the plea hearing, the mother "offered yet another explanation for the cause of [David's] injuries, to wit that he may have slept funny." A review of the trial transcript shows clearly that she was not offering a new explanation for the cause of David's injuries, but was instead explaining, in response to a question, what initially went through her mind when she first saw her son with a swollen leg. The trial court's finding to the contrary, that the mother was offering "yet another explanation" contrary to the medical evidence, was not supported by clear, cogent, and convincing evidence. The majority takes the position that because this fact was also a finding made at the adjudicatory stage and not appealed at that time, it is binding now. However, the adjudication order that was entered after the mother's *Alford* plea on 9 November 2017 was an adjudication only as to her daughter, Brianna. The original adjudication order as to David was entered 19 February 2016, well before the *Alford* plea. Moreover, this fact, even if it were true

and binding with regard to both children, has no real bearing on any legitimate reason to terminate the mother's parental rights.

5. Withholding Information about her Marriage

The trial court found that the mother married someone new in September 2018 but purposely hid that fact from DHHS. However, the trial court had ceased unification efforts and DHHS had stopped providing services to the mother as of 18 December 2017. There is no reason why the mother would have been aware that she had an obligation to inform DHHS nine months later of her marriage or to open her home to any social worker on demand. By this point, the trial court appears to be clutching at straws to find any possible grounds to fault the mother.

6. Lack of Insight and Failure to Determine the Cause of David's Injuries

This argument is simply the Court rehashing the first point above. At the end of the day, the trial court and this Court both can point to nothing more than that they are "troubled by [the mother's] continued failure to acknowledge the likely cause of David's injuries." However, David's mother has accepted responsibility for not keeping her son safe and, in open court, under oath, stated that she could not rule out the possibility that Mr. Goff injured her son. If she did not witness the abuse and does not know how it happened, she cannot honestly determine the cause.

The trial court's factual findings do not support the conclusion that the mother's parental rights are subject to termination. For the reasons discussed above, the failure to explain David's injuries, under the specific facts of this case, is not sufficient to find that the mother failed to make reasonable progress in correcting the conditions that led to removal of her children, nor is it sufficient to find that she is likely to neglect them in the future.

With regard to termination of the mother's parental rights for neglect under N.C.G.S. § 7B-1111(a)(1), the trial court must evaluate the likelihood of future neglect. In doing so, the trial court was required to consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing. *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984). In the time between David's admission to the hospital in March 2015 and the termination hearing, the mother completed her case plan, developed a very positive record of visits with her children, and substantially complied with all of the court-ordered requirements. While she ultimately discontinued individual therapy, she attended sessions from March 2016 until April 2018,

which was well after DHHS had ceased unification efforts in December 2017. In particular, the trial court found that there was a bond between Brianna and her mother at the time of the termination hearing. The court wrote that Brianna "loves her mother and enjoys spending time with her during visits." This finding, in conjunction with the court's other factual findings, does not support a likelihood of future neglect.

The trial court's findings of fact that (1) the mother had been charged with violating probation because she did not timely pay certain fees, (2) that she did not inform DHHS of her marriage to B.H. in the absence of any evidence that she was required to do so, and (3) that she entered an *Alford* plea to misdemeanor child abuse are not sufficient to show either that she had failed to make reasonable progress or that she was likely to neglect her children in the future.

The evidence is clear from the record that, as of 18 December 2017 at the latest, the mother had completed the requirements of her case plan. In fact, DHHS was recommending at that time, not that the mother's parental rights be terminated, but that she be allowed unsupervised visitation because of her "compliance with her case plan, compliance with [DHHS], addressing the risk that led to the removal of the juveniles, and her accepting responsibility as the mother." Instead, the trial court determined that the mother had "not made adequate progress within a reasonable period of time under the [case] plan" because "[a]lthough she [had] addressed all of the conditions in her case plan," she had not explained how David was injured. The trial court then changed the primary permanent plan to adoption and ordered DHHS to pursue the termination of the mother's parental rights. The evidence in this case shows that the mother maintained from the outset that she did not harm her child, maintained from the outset that she did not know the cause of her child's injuries, and acknowledged her responsibility, as the primary caregiver, to protect her children. No evidence presented at any hearing suggested that the mother was lying about whether she injured David. At the time of the termination hearing, the only other person who could have harmed David, Mr. Goff, was no longer in the home. Under those circumstances, the inability to identify the cause of a child's injuries should not, by itself, suffice to determine that the parent has not made "adequate progress" to correct the conditions leading to the juvenile's removal. It also should not suffice, under those circumstances, to establish a likelihood of future neglect.

While the foregoing analysis pertains equally to David and Brianna, I write further because the trial court again adjudicated Brianna neglected without making sufficient findings of fact. In the termination

order, the trial court made only two relevant findings of fact pertaining to Brianna. First, the trial court noted that Brianna "was in the same home when the injuries to her brother occurred and her sole caretakers were" the mother and Mr. Goff. The trial court repeated the same fact later, noting Brianna's "presence in the home where the abuse of her sibling occurred." Second, the trial court noted that Brianna had been adjudicated neglected by an order entered 18 December 2017. No additional facts supported the December 2017 adjudication. However, the December 2017 order contains the following statement as to Brianna: "She faced a substantial risk of physical, mental or emotional impairment because she resided in the same injurious environment as [David], who DID suffer serious injuries, caused by other than accidental means."

The trial court's vague and generalized findings were insufficient to establish that Brianna was a neglected juvenile. It is true that when determining whether a juvenile is neglected, "it is relevant whether [the] juvenile . . . 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). However, finding only that another child in the home has suffered injury, as the trial court did in this case, is not sufficient. "A court may not adjudicate a juvenile neglected solely based upon previous Department of Social Services involvement relating to other children." *In re J.A.M.*, 372 N.C. 1, 9, 822 S.E.2d 693, 698 (2019). Instead, "clear and convincing evidence in the record must show current circumstances that present a risk to the juvenile." *Id.* "[O]ur 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." *Id.* (emphasis omitted) (quoting *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003)). Here, the only basis upon which the court concluded that Brianna "faced a substantial risk of physical, mental or emotional impairment" was that Brianna lived in the home at the time of David's injuries. Piggybacking the termination of the mother's parental rights as to Brianna while merely citing the circumstances surrounding the injuries to David, without any evidence that Brianna is at a substantial risk of harm or neglect, is impermissible.

I am mindful of the fact that David and Brianna have been placed with a foster family and are, by all accounts, doing well. The evidence suggests that they have formed bonds with this new family and might very well happily stay there. By contrast, they have not lived with their mother for more than four years. Even so, these new family bonds came at the cost of those which already existed. The affidavit attached to

the initial juvenile petition filed by DHHS notes that David was "very bonded" to his mother. However, the trial court notes in its order terminating parental rights that "[t]here is no bond between [David] and [the mother]. Although [the mother] visits with [David] regularly . . . [David] does not look to [the mother] for comfort during the visits and is often playing alone. He appears relaxed in [the mother's] presence, but does not display affection." The trial court did not have sufficient factual and legal grounds to terminate the familial relationship between the mother and her children in this case. Accordingly, I would reverse the trial court's order terminating the mother's parental rights and remand for dismissal of the petition.

IN THE MATTER OF J.M, J.M., J.M., J.M., J.M.

No. 220A19

Filed 28 February 2020

1. Termination of Parental Rights—grounds for termination —findings

In a termination of parental rights case, the trial court's extensive findings of fact as to the grounds for removal—likelihood that the neglect would be repeated, failure to remedy the conditions leading to the children's removal, and inability to provide care or supervision—were supported by clear and convincing evidence and the findings as a whole supported the legal conclusions.

2. Termination of Parental Rights—grounds for termination—failure to pay a reasonable portion of the cost of care

In a termination of parental rights case, the trial court's findings established that respondent-mother had the ability to pay some amount toward the cost of care for her children while they were in the custody of the Department of Social Services but did not. Those findings supported the conclusion that grounds existed to terminate respondent-mother's parental rights.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 27 February 2019 by Judge Tiffany M. Whitfield in District Court, Cumberland County. This matter was calendared for argument in the Supreme Court on 5 February 2020 but determined on the record and

briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Michael A. Simmons for petitioner-appellee Cumberland County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by Andrew F. Lopez, for respondent-appellee guardian ad litem.

Sean P. Vitrano for respondent-appellant mother.

EARLS, Justice.

Respondent-mother appeals from the trial court's order terminating her parental rights to her minor children J.M. (Edward), J.M. (David), J.M. (Carol), J.M. (Barbara), and J.M. (Alan).[1] We affirm.

On 8 January 2016, the Cumberland County Department of Social Services (DSS) filed a petition alleging Edward, David, Carol, Barbara, and Alan were neglected, seriously neglected, and dependent juveniles pursuant to N.C.G.S. § 7B-101(9), (15) and (19a), because they did not receive proper care, supervision, or discipline from their parents; had not received necessary medical care; lived in an environment injurious to their welfare; and their parents' conduct evinced a disregard of consequences of such magnitude that it constituted an unequivocal danger to their health, welfare, or safety. DSS had received multiple child protective services reports that year regarding the family and had conducted a family assessment, which led to the provision of services to the family beginning on 7 October 2015. In part, DSS alleged adequate food for the family was seldom in the home; respondent-mother was about to be evicted; and the condition of the home was poor in that it was heavily infested with roaches, the carpets were heavily soiled, and spoiled food was routinely left around the home. The children were alleged to have not been provided necessary wellness check-ups, physicals, immunizations, and other medical care. Police officers had also been called to the home on several occasions due to domestic disturbances, and respondent-mother had tested positive for marijuana on 2 October 2015. DSS also obtained non-secure custody of the children.

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1. The minor children will be referred to throughout this opinion as "Edward," "David," "Carol," "Barbara," and "Alan," which are pseudonyms used to protect the children's identities and for ease of reading. *See* N.C.R. App. P. 42(b)(1).

After a hearing on 9 June 2016, the trial court entered an adjudication and temporary disposition order on 1 July 2016. Respondent-mother stipulated to facts establishing the children did not receive proper care and supervision from their parents and lived in an environment injurious to their welfare due to unsanitary living conditions and their parents' failure to ensure they received necessary medical and "educational/remedial care." DSS dismissed the allegations of serious neglect and dependency. Based upon the stipulations, the court adjudicated the children to be neglected juveniles. The court continued the matter for disposition and left the children in DSS custody.

The trial court conducted a dispositional hearing on 14 July 2016 and entered its order from that hearing on 1 December 2016. The court continued custody of the children with DSS and directed DSS to continue to make reasonable efforts to reunite the children with their parents. Respondent-mother was ordered to complete a psychological evaluation and follow all recommendations, engage in mental health treatment, complete a substance abuse assessment and follow all recommendations, submit to random drug screens, complete an "Impact of Domestic Violence on Children" class, obtain and maintain stable housing and employment, complete a parenting assessment and follow all recommendations, and complete age-appropriate parenting classes. Respondent-mother was also granted weekly supervised visitation with the children.

On 12 April 2017, the trial court entered its initial permanency planning order. The court found respondent-mother was making some progress toward reunification with the children but had made little progress toward addressing the issues that led to the removal of the children from her home. The court further found respondent-mother's visits with the children were chaotic; she was in need of more intensive parenting classes; she had attended only 3 of 17 scheduled mental health treatment sessions; she resided in a three-bedroom apartment but was in the process of being evicted due to a domestic violence incident with the children's father; she was unemployed and had no transportation; and although she was generally cooperative with DSS, she refused to submit to random drug screens. The court set the primary permanent plan for the children as reunification with respondent-mother with a secondary plan of custody with a suitable person. Respondent-mother was ordered to comply with her case plan as set forth in the initial disposition order and directed to sign a release of information from her mental health provider.

The trial court conducted a subsequent permanency planning hearing on 18 May 2017. In its order from that hearing, the court found

respondent-mother was incarcerated with a pending charge of felony assault with a deadly weapon with intent to kill or seriously injure. The alleged victim of the assault was the children's paternal uncle. The court found respondent-mother had failed to fully engage in the services outlined in her case plan and had not demonstrated a desire to make the necessary changes to correct the conditions that led to the removal of the children from her care. The court ceased all visitation with the children and ordered there be no contact between the children and their parents. The primary permanent plan for the children was changed to adoption, while the secondary plan remained unchanged as custody with a suitable person, and DSS was ordered to pursue the termination of parental rights to the children.

DSS did not immediately pursue termination of parental rights, and the trial court conducted two additional permanency planning hearings on 2 October 2017, and 5 March 2018. In its order from the March 2018 hearing, the court found that although respondent-mother was not progressing on her case plan, she had identified a possible kinship placement for the children that required DSS to conduct a home study. The court continued the primary and secondary permanent plans for the children as adoption and custody but directed DSS to not pursue termination of parental rights. The home study was subsequently completed, and the placement was not approved.

On 10 July 2018, DSS filed a petition to terminate parental rights to the children. DSS alleged grounds existed to terminate respondent-mother's parental rights on the bases of neglect, willfully leaving the children in DSS custody for more than 12 months without making reasonable progress toward correcting the conditions that led to the children's removal from her care, willfully failing to pay a reasonable portion of the cost of the children's care while they were in DSS custody, dependency, and abandonment. *See* N.C.G.S. § 7B-1111(a)(1)–(3), (6)–(7) (2017). The trial court conducted a hearing on the petition on 15 and 16 November 2018 and entered an order terminating respondent-mother's parental rights on 27 February 2019. The court concluded grounds existed to terminate respondent-mother's parental rights based on neglect, failure to make reasonable progress toward correcting the conditions that led to the children's removal from her care, failure to pay a reasonable portion of the cost of the children's care while they were in DSS custody, and dependency. The court further concluded terminating respondent-mother's parental rights was in the best interests of the children. Respondent-mother appeals.

[1] On appeal, respondent-mother argues the trial court erred in adjudicating the existence of the grounds to terminate her parental rights. More specifically, she contends that the trial court's findings of fact do not have any bearing on the likelihood that the neglect the children experienced before they were removed from her custody will be repeated, that she made reasonable progress towards correcting the conditions that led to the children's removal, that there was no evidence concerning her ability to pay the costs of her children's support during the relevant time period, and finally, that the record did not support the trial court's conclusion that at the time of the termination hearing the children were dependent juveniles. However, the trial court's extensive findings of fact in this case as to each of the grounds for removal are supported by clear and convincing evidence, and therefore are deemed conclusive. *See In re N.G.*, 186 N.C. App. 1, 4, 650 S.E.2d 45, 47 (2007). With regard to each ground, the trial court's findings of fact taken as a whole do support the legal conclusions that the neglect of the children is likely to be repeated, that respondent-mother failed to remedy the conditions, including inadequate housing, mental health and substance abuse issues, lack of parenting skills and issues with domestic violence, that led to her children being removed from her custody, and that respondent-mother did not have the ability to provide care or supervision to the juveniles such that they were indeed dependent.

[2] Because only one ground is needed to terminate parental rights, we only address in detail below respondent-mother's arguments as to the ground of failure to pay a reasonable portion of the cost of the children's care while they were in DSS custody. *See In re E.H.P.*, 372 N.C. 388, 395, 831 S.E.2d 49, 53 (2019). However, we do not thereby imply that the evidence and supported findings were not also sufficient to establish the other three grounds for termination found by the trial court in this case. The record is clear that at the time of the termination hearing, respondent-mother had failed to maintain stable and adequate housing for the juveniles and had failed to substantially comply with the services outlined for her to complete. She had only attended three of seventeen sessions for mental health treatment that had been scheduled for her. She continued to have issues with domestic violence and had not remained employed on any consistent basis. Her inability to address these issues was a clear indication that there was a strong likelihood of neglect in the future, that there had not been reasonable progress towards correcting the conditions leading to the removal of the children, and that the children were dependent.

"We review a trial court's adjudication under N.C.G.S. § 7B-1111 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.' " *Id.* at 392, 831 S.E.2d at 52 (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)). When DSS filed its petition, a court could terminate parental rights where:

> The juvenile has been placed in the custody of a county department of social services . . . and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C.G.S. § 7B-1111(a)(3) (2017). The "cost of care refers to the amount it costs the Department of Social Services to care for the child, namely, foster care." *In re Montgomery*, 311 N.C. 101, 113, 316 S.E.2d 246, 254 (1984) (quotation marks omitted). "A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay." *In re Clark*, 303 N.C. 592, 604, 281 S.E.2d 47, 55 (1981).

In support of this ground, the trial court found the children had been in DSS custody since 8 January 2016, including the entire relevant six-months under the statute, which was from 10 January 2018 until 10 July 2018. During this time, the cost of care for each of the children was in excess of $40,000.00. The court further found:

> 116. That during the six-month period immediately preceding the filing of the Petition herein, the Respondents paid an amount of zero toward the reasonable cost of care.
>
> 117. The Court finds that the Respondents each had the ability to pay an amount greater than zero toward the cost of care and the basis for that finding is as follows:
>
> a. Both of the Respondents are capable of working.
>
> b. There is no evidence that either of the Respondents were unable to work or became disabled during the six-month period immediately preceding the filing of the Petition. In fact, the Respondent Mother through her sworn testimony, reported that she had been employed at Hair Joy between January 2018 and June 2018; however, she

> did not pay anything towards the reasonable cost of care for the juveniles.
>
> c. That an order was rendered in Cumberland County file number 16 CVD 3061 on November 17, 2016, directing the Respondent Mother to pay $50.00 per month as child support for the juveniles beginning December 1, 2016. As part of that order, the Court found that the Respondent Mother, was physically and financially able to pay a reasonable portion of the cost of care for the juveniles as evidenced by the *Order of Paternity and Permanent Child Support* filed in Cumberland County File 16 CVD 3061 . . . . That since the entry of that, the Respondent Mother has not paid any money towards that order as evidenced by the *Order/Payment History* . . . .
>
> . . . .
>
> 118. That given the Respondents' ability to work and earn money and their failure to pay any amount toward the reasonable cost of care, the Court finds that the Respondents' failure to pay was willful.

Respondent-mother does not challenge the trial court's finding that she paid nothing toward the cost of care for her children during the relevant six-month period, and that finding is binding on appeal. *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

Respondent-mother argues the trial court's finding that she worked at Hair Joy between January 2018 and June 2018 is unsupported by the evidence. We agree and disregard this finding. The evidence established respondent-mother began working at Hair Joy during the latter part of 2016 and remained employed there for nine or ten months. In November 2017, she began working at a Popeyes restaurant but quit that job by January 2018, because a young co-worker would "always come at [her] like sideways and stuff . . . ." Respondent-mother had not been employed since quitting work at Popeyes, and she had just started looking for work at the time of the termination hearing.

Respondent-mother also argues the record does not support the trial court's finding she could work during the relevant six-month period. She contends she had not seen the person responsible for managing her medication during the three to four months prior to July 2018 due to

his military deployment, and she thus had not received her medications for anxiety and depression, which led to an increase in her depression symptoms and a two-day hospitalization at Cape Fear Valley Hospital. However, this argument is unavailing because respondent-mother was working at the beginning of the relevant six-month period and there is nothing in the record to indicate that she could not have found an alternative health-care provider to manage her medication.

In 2016, the Cumberland County Child Support Department received referrals for each of the children when they came into DSS custody. The department filed a complaint for child support from respondent-mother, which was heard on 17 November 2016. Pursuant to a court order entered in December of 2016, respondent-mother was to pay child support in the amount of $50 per month for all five children. Respondent-mother never moved to modify or set aside the order, and she was thus subject to a valid court order during the relevant six-month period that established her ability to financially support for her children. *See In re S.T.B.*, 235 N.C. App. 290, 296, 761 S.E.2d 734, 738 (2014) (" '[A] proper decree for child support will be based on the supporting parent's ability to pay as well as the child's needs, there is no requirement that petitioner independently prove or that the termination order find as fact respondent's ability to pay support during the relevant statutory time period.' " (quoting *In re Roberson*, 97 N.C. App. 277, 281, 387 S.E.2d 668, 670 (1990))).

Moreover, as discussed above, the evidence establishes respondent-mother was working at a Popeyes restaurant at the beginning of the six-month period but quit the job of her own accord. The record also establishes that any fault for the lapse in respondent-mother's medication lies with her, as she chose to not seek another provider until her symptoms worsened to the point that she needed to be hospitalized. Respondent-mother cannot assert a lack of ability to pay for her children's support, when that lack was due to her own conduct. *See In re Tate*, 67 N.C. App. 89, 96, 312 S.E.2d 535, 540 (1984) ("[W]hen a parent has forfeited the opportunity to provide some portion of the cost of the child's care by her misconduct, she 'will not be heard to assert that . . . she has no ability or means to contribute to the child's care and is therefore excused from contributing any amount.' " (quoting *In re Bradley*, 57 N.C. App. 475, 479, 291 S.E.2d 800, 802–03 (1982))).

Here, the trial court's findings establish respondent-mother had the ability to pay some amount toward the cost of care for her children while they were in DSS custody but paid nothing. These findings support its conclusion that grounds exist to terminate respondent-mother's

parental rights to the children pursuant to N.C.G.S. § 7B-1111(a)(3). Respondent-mother does not challenge the trial court's conclusion that termination of her parental rights to the children is in their best interests, and we affirm the court's order.

AFFIRMED.

IN THE MATTER OF S.E., S.A., J.A., V.W.

No. 197A19

Filed 28 February 2020

1. Termination of Parental Rights—subject matter jurisdiction —proceeding in another state

In a termination of parental rights case, the trial had subject matter jurisdiction despite respondent-mother's contentions involving a prior Oklahoma protective services and child custody determination. Respondent-mother relied on allegations and inferences to support her argument and did not meet her burden of showing that the trial court lacked jurisdiction. Furthermore, respondent-mother stipulated that the Oklahoma matter had been closed.

2. Termination of Parental Rights—grounds—failure to pay a reasonable portion of the cost of care

In a termination of parental rights case, there was no merit to respondent-mother's contention that she did not know she was required to pay for her children's care while they were in custody and therefore willful failure to pay a reasonable portion of the cost of care could not be a ground for termination. Parents have an inherent duty to support their children, and the absence of a court order, notice, or knowledge of a requirement to pay support is not a defense to the parent's obligation. Moreover, respondent-mother was on notice through repeated findings in the permanency planning orders.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 7 March 2019 by Judge Wesley W. Barkley in District Court, Burke County. This matter was calendared for argument in the Supreme Court on 5 February 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

N. Elise Putnam for petitioner-appellee Burke County Department of Social Services.

Womble Bond Dickinson (US) LLP, by John E. Pueschel and Patricia I. Heyen, for respondent-appellee guardian ad litem.

Anné C. Wright for respondent-appellant mother.

HUDSON, Justice

Respondent-mother appeals from an order entered by the trial court terminating her parental rights to her children, S.E. (Sara), S.A. (Shanna), J.A. (Jacob), and V.W. (Vera).[1] After careful consideration of respondent-mother's challenges to the trial court's jurisdiction and conclusion that grounds exist to terminate her parental rights on the basis of her willful failure to pay a reasonable portion of the cost of care for the children during their placement in DHHS custody, we affirm the trial court's order.

On 26 June 2016, the Burke County Department of Social Services ("DSS") obtained non-secure custody of Sara, Shanna, Jacob, and Vera, and filed a petition alleging they were abused, neglected, and dependent juveniles. DSS had received a report alleging Jerry A. had been physically assaulting the children.[2] At the time of the filing the children were respectively, twelve, nine, eight, and two years old. DSS interviews with the children uncovered specific and repeated instances of physical abuse of the children and regular instances of domestic violence between respondent-mother and Mr. A. Shanna also disclosed numerous instances of sexual abuse by Mr. A., of which she had informed respondent-mother and an aunt. Respondent-mother was questioned about the sexual abuse and initially denied knowing about it, but she subsequently admitted Shanna had told her about the abuse. DSS also learned respondent-mother and the children had been involved in a child protective services case in Oklahoma. Respondent-mother had temporarily left Mr. A., which led to the closure of the Oklahoma case. She then moved to North Carolina with the children, where she reconciled with Mr. A.

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1. The minor children will be referred to throughout this opinion as "Sara," "Shanna," "Jacob," and "Vera," which are pseudonyms used to protect the children's identities and for ease of reading. The children also had an older sibling who was part of the underlying abuse, neglect, and dependency case but turned eighteen years old prior to the termination of parental rights case.

2. Jerry A. is the biological father of Shanna and Jacob.

After multiple continuances due to DSS's difficulty serving the children's fathers, the trial court conducted a hearing on the petition on 23 March 2017 and entered its adjudication order on 18 April 2017. Respondent-mother and Mr. A. stipulated to the relevant facts and allegations in the petition, and the court found them to be true. The court found Mr. A. had physically abused Shanna, Jacob, and respondent-mother; and he had sexually abused Shanna on multiple occasions. Respondent-mother knew about the physical and sexual abuse of the children and failed to protect them. Respondent-mother had been convicted of intentional child abuse inflicting serious injury on 2 November 2016. She was sentenced to a suspended term of 38 to 58 months imprisonment and placed on supervised probation for 24 months. Mr. A. had been convicted of first-degree statutory rape on 13 February 2017. He was sentenced to an active term of 221 to 326 months imprisonment. The court adjudicated all the children to be abused, neglected, and dependent juveniles. Disposition was continued, but the trial court kept custody of the children with DSS and suspended visitation with their parents.

The trial court entered its dispositional order on 1 June 2017. The court found aggravated circumstances existed in that a parent sexually abused a child in the home while the other children were home and the respondent-mother allowed the abuse to occur. Reunification efforts were initially found not to be in the best interests of the children except for Vera, whose biological father had been located. DSS was in the process of completing a home-study under the Interstate Compact on the Placement of Children ("ICPC") on Vera's father's home to see if he would be an appropriate placement for her. The court continued custody of the children with DSS and directed DSS to provide respondent-mother with one two-hour visitation with the children, after which she was to have no further contact with them. DSS was also directed to identify and inform respondent-mother of programs that would assist her with the issues she was facing. The primary permanent plan for Vera was identified as reunification with her father, with a secondary plan of guardianship. The primary permanent plan for Sara, Shanna, and Jacob was identified as adoption, with a secondary plan of guardianship.

The trial court conducted four permanency planning hearings from 18 May 2017 to 9 August 2018. Respondent mother offered an out-of-state relative as a possible placement for the children, which required DSS to request and obtain a home study under the ICPC. In its orders from the first three hearings, the court consistently found the children may benefit by being adopted, but they were not free to be adopted due

to the outstanding home studies of their relatives and Vera's father. By the fourth hearing, however, the trial court found the ICPC home studies for Vera's father and respondent's relatives indicated their homes were not appropriate placements for the children. In its permanency planning order entered from the 9 August 2018 hearing, the trial court set the primary permanent plan for Vera as adoption and the secondary permanent plan as reunification with her father. The primary and secondary plans for Sara, Shanna, and Jacob remained adoption and guardianship.

DSS filed a petition to terminate parental rights to the children on 27 September 2018. As to respondent-mother, DSS alleged grounds existed to terminate her parental rights on the bases of abuse, neglect, willfully leaving the children in foster care for more than 12 months without making reasonable progress to correct the conditions that led to their removal, willfully failing to pay a reasonable portion of the cost of care for the children during their placement in DHHS custody, and for committing a felony assault resulting in serious bodily injury to a child residing in the home. *See* N.C.G.S. § 7B-1111(a)(1)–(3), (8) (2017). After a hearing on 7 February 2019, the trial court entered an order on 7 March 2019, terminating respondent-mother's parental rights to the children.[3] The court concluded grounds existed to terminate respondent-mother's parental rights on the bases of neglect, willfully leaving the children in foster care for more than 12 months without making reasonable progress to correct the conditions that led to their removal, and willfully failing to pay a reasonable portion of the cost of care for the children during their placement in DSS custody.[4] The court further concluded terminating respondent-mother's parental rights was in the children's best interests. Respondent-mother appeals.

[1] Respondent-mother first argues the trial court's order as to Sara is void for lack of subject matter jurisdiction and must be vacated.[5] Respondent-mother contends the court lacked subject matter jurisdiction over Sara's underlying juvenile case, because it failed to meet the requirements of the Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA"). *See* N.C.G.S. §§ 50A-201-204 (2017). She argues an

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3. Mr. A. relinquished his parental rights to Shanna and Jacob on 18 October 2018. The trial court's order also terminated the parental rights of the fathers of Sara and Vera. None of the fathers are parties to this appeal.

4. At the hearing, DSS elected not to proceed on N.C.G.S. § 7B-1111(a)(8).

5. Respondent-mother only challenges the trial court's subject matter jurisdiction over the juvenile case involving Sara and concedes the court had jurisdiction over the cases involving the other children.

allegation in the initial juvenile abuse, neglect, and dependency petition that one of the children reported child protective services in Oklahoma took the children out of her home put the trial court on notice there was a prior Oklahoma custody determination involving the children, which required the trial court to contact the Oklahoma court to determine if that court would cede jurisdiction to the North Carolina trial court. Respondent-mother's arguments are misplaced.

"The existence of subject matter jurisdiction is a matter of law and cannot be conferred upon a court by consent. Consequently, a court's lack of subject matter jurisdiction is not waivable and can be raised at any time." *In re K.J.L.*, 363 N.C. 343, 345–46, 677 S.E.2d 835, 837 (2009) (citations and quotation marks omitted). Nonetheless,

> "where the trial court has acted in a matter, every presumption not inconsistent with the record will be indulged in favor of jurisdiction . . . ." Nothing else appearing, we apply "the *prima facie* presumption of rightful jurisdiction which arises from the fact that a court of general jurisdiction has acted in the matter." As a result, "[t]he burden is on the party asserting want of jurisdiction to show such want."

In re N.T., 368 N.C. 705, 707, 782 S.E.2d 502, 503–04 (2016) (first quoting *Cheape v. Town of Chapel Hill*, 320 N.C. 549, 557, 359 S.E.2d 792, 797 (1987) then quoting *Williamson v. Spivey*, 224 N.C. 311, 313, 30 S.E.2d 46, 47 (1944)).

The UCCJEA applies to proceedings in which child custody is at issue, including those involving juvenile abuse, neglect, dependency and termination of parental rights; and a trial court must comply with its provisions to obtain jurisdiction in such cases. *See* N.C.G.S. §§ 50A-102(4), -201(a)–(b) (2017). Generally, North Carolina courts have jurisdiction to make a child custody determination if North Carolina is the home state of the child. N.C.G.S. § 50A-201(a)(1). " 'Home state' means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." N.C.G.S. § 50A-102(7) (2017). If a court of another state has home state jurisdiction, North Carolina courts do not have jurisdiction unless one of several statutory exceptions applies. *See* N.C.G.S. § 50A-201(a)(2)–(4).

Respondent-mother contends the allegations in the initial juvenile petition established that a prior child-custody determination had been

made as to Sara in Oklahoma[6], and the trial court failed to take the requisite action under the UCCJEA to obtain jurisdiction over her case. Respondent-mother, however, relies on allegations and inferences to support her argument and has not met her burden of showing the trial court lacked jurisdiction over Sara's case. She neglects to mention the finding of fact made by the trial court in its initial adjudication order, wherein the court found only Shanna was removed from respondent-mother's custody by child protective services in Oklahoma. Furthermore, the respondent-mother stipulated to the court that the child protective services matter in Oklahoma had been closed, a fact she had a duty to disclose pursuant to N.C.G.S. § 50A-209(a) (2017). Given these stipulations and other record facts, it was reasonable for the trial court to infer that Oklahoma did not have continuing jurisdiction under the UCCJEA.

Sara had lived with respondent-mother in North Carolina during the six months immediately preceding the filing of the juvenile petition, and North Carolina was her home state. The record before us establishes the trial court thus had "home state" jurisdiction under the UCCJEA to make an initial child-custody determination regarding Sara. *See* N.C.G.S. § 50A-201(a)(1). The trial court's orders granting DSS custody of Sara are not void for lack of subject matter jurisdiction, and DSS had standing to file the petition to terminate respondent-mother's parental rights to Sara pursuant to N.C.G.S. § 7B-1103(a)(3).

[2] We next address respondent-mother's argument that the trial court erred in concluding grounds exist to terminate her parental rights due to her willful failure to pay a reasonable portion of the cost of care for the children although physically and financially able to do so, pursuant to N.C.G.S. § 7B-1111(a)(3). Respondent-mother concedes she paid nothing toward the cost of care for her children and could have done so but argues her failure to pay was not willful. She contends she did not know she could pay towards the cost of care for her children, did not know how to pay towards the cost, and could not reasonably have been expected to do so. We disagree.

Termination of parental rights under the North Carolina Juvenile Code involves a two-stage process—an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2017). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 832

6. Oklahoma has also adopted the UCCJEA. *See* Okla. Stat. tit. 43 §§ 551-101–402 (2019).

S.E.2d 698, 700 (N.C. 2019) (quoting N.C.G.S. § 7B-1109(f) (2017)). "If a trial court finds one or more grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it then proceeds to the dispositional stage," *id.*, where it "determines whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (2017).

At the time DSS filed its petition, a court could terminate parental rights upon finding that:

> The juvenile has been placed in the custody of a county department of social services . . . and the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C. Gen. Stat. § 7B-1111(a)(3) (Supp. 2018). The cost of care "refers to the amount it costs the Department of Social Services to care for the child, namely, foster care." *In re Montgomery*, 311 N.C. 101, 113, 316 S.E.2d 246, 254 (1984). "A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay." *In re Clark*, 303 N.C. 592, 604, 281 S.E.2d 47, 55 (1981).

Respondent-mother's argument that she did not know she had to pay a reasonable portion of the cost of care for her children or how to do so is fundamentally without merit. The absence of a court order, notice, or knowledge of a requirement to pay support is not a defense to a parent's obligation to pay reasonable costs, because parents have an inherent duty to support their children. *See In re T.D.P.*, 164 N.C. App. 287, 289, 595 S.E.2d 735, 737 (2004) (citing *In re Wright*, 64 N.C. App. 135, 139, 306 S.E.2d 825, 827 (1983) ("Very early in our jurisprudence, it was recognized that there could be no law if knowledge of it was the test of its application. Too, that respondent did not know that fatherhood carries with it financial duties does not excuse his failings as a parent; it compounds them.")), *aff'd per curiam*, 359 N.C. 405, 610 S.E.2d 199 (2005); *see also In re Biggers*, 50 N.C. App. 332, 339, 274 S.E.2d 236, 241 (1981) (holding "[a]ll parents have the duty to support their children within their means . . . ."). Given her inherent duty to support her children, respondent cannot hide behind a cloak of ignorance to assert her failure to pay a reasonable portion of the cost of care for her children was not willful. Moreover, respondent-mother was on notice of her failure to pay something towards the cost of care for her children, as shown

by the trial court's repeated findings in each of its permanency planning orders that none of the respondent-parents were paying child support.

In support of this ground to terminate respondent's parental rights, the trial court found:

> 42. The respondent mother is an able bodied person capable of gainful employment and is capable of paying a sum greater than zero per month toward the support of the minor children during the six months prior to the filing of the petition to terminate her parental rights. The respondent is employed . . . and has been for over one year prior to the date of this hearing and earning at least $600 to $700 per week.
>
> 43. During the six months prior to the filing of the petition to terminate parental rights, a period of time from March 27, 2018 through September 27, 2018, the respondent mother paid zero toward the support of the minor children.
>
> 44. A reasonable portion of the cost of care for the minor children for the respondent mother to have paid during the six months prior to the filing of the petition to terminate said respondent's parental rights would have been an amount greater than zero per child per month.

Apart from her argument that she had no knowledge she was required to pay a reasonable portion of the cost of care for her children or how to do so, which we have rejected, respondent-mother does not challenge the evidentiary basis for these findings of fact. These findings are supported by clear, cogent, and convincing evidence and are binding on appeal. *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). We hold that the findings in this case fully support the trial court's conclusion that grounds exist to terminate respondent-mother's parental rights based upon her willful failure to pay a reasonable portion of the cost of care for the children during their placement in DHHS custody pursuant to N.C.G.S. § 7B-1111(a)(3). The trial court's conclusion that one ground existed to terminate parental rights "is sufficient in and of itself to support termination of [respondent-mother's] parental rights[,]" *In re T.N.H.*, 372 N.C. at 413, 831 S.E.2d at 62, and we need not address her arguments challenging the remaining grounds. Respondent-mother does not challenge the trial court's conclusion that termination of her

parental rights is in the children's best interests. Accordingly, we affirm the trial court's order terminating respondent-mother's parental rights to Sara, Shanna, Jacob, and Vera.

AFFIRMED.

IN RE INQUIRY CONCERNING A JUDGE, NO. 18-069

MICHAEL A. STONE, RESPONDENT

No. 242A19

Filed 28 February 2020

Judges—misconduct—conduct bringing judicial office into disrepute—response to State Bar

A district court judge was censured for his response to the State Bar concerning a fee dispute that arose when he was an attorney in private practice. He responded using judicial letterhead and his judicial title, incorrectly believing that using the letterhead and title in a personal matter was appropriate because the notices from the State Bar were addressed to him in his official capacity. Some of his statements to the State Bar were misleading or were made with reckless disregard for the truth. However, respondent was candid and cooperative with the Judicial Standards Commission.

This matter is before the Court pursuant to N.C.G.S. §§ 7A-376 and -377 upon a recommendation by the Judicial Standards Commission entered on 3 June 2019 that respondent Michael A. Stone, a Judge of the General Court of Justice, District Court Division 16A,[1] be censured for conduct in violation of Canons 1 and 2A of the North Carolina Code of Judicial Conduct, and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b). This matter was calendared for argument in the Supreme Court on 8 January 2020 but was determined on the record without briefs or oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission.

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1. Respondent Michael A. Stone is now a Judge of the General Court of Justice, Superior Court Division 19.

No counsel for Judicial Standards Commission or respondent.

ORDER

The issue before the Court is whether Judge Michael A. Stone, respondent, should be censured for violations of Canons 1, 2A, and 2B of the North Carolina Code of Judicial Conduct amounting to conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b). Respondent has not challenged the findings of fact made by the Judicial Standards Commission (the Commission) or opposed the Commission's recommendation that he be censured by this Court.

On 24 October 2018, Commission Counsel filed a Statement of Charges against respondent alleging that he had engaged in conduct inappropriate to his judicial office by demonstrating a lack of respect for the office; by inappropriately using judicial letterhead and invoking his judicial title to strongly challenge the jurisdiction of the State Bar over his conduct while he was an attorney in private practice; and by making a number of misleading and grossly negligent assertions regarding his representation of a former client, bringing the judicial office into disrepute. Respondent fully cooperated with the Commission's inquiry into this matter. In the Statement of Charges, Commission Counsel asserted that respondent's actions constituted conduct inappropriate to his judicial office and prejudicial to the administration of justice that brings the judicial office into disrepute or otherwise constituted grounds for disciplinary proceedings under Chapter 7A, Article 30 of the North Carolina General Statutes.

Respondent filed his answer on 11 December 2018. On 30 April 2019, Commission Counsel and respondent entered into a Stipulation and Agreement for Stated Disposition (the Stipulation) containing joint evidentiary, factual, and disciplinary stipulations as permitted by Commission Rule 22 that tended to support a decision to censure respondent. The Stipulation was filed with the Commission on 30 April 2019. The Commission heard this matter on 10 May 2019 and entered its recommendation on 3 June 2019, which contains the following stipulated findings of fact:

> 7. On or about August 21, 2014, Respondent was sworn in as a district court judge for Judicial District 16A, including Anson, Hoke, Richmond, and Scotland Counties. Prior to that time, Respondent was in private practice

primarily focused on criminal defense and Department of Social Services work.

8. On or about May 2, 2017, a "Petition for Resolution of Disputed Fee" was filed against Respondent with the State Bar's "Attorney Client Assistance Program" by Dahndra Moore based upon Respondent's representation of Mr. Moore for several months in 2014 prior to Respondent's appointment to the bench.

9. In his fee dispute petition, Mr. Moore alleged that Respondent agreed to represent him in a criminal matter for a total fee of $10,000, and that Mr. Moore paid Respondent $5,000 when Respondent withdrew from the representation to accept appointment as a judge. Mr. Moore disputed that Respondent earned the $5,000 he paid Respondent at the time of his withdrawal as counsel.

10. On or about May 8, 2017, Respondent received a "Notification of Mandatory Fee Dispute Resolution" from the State Bar's Attorney Client Assistance Program. The letter was addressed to "Judge Michael A. Stone" but also noted "Attorney at Law" and was mailed to Respondent's home address, not a courthouse or business address.

11. When Respondent received notice of the fee dispute in 2017, he did not recognize Mr. Moore's name, had no independent recollection of his representation of Mr. Moore in 2014, and had no files or other documents relating to the representation.

12. At some point thereafter, and to refresh his recollection as to his representation of Mr. Moore, Respondent contacted his former paralegal Sylvia Williams to gain more information about the representation.

13. Ms. Williams reminded Respondent about the circumstances of his representation of Mr. Moore and informed Respondent that she was still in contact with Nina McLaurin, who had made payments to Respondent on Mr. Moore's behalf during the representation. Based upon the information provided to him by Ms. Williams, Respondent asked Ms. Williams to contact Ms. McLaurin to provide a statement to the State Bar indicating that she personally paid for the legal work performed by

Respondent and that she was satisfied with the legal representation he provided.

14. On or about June 19, 2017, the State Bar received Respondent's response to the fee dispute.

15. Respondent wrote his response to the State Bar on official court letterhead despite the fact that it addressed Respondent's conduct in his private capacity prior to taking the bench. Respondent's letter also immediately invoked his judicial title to strongly challenge the jurisdiction of the State Bar over his conduct while he was an attorney in private practice. Respondent closed the letter by signing his name, and again invoking his judicial title by including "District Court Judge – District 16A" under his signature.

16. Respondent incorrectly believed it was appropriate to use judicial letterhead and invoke his judicial title in a personal matter because the fee dispute notices from the State Bar were addressed to Respondent as "Judge Michael A. Stone," and he was responding to the State Bar, a government agency.

17. In Respondent's written response to the State Bar, Respondent also made a number of assertions regarding his representation of Mr. Moore. Respondent acknowledges those assertions were either misleading or made with reckless disregard for the truth because he did not have independent recollection of the details of Mr. Moore's case or records to justify his assertions. Those assertions include the following statements from his response to the State Bar:

a. Respondent informed the State Bar that Mr. Moore was not entitled to any part of the fees paid because they were not paid by him, but by family and friends. In support of this statement, Respondent included a signed statement purportedly from Ms. Nina McLaurin, a friend of Mr. Moore's, stating that she made the majority of the payments towards the legal fees and that she was "very happy with Mr. Stone's legal services" because Respondent "really helped" Mr. Moore. In fact, because Mr. Moore was in jail and unable

to make the payments in person, Mr. Moore's family and friends paid the fees on his behalf with funds from Mr. Moore's bank account. In addition, the letter Respondent submitted to the State Bar purportedly from Ms. McLaurin was prepared by Ms. Sylvia Williams, Respondent's former legal assistant. Ms. Williams prepared the statement requested by Respondent, and then forged Ms. McLaurin's signature after being unable to secure the statement from her. Respondent was not aware of, nor responsible for, the forgery.

b. Respondent also asserted to the State Bar that he withdrew from representing Mr. Moore because he had not been paid all of the legal fees due to him. However, Respondent now acknowledges that he withdrew from Mr. Moore's case because he was appointed to the bench and could no longer serve as counsel regardless of Mr. Moore's ability to pay.

c. Respondent informed the State Bar that he was unable to produce a copy of his fee agreement with Mr. Moore because he had given it to the court-appointed attorney who took over Mr. Moore's representation after Respondent withdrew, as was his practice as he prepared to wind down his law office. Mr. Moore's new attorney stated that he never received the fee agreement.

d. As part of the justification of the fees he retained, Respondent asserted to the State Bar that he earned his fees because he "worked very hard in negotiating a plea arrangement" that would have avoided a lengthy prison sentence for Mr. Moore. While there may have been serious discussions with prosecutors about Mr. Moore's case, there was never a plea offer made by the District Attorney's office, which also has no documentation of plea negotiations or plea offers made during Respondent's brief representation of Mr. Moore.

18. Respondent's response to the State Bar also included a very detailed summary of the work and hours

Respondent claimed to have performed in Mr. Moore's case, including *inter alia*:

a. "5 separate meeting with the District Attorney's office discussing the case and negotiating his case (6½ hours + minimum 6 hours travel time)";

b. "Meeting with the District Attorney's office about discovery in the case and potential evidentiary issues related to DNA of an aborted fetus from an abortion and legal chain of custody issues as to the evidence, DNA, and legality of evidence related to the tissue of aborted fetus. (2 Hrs. + 2 Hrs travel)";

c. "Legal Research and case law research related to the unique and novel DNA evidence issues in the case (5 Hrs)"; and

d. "Meeting with my private investigator to go over his report regarding the alleged rape victim and her family as well as travel to try to interview the alleged rape victim and her mother (6 hrs + 2 hours travel)."

19. Respondent knew or should have known that the statements to the State Bar described in paragraph 18 above were misleading, or made with reckless disregard for the truth. Respondent concedes that he based his statements upon his review of the court file because he had an insufficient recollection of the work and no records. The following facts establish that the statements to the State Bar were misleading:

a. Despite Respondent's affirmative assertion to the State Bar that he spent two hours of work plus two hours of travel time to the DA's office to discuss DNA issues and evidence in the case, and despite Respondent's claims that he worked very hard to negotiate a plea deal for Mr. Moore, Respondent admits that he has no specific recollection of the time spent or travel time involved and the Assistant District Attorney who prosecuted Mr. Moore and who handled the DNA issues in Mr. Moore's case never discussed Mr. Moore's

charges, the DNA issues, or any plea offer with Respondent in person, by telephone, or via email.

b. Despite Respondent's affirmative assertion to the State Bar that he performed five hours of legal research, Respondent admits that he only recalls this research because it involved a unique DNA issue, and he does not have any specific recollection or documentation of actual time spent doing the research, and did not document any of his research about the DNA issues in Mr. Moore's case.

c. Despite Respondent's affirmative assertion to the State Bar that he spent six hours meeting with his private investigator to go over the investigator's report, the investigator in fact never produced a written investigative report for Respondent's review and does not recall even being paid to do any work in Mr. Moore's case, which Respondent says was not unusual in their working relationship.

20. On or about July 24, 2017, the Fee Dispute Resolution Program notified Mr. Moore and Respondent that the State Bar's fee dispute facilitator concluded that the parties were unable to reach a voluntary resolution of the fee dispute and therefore the dispute was closed.

21. After the fee dispute was closed, the State Bar received a letter from Ms. McLaurin, who had learned from Mr. Moore that Respondent had given the State Bar a letter allegedly provided by her. Ms. McLaurin informed the State Bar that she had no knowledge of the statement and that her signature was forged.

22. Based upon Ms. McLaurin's forgery claim, the State Bar opened a grievance against Respondent, although Respondent asserts that the State Bar did not formally notify him that he was under investigation or why he was under investigation. During the State Bar's investigation, Respondent was interviewed by a State Bar Investigator. During the interview, Respondent reiterated all of the specific assertions as to time worked on Mr. Moore's case made in his June 7, 2017 response letter, and further expressed anger and irritation at being subject to an investigation by the State Bar for his conduct as an

attorney, particularly after Respondent believed the matter to have already been concluded.

23. The State Bar Investigator did not reveal to Respondent that Ms. McLaurin's letter was forged. Respondent remained unaware of the forgery until he received notice of the Commission's formal investigation into this matter.

24. While Respondent did not intentionally attempt to deceive the State Bar, he acknowledges that his assertions to the State Bar were willful, and that those assertions were either misleading or made with reckless disregard for the truth because he did not have any independent recollection of the details of Mr. Moore's case or records to justify his assertions.

(Citations to pages of the Stipulation omitted.)

Based on these findings of fact, the Commission concluded as a matter of law that:

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

2. Canon 2 of the Code of Judicial Conduct generally mandates that "[a] judge should avoid impropriety in all the judge's activities." Canon 2A specifies that "[a] judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2B specifies that a "judge should not lend the prestige of the judge's office to advance the private interest of others . . . ."

3. Respondent concedes that he violated these provisions of the Code of Judicial Conduct.

4. Upon the Commission's independent review of the stipulated facts concerning Respondent's conduct, the

Commission concludes that Respondent failed to personally observe appropriate standards of conduct necessary to ensure that the integrity of the judiciary is preserved, in violation of Canon 1 of the North Carolina Code of Judicial Conduct, and failed to conduct himself in a manner that promotes public confidence in the integrity of the judiciary, in violation of Canon 2A of the North Carolina Code of Judicial Conduct.

5. The Commission further concludes that the facts establish that Respondent engaged in willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C. Gen. Stat. § 7A-376(b). *See also* Code of Judicial Conduct, Preamble ("[a] violation of this Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or willful misconduct in office . . .").

6. The Supreme Court defined conduct prejudicial to the administration of justice in *In re Edens*, 290 N.C. 299 (1976) and stated as follows:

> Conduct prejudicial to the administration of justice that brings the judicial office into disrepute has been defined as "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to the public esteem for the judicial office." Whether the conduct of a judge may be so characterized "depends not so much upon the judge's motives but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers."

Id. at 305-306 (internal citations omitted).

7. The Supreme Court has defined "willful misconduct in office" as "improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly and, generally in bad faith. It is more than a mere error of judgement or an act of negligence." *In re Edens*. 290 N.C. 299, 305 (1976). The Supreme Court has also made clear,

however, that "willful misconduct in office" is not limited to conduct undertaken during the discharge of official duties. As stated in *In re Martin*, 302 N.C. 299 (1981):

> We do not agree, nor have we ever held, that "willful misconduct in office" is limited to the hours of the day when a judge is actually presiding over court. A judicial official's duty to conduct himself in a manner befitting his professional office does not end at the courthouse door. Whether the conduct in question can fairly be characterized as "private" or "public" is not the inquiry; the proper focus is on, among other things, the nature and type of conduct, the frequency of occurrences, the impact which knowledge of the conduct would likely have on the prevailing attitudes of the community, and whether the judge acted knowingly or with a reckless disregard for the high standards of the judicial office.

Id. at 316 (internal citation omitted).

8. In the present case, Respondent made detailed, affirmative and specific factual assertions to the State Bar during its investigation that Respondent knew were unsupported by any personal recollection or documentation. Respondent also did so while invoking his position as a sitting judge and on letterhead bearing the imprimatur of the North Carolina Judicial Branch. Respondent has also fully admitted that his factual assertions to the State Bar were not only misleading and grossly negligent, but that he knew or should have known that such statements were made with reckless disregard for the truth.

9. The Commission concludes that this course of action amounts to willful misconduct in office and that Respondent willfully engaged in misconduct prejudicial to the administration of justice that brings the judicial office into disrepute.

10. Respondent also acknowledges that the factual stipulations contained herein are sufficient to prove by clear and convincing evidence that his actions constitute willful misconduct in office and that he willfully engaged in misconduct prejudicial to the administration of justice

> that brings the judicial office into disrepute in violation of N.C. Gen. Stat. § 7A-376.

(Brackets in original and citations to pages of the Stipulation omitted.)

Based on these findings of fact and conclusions of law, the Commission recommended that this Court censure respondent. The Commission based this recommendation on its earlier findings and conclusions, as well as the following additional dispositional determinations:

> 1. The Supreme Court in *In re Crutchfield*, 289 N.C. 597 (1975) first addressed sanctions under the Judicial Standards Act and stated that the purpose of judicial discipline proceedings "is not primarily to punish any individual but to maintain due and proper administration of justice in our State's courts, public confidence in its judicial system, and the honor and integrity of its judges." *Id.* at 602.
>
> 2. The Commission recommends censure rather than a more severe sanction based on several considerations. First, the actions identified by the Commission as misconduct by Respondent appear to be isolated and do not form any sort of recurring pattern of misconduct. Second, Respondent has been cooperative with the Commission's investigation, voluntarily providing information about the incident and reaching a resolution through this Stipulation. Third, the Commission has observed that Respondent not only fully and openly admitted his error and expressed genuine remorse, but that he fully understands the negative impact his actions have had on the integrity and impartiality of the judiciary.
>
> 3. The Commission and Respondent acknowledge the ultimate jurisdiction for the discipline of judges is vested in the North Carolina Supreme Court pursuant to Chapter 7A, Article 30 of the North Carolina General Statutes, which may either accept, reject, or modify any disciplinary recommendation from the Commission.
>
> 4. Pursuant to N.C. Gen. Stat. § 7A-377(a5), which requires that at least five members of the Commission concur in a recommendation of public discipline to the Supreme Court, all seven Commission members present

> at the hearing of this matter concur in this recommendation to **censure Respondent**.

(Citations to pages of the Stipulation omitted.)

"The Supreme Court 'acts as a court of original jurisdiction, rather than in its typical capacity as an appellate court' when reviewing a recommendation from the Commission." *In re Hartsfield*, 365 N.C. 418, 428, 722 S.E.2d 496, 503 (2012) (order) (quoting *In re Badgett*, 362 N.C. 202, 207, 657 S.E.2d 346, 349 (2008) (order)). Neither the Commission's findings of fact nor its conclusions of law are binding on this Court, but we may adopt them. *Id.* (citing *In re Badgett*, 362 N.C. at 206, 657 S.E.2d at 349). If the Commission's findings are adequately supported by clear and convincing evidence, the Court must determine whether those findings support the Commission's conclusions of law. *Id.* at 429, 722 S.E.2d at 503.

The Commission found the stipulated facts to be supported by "clear, cogent and convincing evidence." Respondent entered into the Stipulation agreeing that those facts and information would serve as the evidentiary and factual basis for the Commission's recommendation, and respondent does not contest the findings or conclusions made by the Commission. We agree that the Commission's findings are supported by clear, cogent, and convincing evidence, and we now adopt them as our own. Furthermore, we agree with the Commission's conclusions that respondent's conduct violates Canons 1, 2A, and 2B of the North Carolina Code of Judicial Conduct, and is prejudicial to the administration of justice, thus bringing the judicial office into disrepute in violation of N.C.G.S. § 7A-376.

This Court is not bound by the recommendations of the Commission. *In re Hartsfield*, 365 N.C. at 429, 722 S.E.2d at 503. Rather, we may exercise our own judgment in arriving at a disciplinary decision in light of respondent's violations of the North Carolina Code of Judicial Conduct. *Id.* Accordingly, "[w]e may adopt the Commission's recommendation, or we may impose a lesser or more severe sanction." *Id.* The Commission recommended that respondent be censured. Respondent does not contest the Commission's findings of fact or conclusions of law and voluntarily entered into the Stipulation with the understanding that the Commission's recommendation would be censure.

We appreciate respondent's cooperation and candor with the Commission throughout these proceedings. Furthermore, we recognize respondent's expressions of remorse and his understanding of the negative impact that his actions have had on the integrity and impartiality of the judiciary. Weighing the severity of respondent's misconduct against

his candor and cooperation, we conclude that the Commission's recommended censure is appropriate.

Therefore, the Supreme Court of North Carolina orders that respondent Michael A. Stone be CENSURED for conduct in violation of Canons 1, 2A, and 2B of the North Carolina Code of Judicial Conduct, and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376.

By order of the Court in Conference, this the 26th day of February, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of February, 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

JONES v. JONES

[373 N.C. 381 (2020)]

JOY MANN JONES
v.
BRUCE RAY JONES

No. 78A19

Filed 28 February 2020

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 824 S.E.2d 185 (N.C. Ct. App. 2019), affirming orders entered on 10 August 2016 and 12 October 2017 by Judge Mary H. Wells in District Court, Lee County. Heard in the Supreme Court on 11 December 2019.

Elizabeth Myrick Boone for plaintiff-appellee.

Wilson, Reives and Silverman, PLLC, by Jonathan Silverman, for defendant-appellant.

PER CURIAM.

AFFIRMED.

NORTH CAROLINA DEPARTMENT OF REVENUE
v.
GRAYBAR ELECTRIC COMPANY, INC.

No. 153A19

Filed 28 February 2020

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order and opinion on petitioner's petition for judicial review entered on 9 January 2019 by Judge Louis A. Bledsoe III, Chief 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(a). Heard in the Supreme Court on 6 January 2020.

Parker Poe Adams & Bernstein LLP, by Kay Miller Hobart, for respondent-appellant.

Joshua H. Stein, Attorney General, Matthew W. Sawchak, Solicitor General, Ronald D. Williams II, Assistant Attorney General, James W. Doggett, Deputy Solicitor General, and Caryn Devins Strickland, Solicitor General Fellow, for petitioner-appellee.

PER CURIAM.

AFFIRMED.

N.C. DEP'T OF REVENUE v. GRAYBAR ELEC. CO.

[373 N.C. 382 (2020)]

STATE OF NORTH CAROLINA WAKE COUNTY N.C. DEPARTMENT OF REVENUE, Petitioner, v. GRAYBAR ELECTRIC COMPANY, INC., Respondent.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 17 CVS 13902 **ORDER AND OPINION ON PETITION FOR JUDICIAL REVIEW**

1. **THIS MATTER** presents for decision whether dividends deducted on a corporation's federal corporate income tax return under the dividends-received deduction ("DRD") of section 243 of the Internal Revenue Code (the "Code") constitute "income not taxable" for purposes of calculating the corporation's net economic loss ("NEL") deduction under N.C. Gen. Stat. § 105-130.8(a) (repealed 2014)[1] for North Carolina corporate income tax purposes. Secondary to this issue is whether reducing NEL deductions by subtracting deducted dividends violates either the United States or North Carolina Constitution.

2. Petitioner North Carolina Department of Revenue (the "Department") filed its Petition for Judicial Review (the "Petition") on November 17, 2017 seeking reversal of the Office of Administrative Hearings' ("OAH") Final Decision (the "Final Decision") entering summary judgment in favor of Respondent Graybar Electric Company, Inc. ("Graybar").

3. The Court held a hearing on the Petition on April 19, 2018, at which both parties were represented by counsel. After considering the Petition, the parties' briefs in support of and in opposition to the Petition, the relevant evidence of record, and the arguments of counsel made at the April 19, 2018 hearing, the Court, for the reasons set forth below, hereby **REVERSES** the Final Decision and **REMANDS** to the OAH with instructions to enter summary judgment in favor of the Department.

North Carolina Attorney General, by Special Deputy Attorney General Tenisha S. Jacobs, for Petitioner N.C. Department of Revenue.

1. The provisions of this statute were in effect during the years at issue here. The General Assembly has since modified the statute, effective for the tax years beginning on and after January 1, 2015.

Parker Poe Adams & Bernstein LLP, by James Greene, Kay Miller Hobart, and Ray Stevens, for Respondent Graybar Electric Company, Inc.

Bledsoe, Chief Judge.

I.

FACTUAL AND PROCEDURAL BACKGROUND

4. The material facts of this matter are not in dispute.

5. Graybar is a New York corporation headquartered in St. Louis, Missouri. (R. at 8, ECF No. 20.) The company distributes electrical, communications, and data networking products throughout the United States and is authorized to do business in North Carolina. (R. at 8; *see* R. at 218–19, ECF No. 22.) Graybar files as a "C" corporation for both federal and North Carolina state income tax purposes. (R. at 8.)

6. Graybar is the parent corporation of several wholly owned subsidiaries, including Graybar Services, Inc. ("Graybar Services"), an Illinois corporation, and Commonwealth Controls Corporation ("Commonwealth"), a Missouri corporation. (R. at 8.) Both Graybar Services and Commonwealth are taxed as "C" corporations for federal income tax purposes. (R. at 8.) Graybar Services has filed North Carolina corporate income tax returns since 1998. (R. at 329, ECF No. 25.)

7. In 2007, Graybar Services paid Graybar a dividend of $400,000,000. (*See* R. at 172.) In 2008, Commonwealth paid Graybar a dividend of $1,000,000. (*See* R. at 173.) Both of these dividends (each a "Dividend," and collectively, the "Dividends") were paid from the respective subsidiary's earnings and profits. (R. at 8.)

8. In 2007 and 2008, the years it received the Dividends, Graybar filed for federal corporate income tax purposes as a consolidated group that included Graybar Services and Commonwealth. (*See* R. at 782.) North Carolina generally does not allow consolidated tax returns but instead requires a corporation to determine its State net income as if it filed a federal return as a separate entity. (R. at 782.) These "as if" federal returns are commonly referred to as pro forma federal corporate income tax returns. (R. at 782.)

9. Graybar included the Dividends on its 2007 and 2008 pro forma federal corporate income tax returns and deducted the Dividends from the amounts it reported as federal taxable income. (*See* R. at 188, 192, 203, 209.) Specifically, Graybar claimed a DRD under section 243 of the

Code for the Dividends it had received from its subsidiaries and deducted 100 percent of the Dividends on Line 29(b), "Special Deductions," in its federal corporate income tax returns. (*See* R. at 182, 192, 203, 209.)

10. Because Graybar was doing business in North Carolina in the tax years 2007 and 2008, it filed a series of North Carolina "C" corporation tax returns reporting its liability for State corporate income and franchise taxes. (R. at 603–04; *see* R. at 648–66.) North Carolina levies a corporate income tax on "State net income," which is based on a corporation's federal taxable income. (R. at 36, ECF No. 21.) Graybar's calculation of its corporate income tax for each of its North Carolina corporate income tax returns reflected the amount of federal taxable income *after* the Dividends were deducted on Line 29(b) of the federal tax returns. (R. at 603–04; *see* R. at 648–66.) Ultimately, Graybar reported its State net income as zero for 2007 and 2008 because it offset its taxable income with substantial NELs it sustained in prior years dating back to 2001. (R. at 605; *see* R. at 648–66.)

11. The Department audited Graybar in 2015. (R. at 605.) After the audit, the Department determined that Graybar underreported its corporate income tax liability for the tax years 2008, 2012, and 2013 because it improperly calculated its NEL deductions. (R. at 35.) The Department concluded that Graybar had failed to reduce the NEL it carried forward to the tax years 2007 and 2008 by the income attributable to the Dividends received. (R. at 605.) The Department reasoned that "[b]efore a [NEL] brought forward may be deducted, . . . [the NEL] must be reduced by any current-year nontaxable income[.]" (R. at 9.) Because the Dividends were deducted from Graybar's federal gross income to derive its federal taxable income, the Department concluded that the Dividends constituted "current-year nontaxable income." (R. at 9.)

12. The Department accordingly reduced the NELs that Graybar reported in 2007 and 2008 by the apportioned amount of the Dividends received,[2] and as a result, concluded that Graybar did not have a NEL for those two years. (R. at 605.) The elimination of the NEL for tax years 2007 and 2008 increased Graybar's State corporate income tax liability for 2008, 2012, and 2013. (R. at 605–06.) Based on the new NEL calculation, the Department proposed assessments against Graybar for the tax

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2. It is undisputed that the Dividends constituted North Carolina apportionable income under the then current version of N.C. Gen. Stat. § 105-130.4 during the tax years at issue. While the Dividends totaled $400,000,000 in 2007 and $1,000,000 in 2008, the amount apportioned to North Carolina for state income tax purposes was $14,194,000 and $34,465, respectively. (R. at 9.)

years 2008, 2012, and 2013, (R. at 6), in the total amount of $380,835.97, inclusive of additional State taxes, penalties, and interest, (R. at 35).

13. On September 16, 2015, Graybar timely filed with the Department a request for review concerning the proposed assessment of additional State taxes, penalties, and interest. (R. at 6.) In June 2016, the Department issued a Notice of Final Determination upholding the assessment, (R. at 35–39), citing N.C. Gen. Stat. § 105-130.8(a)(3), which provides that a NEL from a prior year can be deducted from income in a succeeding year, "only to the extent that the loss carried forward from the prior year exceeds any income not taxable" received in the succeeding year. The Department found that the Dividends received constituted "income not taxable," and thus that Graybar was required to reduce its NEL deductions by the amount of the Dividends apportioned to North Carolina. (R. at 37–38.)

14. Following receipt of the Notice of Final Determination, Graybar filed a contested case with the OAH on August 10, 2016, alleging that "the Department improperly reduced [Graybar's] net economic loss carryovers" by the amounts attributable to the Dividends. (R. at 27–34.) Graybar argued that its Dividend income was not "income not taxable" and that a reduction of its NELs was unconstitutional under both the North Carolina and United States Constitutions. (R. at 30–33.) Both parties moved for summary judgment on June 9, 2017. (R. at 4.)

15. By a Final Decision issued on October 16, 2017, the OAH entered summary judgment for Graybar, holding that the Dividends were "taxable as a matter of law" and were "not 'income not taxable.' " (R. at 4–23, 14.) The OAH further noted its agreement with Graybar's contention that "the Department's position created a double taxation on the same income" in violation of the North Carolina Constitution. (R. at 21.)

16. On November 14, 2017 the Department filed the Petition in Wake County Superior Court, seeking reversal of the OAH's Final Decision and the entry of summary judgment in favor of the Department. The matter was subsequently designated as a complex business case by the Chief Justice of the Supreme Court of North Carolina and assigned to the undersigned. The Department and Graybar each submitted briefs in support of and opposition to the Petition, each seeking the entry of summary judgment in its favor. On April 19, 2018, the Court held a hearing on the Petition, at which both parties were represented by counsel. The Petition is now ripe for resolution.

II.

LEGAL STANDARD

17. When the trial court "exercises judicial review over an agency's final decision, it acts in the capacity of an appellate court." *Meza v. Div. of Soc. Servs.*, 364 N.C. 61, 75, 692 S.E.2d 96, 105 (2010) (quoting *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 662, 599 S.E.2d 888, 896 (2004)).

18. Chapter 150B of the North Carolina General Statutes provides that "[t]he court reviewing a final [agency] decision may affirm the decision or remand the case for further proceedings." N.C. Gen. Stat. § 150B-51(b). "In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record." *Id.* § 150B-51(c).

19. The Department appeals the Final Decision of the OAH granting summary judgment in favor of Graybar. "Appeals arising from summary judgment orders are decided using a *de novo* standard of review." *Midrex Techs. v. N.C. Dep't of Revenue*, 369 N.C. 250, 257, 794 S.E.2d 785, 791 (2016). Under the *de novo* standard of review, the Court will "consider[] the matter anew and freely substitute[] its own judgment" for that of the OAH. *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895 (quoting *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)). "In reviewing a final decision allowing . . . summary judgment, the court may enter any order allowed by . . . Rule 56" of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 150B-51(d).

20. Under Rule 56, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to . . . judgment as a matter of law." N.C. R. Civ. P. 56(c). A genuine issue is "one that can be maintained by substantial evidence." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). A material fact is one that "would constitute or would irrevocably establish any material element of a claim or defense." *Abner Corp. v. City Roofing & Sheetmetal Co.*, 73 N.C. App. 470, 472, 326 S.E.2d 632, 633 (1985). Summary judgment is appropriate if "the facts are not disputed and only a question of law remains." *Wal-Mart Stores E. v. Hinton*, 197 N.C. App. 30, 37, 676 S.E.2d 634, 638 (2009) (quoting *Carter v. W. Am. Ins. Co.*, 190 N.C. App. 532, 536, 661 S.E.2d 264, 268 (2008)). Thus, where, as here, the material facts are

undisputed on appeal, "a summary disposition of the claims is proper and appropriate." *Technocom Bus. Sys. v. N.C. Dep't of Revenue*, 2011 NCBC LEXIS 1, at *12 (N.C. Super. Ct. Jan. 4, 2011).

21. Graybar, as the "taxpayer claiming a deduction," must bring itself "within the statutory provisions authorizing the deduction." *Wal-Mart Stores E.*, 197 N.C. App. at 54–55, 676 S.E.2d at 651 (quoting *Ward v. Clayton*, 5 N.C. App. 53, 58, 167 S.E.2d 808, 811 (1969)).

III.

ANALYSIS

22. North Carolina imposes a tax on the "State net income of every C Corporation doing business in this State[.]" N.C. Gen. Stat. § 105-130.3. "State net income" is based on a "taxpayer's federal taxable income as determined under the Code, adjusted as provided in G.S. 105-130.5[.]" *Id.* § 105-130.2(15). Under the Code, federal taxable income "means gross income minus the deductions allowed by [the Code]." I.R.C. § 63(a). Although the Code identifies dividends as an item of gross income, *id.* § 61(a)(7), the DRD allowed under section 243 of the Code authorizes a corporation to deduct "100 percent" of the dividends it receives from "a member of the same affiliated group[,]" *id.* § 243(a)(3), (b)(1)(A). Because dividends deducted under the DRD are not included in a corporation's federal taxable income, such dividends are likewise not included in a corporation's State net income.

23. As noted, a corporation's State net income is subject to certain adjustments set forth in section 105-130.5. N.C. Gen. Stat. § 105-130.2(15). One such adjustment authorizes a deduction for "[l]osses in the nature of net economic losses sustained by the corporation in any or all of the 15 preceding years pursuant to the provisions of G.S. 105-130.8." *Id.* § 105-130.5(b)(4). In turn, the now-repealed section 105-130.8 provided that a corporation that sustained a NEL in any or all of the preceding fifteen income years was permitted to apply the NEL as a deduction from income in a succeeding taxable year. *Id.* § 105-130.8(a). Such deductions, however, were limited by section 105-130.8(a)(3), which provided in relevant part as follows:

> Any net economic loss of prior years brought forward and claimed as a deduction in any income year may be deducted from net income of the year only to the extent that the loss carried forward from the prior years exceeds any *income not taxable under this Part* received in the same year in which the deduction is claimed[.]

Id. § 105-130.8(a)(3) (emphasis added). The purpose of this NEL provision was to provide "some measure of relief to the corporation that has incurred economic misfortune." *Id.* § 105-130.8(a)(1).

24. Here, Graybar deducted from its gross income the Dividends received pursuant to the DRD and claimed those deductions to arrive at the amounts reported on Line 30 of its 2007 and 2008 federal corporate income tax returns as its federal taxable income. For purposes of its North Carolina corporate income tax returns, Graybar reported the amounts reflected on Line 30 of its federal returns as its "federal taxable income," and this figure became the starting point for the calculation of Graybar's State net income. As a result, the Dividends, deducted from gross income to determine federal taxable income, were not included in the amounts that comprised Graybar's State net income. Graybar ultimately reported its State net income as zero for 2007 and 2008 because Graybar's substantial NELs from prior years were greater than Graybar's apportioned federal taxable income as reflected on its North Carolina corporate income tax returns. In calculating its NELs, Graybar did not reduce its losses by the amount of the Dividends received (i.e., it did not treat the Dividends as "income not taxable" under section 105-130.8(a)(3)).

A. Income Not Taxable

25. In the proceeding below, the OAH concluded that the Dividends were not "income not taxable" for purposes of the NEL provision then in effect. The OAH specifically concluded, and Graybar argues here, that the Dividends were not "income not taxable" because they do not fall within either of the two categories of income specifically referenced in N.C. Gen. Stat. § 105-130.8(a)(5):

> For purposes of this section, any income item deductible in determining State net income under the provisions of G.S. 105-130.5 and any nonapportionable income not allocable to this State under the provisions of G.S. 105-130.4 *shall be considered* as income not taxable under this Part. The amount of the income item considered income not taxable under this Part is determined after subtracting related expenses for which a deduction was allowed under this Part.

Id. § 105-130.8(a)(5) (emphasis added).

26. The OAH agreed with Graybar's contention that section 105-130.8(a)(5) must be read as limiting "income not taxable" to include only the two categories of income specifically identified therein. Because

it is undisputed that the Dividends fall into neither category, Graybar contends that summary judgment was appropriately entered in its favor.

27. "In matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished." *Elec. Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). The General Assembly's intent "is first ascertained from the plain words of the statute." *Id.*

28. Applying this standard, the Court concludes that section 105-130.8(a)(5) is exemplary—not exclusive or exhaustive. As noted by the OAH, "the language of § 105-130.8(a)(5) does not contain any indicia that the General Assembly intended that section to be an exhaustive list of all types of income that would be considered as 'income not taxable.' " (R. at 11.) Indeed, the statute's plain words do not purport to provide a complete list or otherwise limit "income not taxable" to only the types of income referenced therein. It does not use words or phrases like "means," "shall mean," "exclusively," "solely," "only," or "limited to," and instead simply declares that two types of income "shall be considered as income not taxable." N.C. Gen. Stat. § 105-130.8(a)(5); *see Pipe Line Cases*, 234 U.S. 548, 559–60 (1914) (interpreting statutory phrase "shall be considered" as not narrowing statute's reach); *Lynch v. PPG Indus.*, 105 N.C. App. 223, 225, 412 S.E.2d 163, 165 (1992) ("The statutory language, 'include but not be limited to,' clearly indicates, however, that the legislature did not intend an exclusive list."); *cf. Evans v. Diaz*, 333 N.C. 774, 779–80, 430 S.E.2d 244, 246–47 (1993) (finding "a long and specific list" that was "obviously intended to be" exhaustive to constitute a complete list).

29. Moreover, had the legislature intended the statute to be exclusive, it could have done so.[3] This is especially true in light of the North Carolina Supreme Court's decision in *Dayco Corp. v. Clayton*, 269 N.C.

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3. The language chosen in other subsections within section 105-130.8 suggests that the General Assembly did not intend for section 105-130.8(a)(5) to contain an exhaustive list. "When a legislative body includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that the legislative body acts intentionally and purposely in the disparate inclusion or exclusion." *N.C. Dep't of Revenue v. Hudson*, 196 N.C. App. 765, 768, 675 S.E.2d 709, 711 (2009) (internal quotation marks, alteration, and citation omitted). While the General Assembly provided a clearly exhaustive definition for "net economic loss," *see* N.C. Gen. Stat. § 105-130.8(a)(2) ("The net economic loss for any year *means* the amount by which allowable deductions for the year other than prior year losses exceed income from all sources in the year including any income not taxable under this Part." (emphasis added)), the same cannot be said of section 105-130.8(a)(5).

490, 153 S.E.2d 28 (1967), a decision issued four months before section 105-130.8 was enacted that addressed the meaning of "income not taxable" for purposes of the substantially similar NEL provisions in the predecessor statute. *Id.* at 497–98, 153 S.E.2d at 33; *see Kornegay Family Farms LLC v. Cross Creek Seed, Inc.*, 370 N.C. 23, 29, 803 S.E.2d 377, 381 (2017) ("[T]he legislature is always presumed to act with full knowledge of prior and existing law and . . . where it chooses not to amend a statutory provision that has been interpreted in a specific way, we may assume that it is satisfied with that interpretation." (quoting *Polaroid Corp. v. Offerman*, 349 N.C. 290, 303, 507 S.E.2d 284, 294 (1998))).

30. In *Dayco*, our Supreme Court considered whether dividend income allocable to states other than North Carolina constituted "income not taxable" for State income tax purposes under N.C. Gen. Stat. § 105-147(9)(d) (repealed 1967), the substantially similar predecessor statute to section 105-130.8.[4] *Dayco Corp.*, 269 N.C. at 497, 153 S.E.2d at 32–33. The Supreme Court concluded that because such income is not allocable to North Carolina, it is not subject to tax by North Carolina. *Id.* at 498, 153 S.E.2d at 33. The taxpayer argued that even though this income was not taxed by North Carolina, it was subject to tax in other states and thus was taxable income. *Id.* at 497, 153 S.E.2d at 33. The Supreme Court disagreed, concluding that " 'taxable income' clearly means income on which the State of North Carolina, by the Revenue Act, levies a tax" and that "[a]ll other income is 'income not taxable.' " *Id.* at 498, 153 S.E.2d at 33; *see also Aberfoyle Mfg. Co. v. Clayton*, 265 N.C. 165, 171–73, 143 S.E.2d 113, 118–19 (1965) (holding that a liquidating distribution, while not taxable income, was nonetheless "income not taxable" because it increased the corporation's assets and was not taxed by the State).

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4. N.C. Gen. Stat. § 105-147(9)(d) provided, in relevant part, as follows:

> Any net economic loss of a prior year or years brought forward and claimed as a deduction in any income year may be deducted from taxable income of the year only to the extent that such carry-over loss from the prior year or years shall exceed any income not taxable under this article received in the same year in which the deduction is claimed, except that in the case of taxpayers required to apportion to North Carolina their net apportionable income, as defined in this article, only such proportionate part of the net economic loss of a prior year shall be deductible from the income taxable in this State as would be determined by the use of the apportionment ratio computed under the provisions of G.S. 105-134 or of subsection (c) of G.S. 105-142, as the case may be, for the year of such loss.

N.C. Gen. Stat. § 105-147(9)(d)(3) (repealed 1967).

31. Applying the definition set forth in *Dayco*, the Court concludes that the Dividends Graybar received are "income not taxable" under section 105-130.8(a)(3). Graybar deducted the Dividends from its gross income pursuant to the Code's DRD, and the Dividends were thus excluded from Graybar's federal taxable income and, consequently, its State net income. As a result, the Dividends were not income upon which the State levied a tax.

32. In its Final Decision, the OAH distinguished *Dayco* on the ground that it applied to dividend income allocable to other states, not, as here, dividend income apportioned to North Carolina. The Court disagrees with the OAH's interpretation of *Dayco*. By clearly defining "income not taxable" under a substantially similar statute as income on which the State does not levy a tax, the Supreme Court has, at a minimum, offered persuasive authority and forecast its view of the proper interpretation of "income not taxable" under section 105-130.8(a)(3) and, at most, provided the rule of decision in this case.

33. When interpreting tax statutes, any "ambiguities . . . are resolved in favor of taxation." *Home Depot U.S.A., Inc. v. N.C. Dep't of Revenue*, 2015 NCBC LEXIS 103, at *19 (N.C. Super. Ct. Nov. 6, 2015) (quoting *Aronov v. Sec'y of Revenue*, 323 N.C. 132, 140, 371 S.E.2d 468, 472 (1988)). Although the Court does not find section 105-130.8 to be ambiguous, should the Supreme Court decide otherwise, this Court notes that its statutory interpretation limiting "income not taxable" to the two categories listed in subsection 105-130.8(a)(5) will permit a broader range of income to offset NEL deductions, a result in favor of taxation. *See Bodford v. N.C. Dep't of Revenue*, 2013 NCBC LEXIS 18, at *13 (N.C. Super. Ct. Apr. 10, 2013) ("The court is to construe strictly any statute providing for a deduction and resolve ambiguities in favor of taxation.").

34. The OAH also rested its conclusion on the fact that the Dividends were "deductions," rather than "exclusions," stating that because "[n]o exemption or exclusion prevented the Dividends from being included in income on either the federal or North Carolina returns[,] . . . the Dividends are not 'income not taxable.' " (R. at 19.) The OAH concluded, and Graybar argues here, that "income not taxable" under section 105-130.8 should be read to mean income items excluded from gross income altogether (i.e., items that were never within the State's authority to tax) and does not include income that the State had the authority to tax, including items first included in, and then removed from, gross income by the claiming of a deduction (like the Dividends here).

35. The OAH's focus on the Dividends' status as "deductions" and not "exclusions" is misplaced. Under *Dayco*, the determinative issue is whether the State actually levied a tax on the item of income, not whether the State had the authority to do so. The Dividends were deducted from Graybar's federal taxable income pursuant to the DRD and were not included in its State net income. Because the Dividends are income on which the State did not levy a tax, the Dividends were "income not taxable" under section 105-130.8(a)(3).

36. The Court finds further support for its conclusion in the stated policy aims motivating the passage of section 105-130.8. *See Elec. Supply Co.*, 328 N.C. at 656, 403 S.E.2d at 294 ("Courts also ascertain legislative intent from the policy objectives behind a statute's passage and the consequences which would follow from a construction one way or another." (internal quotation marks omitted)). As expressed in the statute, the NEL provisions were intended to address a corporation's "net economic situation" in order to provide relief to corporations that "incurred economic misfortune." N.C. Gen. Stat. § 105-130.8(a)(1). The Court concludes that the legislature likely did not intend for over $14,000,000 in allocable income to be disregarded in determining a corporation's "net economic situation" for purposes of providing relief based on a corporation's "economic misfortune." *See Aberfoyle Mfg. Co.*, 265 N.C. at 172, 143 S.E.2d at 119 (reducing NEL deduction where liquidating distribution increased taxpayer's assets by over $4,000,000).

37. The Court's conclusion is also buttressed by the Department's published guidance. The Department is required to administer the State's tax laws. N.C. Gen. Stat. § 143B-219. The Secretary of Revenue (the "Secretary") is authorized to publish guidance and bulletins interpreting the laws administered by the Department. N.C. Gen. Stat. § 105-264. The Supreme Court of North Carolina has explained that "[a]n interpretation by the Secretary is *prima facie* correct" and that the Secretary's interpretation of "the relevant statutory language is important and must be given 'due consideration.' " *Midrex Techs.*, 369 N.C. at 260, 794 S.E.2d at 793; *see Carolina Photography, Inc. v. Hinto*n, 196 N.C. App. 337, 339, 674 S.E.2d 724, 725 (2009) ("A rule, *bulletin*, or directive promulgated by the Secretary of Revenue which interprets [laws administered by the Department] is *prima facie* correct[.]" (emphasis added)).

38. During the years at issue here, the Secretary published a series of bulletins interpreting section 105-130.8 and, in particular, the meaning of "income not taxable" under the statute (the "Bulletins"). (*See* R. at 735–52.) In particular, the Bulletins for taxable years 2007 and 2008

define "income not taxable" as "any income that has been deducted in computing State net income under G.S. 105-130.5, any nonapportionable income that has been allocated directly to another state under G.S. 105-130.4, and *any other income* that is not taxable under State law. (*See Dayco Corporation v. Clayton*.)." (R. at 738 (emphasis added).) Thus, in addition to referencing the two categories of income identified in section 105-130.8(a)(5), the Bulletins also explicitly referenced, and adopted the holding in *Dayco*.

39. Although the OAH found that the Bulletins were "entitled to some deference," the OAH concluded, and Graybar argues here, that the Bulletins are not controlling and misinterpret section 105-130.8.[5] (R. at 11.) Graybar contends that the Court should instead rely upon a 1965 opinion of the North Carolina Attorney General. That opinion, which was issued two years before the Supreme Court's *Dayco* decision, opined that the interpretation of "income not taxable" depended on the "distinction between income excludable from gross income and income deductible from gross income." (Resp't's Br. Ex. 1 [hereinafter "AG Opinion"], ECF No. 30.) The Attorney General concluded:

> [s]ince interest and dividends are both items of gross income subject to taxation . . . , all such income would be considered TAXABLE INCOME notwithstanding the fact that a portion of such interest and dividends may qualify as deductions from gross income . . . in determining the taxpayer's net taxable income.

(AG Opinion 3.) As Graybar points out, other states have followed this same approach. *See Rosemary Props., Inc. v. McColgan*, 177 P.2d 757, 763 (Cal. 1947) ("Since the gross income and specified deductions are the factors included in arriving at the net income, the conclusion is unavoidable that it is gross income that is included in the measure of the tax."); *Yaeger v. Dubno*, 449 A.2d 144, 147 (Conn. 1982) (concluding " 'dividends taxable for federal income tax purposes' means gross dividends as defined under Code, without regard to federal adjustments").

40. Upon careful review, however, the Court concludes that the Attorney General's opinion is of limited value here, particularly when

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5. The OAH concluded that the Department's reliance on the Bulletins was misguided because (i) the Dividends were not "income not taxable" under *Dayco* (i.e., because *Dayco* involved dividend income allocable to other states), (ii) in any event, section 105-130.8(a)(5) provided a "statutory definition" of "income not taxable" that does not encompass the Dividends, and (iii) the Bulletins did not give notice that a DRD deduction "converts taxable dividends into 'income not taxable.'" (R. at 11–12.)

compared to the Department's Bulletins, because the opinion was issued before the Supreme Court's decision in *Dayco*. Indeed, the Court's research has not disclosed, and Graybar has not cited, any judicial or administrative decisions relying upon the Attorney General's opinion. Moreover, while the Department's Bulletins are presumed to be *prima facie* correct, *see Carolina Photography, Inc.*, 196 N.C. App. at 339, 674 S.E.2d at 725, the Attorney General's opinion on tax matters is merely advisory, *see In re Va.-Carolina Chem. Corp.*, 248 N.C. 531, 538, 103 S.E.2d 823, 828 (1958), and our appellate courts have admonished that "[w]hile opinions of the Attorney General are entitled to 'respectful consideration,' such opinions are not compelling authority[,]" *McLaughlin v. Bailey*, 240 N.C. App. 159, 167–68, 771 S.E.2d 570, 577 (2015) (quoting *Williams v. Alexander Cty. Bd. of Educ.*, 128 N.C. App. 599, 602, 495 S.E.2d 406, 408 (1998)). As a result, the Court concludes that, as between the two, the Department's guidance, rather than the Attorney General's opinion, is the more persuasive and further supports the Court's conclusion that the Dividends Graybar received constituted "income not taxable" for purposes of section 105-130.8.

41. Finally, the OAH found, and Graybar argues here, that the Bulletins did not provide the public with notice of the Department's interpretation that dividends deducted under the DRD are "income not taxable" for purposes of section 105-130.8(a)(3). The Court disagrees. The Department's Bulletins interpreting the NEL provision explicitly state that "income not taxable" includes "any other income that is not taxable under State law" and cite *Dayco* for support. Because *Dayco* provides that "income not taxable" includes any income on which the State does not levy a tax, the Court concludes that the Bulletins afforded the public, including Graybar, adequate notice of the Department's interpretation.[6]

42. For each of these reasons, therefore, the Court concludes that the Dividends deducted pursuant to the DRD, I.R.C. § 243(a)(3), are

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6. Graybar also points to case law holding that where the only authority for an agency's interpretations of the law is its litigation position in a particular case, "that interpretation may be viewed skeptically on judicial review." *See Cashwell v. Dep't of State Treasurer, Ret. Sys. Div.*, 196 N.C. App. 80, 89, 675 S.E.2d 73, 78 (2009) (quoting *Rainey v. N.C. Dep't of Pub. Instruction*, 361 N.C. 679, 681, 652 S.E.2d 251, 252 (2007)). The Bulletins at issue here, however, were published for the 2007 and 2008 tax years, seven years before the Department conducted its audit and seven years before Graybar formally requested a review of the Department's proposed assessments. In fact, this same interpretation appears in Bulletins dating back to at least 1999. (*See* R. at 751–52.) Graybar's argument on this point is thus unpersuasive. *See Cashwell*, 196 N.C. App. at 89, 675 S.E.2d at 78 ("[I]f the agency's interpretation of the law is not simply a 'because I said so' response to the contested case, then the agency's interpretation should be accorded . . . deference[.]" (quoting *Rainey*, 361 N.C. at 681, 652 S.E.2d at 252–53)).

"income not taxable" under section 105-130.8(a)(3), that Graybar has failed to bring itself within the statutory provisions authorizing the NEL deduction calculation it seeks, and that the OAH's contrary conclusion should be reversed.

B. Constitutionality

43. In light of the OAH's determination that the Dividends were not "income not taxable" for purposes of section 105-130.8, the OAH concluded that it was "not necessary to rule on [Graybar's] constitutional argument." (R. at 18.) Nevertheless, the OAH noted its agreement with Graybar's contention that "the Department's position creates a double taxation on the same income" in violation of the North Carolina Constitution's Just and Equitable Clause. (R. at 18.) Graybar agrees with this conclusion and argues in addition that this alleged double taxation violates the Law of the Land Clause in the North Carolina Constitution and the Due Process Clause contained in the Fourteenth Amendment of the United States Constitution. (*See* Resp't's Br. 20–22.) The Court concludes that these applied constitutional challenges are properly before the Court for determination. *See* N.C. Gen. Stat. § 150B-51(d) ("In reviewing a final decision allowing . . . summary judgment, the court may enter any order allowed by . . . Rule 56.").

44. As an initial matter, our appellate courts have held that "[a] law is presumed constitutional until the contrary is shown and the burden is on the party claiming that the law is unconstitutional to show why it is unconstitutional as applied to him." *Perry v. Perry*, 80 N.C. App. 169, 176, 341 S.E.2d 53, 58 (1986).

45. The Just and Equitable Clause of the North Carolina Constitution provides that "[t]he power of taxation shall be exercised in a just and equitable manner[.]" N.C. Const. art. V, § 2(1). The provision operates to limit the State's taxing power and protects the public against abusive tax policies. *IMT, Inc. v. City of Lumberton*, 366 N.C. 456, 461–62, 738 S.E.2d 156, 159 (2013). The tension between the State's constitutional authority to tax and the Just and Equitable Clause "must be resolved in a manner that protects the citizenry from unjust and inequitable taxes while preserving legislative authority to enact taxes without exposing the State or its subdivisions to frivolous litigation." *Id.* at 461, 738 S.E.2d at 159. In determining whether a tax is just and equitable, courts should look to factors such as, among others, whether the tax was uniformly applied, exemptions from alternative taxes, and the size of the taxing jurisdiction. *Id.* at 461–62, 738 S.E.2d at 159–60 (citing *Nesbitt v. Gill*, 227 N.C. 174, 179–80, 41 S.E.2d 646, 650–51 (1947)).

46. Challenges under the Just and Equitable Clause must be determined on a case-by-case basis, *id.* at 463, 738 S.E.2d at 160, and legislative action "will not be held invalid as violative of the Constitution unless it so appears beyond a reasonable doubt[,]" *Nesbitt*, 227 N.C. at 181, 41 S.E.2d at 651. "And when there is reasonable doubt as to the validity of a statute, such doubt will be resolved in favor of its constitutionality." *Id.* "The 'power of taxation is very largely a matter of legislative discretion' and . . . 'in respect to the method of apportionment as well as the amount, it only becomes a judicial question in cases of palpable and gross abuse.' " *Smith v. City of Fayetteville*, 220 N.C. App. 249, 256, 725 S.E.2d 405, 411 (2012) (quoting *E. B. Ficklen Tobacco Co. v. Maxwell*, 214 N.C. 367, 372, 199 S.E. 405, 409 (1938)).

47. The Law of the Land Clause provides that "[n]o person shall be denied the equal protection of the laws," and shall not be "taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. Our courts have held that the clause is "interpreted to be analogous with the [United States Constitution's] Fourteenth Amendment 'due process of law' clause." *City of Asheville v. State*, 192 N.C. App. 1, 44, 665 S.E.2d 103, 133 (2008). "These clauses have been consistently interpreted to permit the state, through the exercise of its police power, to regulate economic enterprises provided the regulation is rationally related to a proper governmental purpose." *Id.* Accordingly, the Court's analysis of the Law of the Land Clause and the Due Process Clause for present purposes diverges into a two-fold inquiry: "(1) Does the regulation have a legitimate objective? and (2) If so, are the means chosen to implement the objective reasonable?" *Id.*

48. Here, the OAH concluded, and Graybar argues now, that the substantial Dividend paid to Graybar by Graybar Services was subject to double taxation because Graybar Services paid taxes on the earnings and profits from which it paid the Dividend to Graybar and thereafter the State taxed these same monies by determining the Dividend to be "income not taxable" under the NEL provision.[7]

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7. It is worth noting that Graybar, Graybar Services, and Commonwealth are all structured as "C" corporations for federal income tax purposes and that "double taxation" is a common, widely accepted, and permissible feature of this form of business organization. As explained by one federal circuit court:

> A C corporation is a corporate entity that is required to pay taxes on the income it earns. If a C corporation decides to issue dividends to its shareholders, the shareholders must pay income tax on these dividends.

49. Notably, it has long been held that nothing in either the United States Constitution or the North Carolina Constitution prevents the State from imposing double taxation, provided the tax is imposed without arbitrary distinctions. *See*, *e.g.*, *Illinois C. R. Co. v. Minnesota*, 309 U.S. 157, 164 (1940) ("[T]he Fourteenth Amendment no more forbids double taxation than it does doubling the amount of a tax; short of confiscation or proceedings unconstitutional on other grounds." (internal quotation marks omitted)); *Jamison v. Charlotte*, 239 N.C. 682, 693–94, 80 S.E.2d 904, 913 (1954) (citing North Carolina cases to similar effect); *see also*, *e.g.*, *Swiss Oil Corp. v. Shanks*, 273 U.S. 407, 413 (1927) ("[T]he Fourteenth Amendment does not require uniformity of taxation, nor forbid double taxation." (citations omitted)); *Charlotte Coca-Cola Bottling Co. v. Shaw*, 232 N.C. 307, 309, 59 S.E.2d 819, 821 (1950) ("Double taxation, as such, is not prohibited by the Constitution, and is not invalid if the rule of uniformity is observed."); *Sabine v. Gill*, 229 N.C. 599, 603, 51 S.E. 2d 1, 3 (1948) ("[D]ouble taxation, even within the State, is not *ipso facto* necessarily obnoxious to the Constitution when the intention to impose it is clear and it is free from discriminatory features, however odious to the taxpayer.").

> This arrangement exposes shareholder dividends to double taxation—a C corporation's income is taxed at the corporate level and the portion of the C corporation's income that is passed on to shareholders is taxed again at the shareholder level.

Crumpton v. Stephens, 715 F.3d 1251, 1253 n.2 (11th Cir. 2013); *see Crowder Constr. Co. v. Kiser*, 134 N.C. App. 190, 194, 517 S.E.2d 178, 182 (1999) ("As a 'C' corporation, the Company paid corporate income tax on its earnings, and its shareholders paid income taxes on any dividends received by them.").

The DRD permits a corporation to deduct the dividends it receives from a subsidiary to avoid double taxation in this context. The policy considerations motivating the DRD deduction, however, are different from those justifying an NEL deduction. *Compare* H.R. Rep. No. 708, 72d Cong., 1st Sess., 12 (1932) (legislative history of 26 U.S.C. § 243(a)(1) reflecting a Congressional policy against double taxation of income by permitting dividends received deductions to corporations on "the theory that a corporate tax has already been paid upon the earnings out of which the dividends are distributed"), *with* N.C. Gen. Stat. § 105-130.8(a)(1) (affording relief for corporations suffering "economic misfortune" based on "net economic situation of the corporation"), *and Aberfoyle Mfg. Co.*, 265 N.C. at 171, 143 S.E.2d at 118 ("The General Assembly was under no constitutional or other legal compulsion to permit a net economic loss or losses deduction for a corporation from taxable income in a subsequent year or years. It enacted the carry-over provisions of [the predecessor statute] purely as a matter of grace, gratuitously conferring a benefit but limiting such benefit to the net economic loss of the taxpayer after deducting therefrom the allocable portion of such taxpayer's nontaxable income." (internal quotation marks omitted)).

50. Here, assuming without deciding that the State's determination concerning "income not taxable" results in double taxation,[8] the Court concludes that Graybar has failed to show that its tax burden resulting from the State's determination—i.e., the reduction of Graybar's NEL deductions by the apportioned amount of the Dividends received—is the product of discriminatory or arbitrary taxation or otherwise derives from an abusive or unreasonable taxation scheme in violation of the North Carolina or United States Constitution. The Department's interpretation of "income not taxable" is based on the Supreme Court's holding in Dayco, a holding the legislature elected not to overturn or modify in its 1967 statutory amendment, and a position the Department has publicly announced and implemented for at least twenty years, including during the taxable years at issue. There is no evidence that the Department's interpretation has been applied inconsistently, arbitrarily, or discriminatorily or that the Department has identified Graybar for adverse treatment relative to other similarly situated taxpayers. Moreover, the Department's interpretation is reasonable and consistent with section 105-130.8's legitimate and stated purpose "to grant some measure of relief to the corporation that has incurred economic misfortune" and to afford that relief based on the "net economic situation of the corporation." N.C. Gen. Stat. § 105-130.8(a)(1).

51. In short, the Department's interpretation does not cause section 105-130.8 to be unfair, unreasonable, arbitrary, or abusive, and Graybar's constitutional challenges must therefore be rejected. *See Aronov*, 323 N.C. at 136–39, 371 S.E.2d at 470–72 (holding that requiring a taxpayer to reduce North Carolina carryover losses by non-North Carolina income did not violate the Due Process Clause or the Law of the Land Clause, in part, because "[d]eductions are privileges, not rights"); *cf. IMT, Inc.*, 366 N.C. at 462, 738 S.E.2d at 160 (holding unconstitutional a 59,900% minimum tax increase for promotional sweepstake companies).

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8. The parties dispute whether the Department's treatment has resulted in double taxation. Graybar argues that the income from which the larger Dividend was paid was taxed twice, first when it was earned by Graybar's subsidiary, Graybar Services, and again when the Graybar could not offset its NEL deduction by that Dividend. The Department argues that the Dividend income was not initially taxed to Graybar because Graybar Services, which filed separately from Graybar, paid corporate income tax on the Dividend, not Graybar, and that the Dividend, once received by Graybar, was not taxed. The Court need not resolve this dispute to determine Graybar's constitutional challenges.

IV.

CONCLUSION

52. Based on the foregoing, the Court hereby **REVERSES** the Final Decision and **REMANDS** with instructions to the OAH to enter summary judgment in favor of the Department.

SO ORDERED, this the 9th day of January, 2019.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge

TERESSA B. ROUSE, PETITIONER
v.
FORSYTH COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENT

No. 1PA19

Filed 28 February 2020

Public Officers and Employees—career employee—wrongful termination—back pay—attorney fees

An administrative law judge was expressly authorized by statute (N.C.G.S. § 126-34.02) to award back pay and attorney fees to a career local government employee who prevailed in a wrongful termination proceeding under the Human Resources Act. The portions of *Watlington v. Dep't of Soc. Servs. Rockingham Cty.*, 252 N.C. App. 512 (2017), to the contrary were overruled.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 822 S.E.2d 100 (N.C. Ct. App. 2018), affirming, in part, and vacating, in part, a final decision entered on 18 April 2017 by Administrative Law Judge J. Randall May in the Office of Administrative Hearings. Heard in the Supreme Court on 10 December 2019.

Elliot Morgan Parsonage, PLLC, by Benjamin P. Winikoff, Robert M. Elliot, and J. Griffin Morgan, for petitioner-appellant.

Office of Forsyth County Attorney, by Assistant County Attorney Gloria L. Woods, for respondent-appellee.

Tin Fulton Walker & Owen, PLLC, by John W. Gresham, and Edelstein & Payne, by M. Travis Payne, for North Carolina Advocates for Justice, amicus curiae.

ERVIN, Justice.

This case presents the question of whether an administrative law judge has the authority to award back pay and attorneys' fees to local government employees protected under the North Carolina Human Resources Act who prevail in a wrongful termination proceeding before the Office of Administrative Hearings. In view of the fact that N.C.G.S. § 126-34.02 explicitly provides that an administrative law judge has the authority to award back pay and attorneys' fees to any protected state and local government employee, we reverse the Court of Appeals' decision to the contrary and remand this case to the Court of Appeals for further proceedings not inconsistent with this opinion.

Petitioner Teressa B. Rouse worked for respondent Forsyth County Department of Social Services for nineteen years, with her most recent employment being as a Senior Social Worker working in the After Hours Unit, where her job duties included receiving and screening juvenile abuse, neglect, and dependency reports. On 20 June 2016, Ms. Rouse met a father, who was accompanied by his son, who claimed to be homeless, and who inquired about the possibility that his son might be placed in foster care. After Ms. Rouse explained the circumstances under which the son could be placed in foster care, the father declined to pursue that option any further.

Upon making this decision, the father contacted the son's mother using Ms. Rouse's phone and learned that the mother did not want her son to live in her home. While speaking with Ms. Rouse, the mother explained her refusal to provide a home for the son by stating that the son had previously molested her daughters. Upon receiving this information, Ms. Rouse questioned the mother concerning whether she had filed a report or contacted law enforcement officers about the son's alleged conduct and received a negative response. Subsequently, the mother recanted her allegation against the son, stating that she did not say that her son had molested her daughters and that she had only meant to say that the son had "tendencies." In addition, the father and the son each denied the mother's allegation. Ultimately, Ms. Rouse concluded that the mother's initial statement was not entitled to any credence and that there was no basis for believing that any sexual abuse had actually occurred.

After the mother promised to give the son's housing situation further thought, the father contacted the child's paternal grandmother and made arrangements for her to house the son that night. On the following day, the mother contacted Ms. Rouse and agreed to allow the son to stay at her residence. Ms. Rouse took no further action with respect to the mother's initial allegation that the son had sexually abused her daughters.

In mid-July 2016, the Forsyth County DSS received a request for assistance from the Wilkes County Department of Social Services arising from a 16 July 2016 allegation that the son had sexually molested his sisters. On 22 September 2016, the Department dismissed Ms. Rouse from its employment on the grounds that her alleged mishandling of the mother's allegation that the son had sexually abused her daughters provided just cause for the termination of Ms. Rouse's employment based upon grossly inefficient job performance and unacceptable personal conduct.

On 21 October 2016, Ms. Rouse filed a contested case petition with the Office of Administrative Hearings in which she alleged that the Department had (1) failed to follow the proper procedures prior to making the dismissal decision, (2) failed to follow the proper procedures in dismissing her from its employment, and (3) dismissed her from its employment without just cause. An evidentiary hearing was held in this case on 31 January 2017 before the administrative law judge. On 18 April 2017, the administrative law judge entered an order reversing the Department's decision to terminate Ms. Rouse's employment on the grounds that the Department had violated Ms. Rouse's procedural rights and lacked just cause to dismiss Ms. Rouse from its employment. In light of this decision, the administrative law judge ordered the Department to reinstate Ms. Rouse "to her position as Senior Social Worker, or comparable position . . . with all applicable back pay and benefits" and to pay Ms. Rouse's attorneys' fees. The Department noted an appeal to the Court of Appeals from the administrative law judge's order.

In seeking relief from the administrative law judge's order before the Court of Appeals, the Department contended that the administrative law judge had erred by concluding that it had violated Ms. Rouse's procedural rights and lacked the just cause necessary to support the decision to dismiss Ms. Rouse from its employment and by awarding Ms. Rouse back pay and attorneys' fees. On 6 November 2018, the Court of Appeals filed an opinion affirming the administrative law judge's decision, in part, and vacating that decision, in part. *Rouse v. Forsyth Cty. Dep't of Soc. Servs.*, 822 S.E.2d 100, 113 (N.C. Ct. App. 2018). As an initial

matter, the Court of Appeals upheld the administrative law judge's decision to overturn the Department's dismissal decision on the grounds that the record developed before the administrative law judge "provided substantial evidence to support [its] findings of fact and the conclusions of law" that Ms. Rouse had not engaged in grossly inefficient job performance or unacceptable personal conduct *Id.* at 102. On the other hand, acting in reliance upon its prior decision in *Watlington v. Dep't of Soc. Servs. Rockingham Cty.*, 252 N.C. App. 512, 799 S.E.2d 396 (2017), the Court of Appeals concluded that the administrative law judge lacked the authority to award back pay and attorneys' fees to Ms. Rouse on the grounds that the administrative regulations contained in Title 25, Subchapter I, of the North Carolina Administrative Code and the statutory provisions embodied in N.C.G.S. § 150B-33(b)(11) did not provide for the making of such awards for local government employees wrongfully discharged in violation of the North Carolina Human Resources Act. *Rouse*, 822 S.E.2d at 113. On 10 May 2019, this Court allowed Ms. Rouse's request for discretionary review of that portion of the Court of Appeals' decision holding that the administrative law judge lacked the authority to award her back pay and attorneys' fees.[1]

In seeking to persuade us to overturn the Court of Appeals' decision with respect to the backpay and attorneys' fees issue, Ms. Rouse points out that, in accordance with N.C.G.S. § 126-5(a), employees of local departments of social services are protected under the relevant provisions of the North Carolina Human Resources Act. According to Ms. Rouse, N.C.G.S. § 126-34.02(a)(3) authorizes an administrative law judge who determines that a protected employee has been unlawfully discharged to "[d]irect other suitable action to correct the abuse which may include the requirement of *payment for any loss of salary* which has resulted from the improper action of the appointing authority." As a result, Ms. Rouse argues that "the same statute that authorized the [administrative law judge] to reinstate [Ms.] Rouse authorized the [administrative law judge] to award backpay as payment for her two-year loss of salary," with the absence of any administrative rule authorizing an award of backpay having "no effect on the statutory mandate of N.C.[G.S.] § 126-34.02, which provided the authority to [the

1. Although this Court denied the Department's request for discretionary review of the Court of Appeals' decision to uphold the administrative law judge's decision that Ms. Rouse had been wrongfully dismissed, the Department devoted a substantial portion of its brief before this Court to an argument that the administrative law judge had reached the wrong result with respect to the wrongful discharge issue. Needless to say, the wrongful discharge issue is not before this Court, *see* N.C.R. App. P. 16(a), so we decline to address that issue any further in this opinion.

administrative law judge] to grant [Ms.] Rouse the remedies of payment for loss of salary and attorneys' fees." As a result, for this and other reasons, Ms. Rouse urges us to reinstate the administrative law judge's backpay award.

Similarly, Ms. Rouse argues that N.C.G.S. § 126-34.02(e) "permits an award of attorneys' fees to *all* employees subject to the [North Carolina Human Resources Act], including local government employees." According to Ms. Rouse, the Court of Appeals' focus upon the absence of any language in N.C.G.S. § 150B-33(b)(11) authorizing attorneys' fee awards to unlawfully discharged local government employees "ignor[es] the explicit mandate of N.C.[G.S.] § 126-34.02 and fail[s] to reconcile the two statutes [so as] to give effect to both." For that reason, Ms. Rouse contends that the Court of Appeals erred by setting aside the administrative law judge's attorneys' fee award as well.

The Department, on the other hand, argues that personnel actions involving State employees are governed by Subchapter J of Title 25 of the North Carolina Administrative Code, while personnel actions involving local government employees are subject to Subchapter I. As a result of the fact that the regulation authorizing back pay awards to local government employees expired on 1 November 2014, "[n]o remedies were set out in the amendments for local government employees at the time of the decision in this matter." According to the Department, "[t]he application of 25 [N.C. Admin. Code] Subchapter 01I exclusively to local government employees for rights and remedies was settled before the [administrative law judge] decision in this case" in *Watlington*, with there being "a host of other [ ] provisions" of the North Carolina Human Resources Act that are limited to state employees and with there being "no express statutory provision under the [North Carolina Human Resources Act] or regulatory provisions at the time of the decision in this matter which specifically authorizes an award of attorneys' fees to local government employees effective as of [Ms. Rouse's] dismissal." In view of the fact that the Court of Appeals held in *Watlington* "that it was erroneous to award backpay and attorneys' fees to a local government employee under 25 [N.C. Admin. Code] Subchapter J at the time of the decision[,]" the Department also argues that "it was [also] error for the [administrative law judge] just a few days later . . . to apply Subchapter 01J to this matter and award back pay and attorneys' fees."

The General Assembly enacted the North Carolina Human Resources Act "to establish for the government of the State a system of personnel administration under the Governor, based on accepted principles of personnel administration and applying the best methods as

evolved in government and industry." N.C.G.S. § 126-1 (2019). The North Carolina Human Resources Act applies to all State employees that are not exempted from its coverage and to the employees of certain local entities, including local departments of social services. *Id.* § 126-5(a)(1), (2)(b). According to N.C.G.S. § 126-34.02(a), once an agency whose employees are protected by the North Carolina Human Resources Act makes a final decision to terminate a protected employee[2] from its employment, the adversely affected employee "may file a contested case in the Office of Administrative Hearings under Article 3 of Chapter 150B of the General Statutes," *id.* § 126-34.02(a), and may seek relief from the agency's termination decision on the grounds "that he or she was dismissed, demoted, or suspended for disciplinary reasons without just cause." *Id.* § 126-34.02(b)(3). In the event that the administrative law judge upholds the validity of the employee's challenge to his or her dismissal, demotion, or suspension, it may:

> (1) Reinstate any employee to the position from which the employee has been removed.
>
> (2) Order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied.
>
> (3) Direct other suitable action to correct the abuse which may include the requirement of payment for any loss of salary which has resulted from the improper action of the appointing authority.

Id. § 126-34.02(a). In addition, an administrative law judge "may award attorneys' fees to an employee where reinstatement or back pay is ordered." *Id.* § 126-34.02(e). As a result, an administrative law judge who has determined that a protected employee has been discharged from his or her employment by a covered agency without just cause is statutorily authorized to award back pay and attorneys' fees to the wrongfully discharged employee.

In holding that the administrative law judge lacked the authority to award back pay to Ms. Rouse after determining that she had been wrongfully discharged from the Department's employment, the Court of Appeals began by pointing out that Ms. Rouse was a local government, rather than a state, employee and that Subchapter I of Title 25 of the

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2. The Department does not contend that Ms. Rouse is not a protected employee for purposes of the North Carolina Human Resources Act.

North Carolina Administrative Code contained no provision authorizing an award of back pay to wrongfully discharged local government employees. *Rouse*, 822 S.E.2d at 113 (noting that the Court of Appeals "has held that Title 25's Subchapter J applies to State employees, while Subchapter I applies to local government employees" (citing *Watlington*, 252 N.C. App. at 523, 799 S.E.2d at 403)).[3] In view of the fact that nothing in Subchapter I of Title 25 of the North Carolina Administrative Code mentioned the availability of backpay awards to wrongfully discharged local government employees, the Court of Appeals concluded that backpay was not one of the remedies to which such wrongfully discharged employees might be entitled. *Id.*; *see also Watlington*, 252 N.C. App. at 526, 799 S.E.2d 404. As a result, as was the case in *Watlington*, the Court of Appeals concluded that the administrative law judge lacked the authority to award back pay to Ms. Rouse despite the fact that she had been wrongfully discharged from the Department's employment. *Rouse*, 822 S.E.2d at 113.

The Court of Appeals' determination that the absence of any regulatory provision authorizing an award of back pay to an unlawfully discharged local government employee precludes the making of such an award in spite of the fact that the relevant statutory provisions clearly authorize the making of such an award rests upon a fundamental misapprehension of the relative importance of statutory provisions and administrative regulations. Simply put, the absence of an implementing

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3. Prior to 30 November 2014, Title 25, Subchapter B of the North Carolina Administrative Code provided for backpay awards in appeals by allegedly aggrieved state and protected local government employees to the State Personnel Commission, 25 N.C. Admin. Code 1B.0421 (2014), which served as the factfinding body in public employee wrongful discharge cases at that time. *See* N.C.G.S. § 126-37 (2009) (repealed 2013). This provision of Title 25, Subchapter B expired on 30 November 2014, 25 N.C. Admin. Code 1B.0421 (Supp. Jan. 2015), with no replacement regulation applicable to protected local government employees ever having been adopted. In 2011, the General Assembly amended N.C.G.S. § 126-37 to provide that the Office of Administrative Hearings, rather than the State Personnel Commission, would have factfinding authority in cases involving alleged wrongful dismissals and other prohibited adverse personnel actions directed to protected state and local employees. Act of June 18, 2011, S.L. 2011-398, § 44, 2011 N.C. Sess. Laws 1678, 1693–94. In 2013, the General Assembly repealed N.C.G.S. § 126-37 and replaced it with N.C.G.S. § 126-34.02, while continuing to assign factfinding responsibility to the Office of Administrative Hearings rather than reassigning it to the Human Resources Commission. Act of July 25, 2013, S.L. 2013–382, § 6.1, 2013 N.C. Sess. Laws 1559, 1564–70. The Human Resources Commission's failure to replace 25 N.C. Admin. Code 1B.0421 with an equivalent provision applicable to protected local government employees following its expiration resulted in the absence of any regulation specifically authorizing the making of backpay awards to unlawfully discharged local government employees upon which the Court of Appeals relied in *Watlington*. *See Watlington*, 252 N.C. App. 526, 799 S.E.2d at 404.

regulation has no bearing upon the extent to which a statutory remedy is available to a successful litigant. On the contrary, "[w]hatever force and effect a rule or regulation has is derived entirely from the statute under which it is enacted." *Swaney v. Peden Steel Co.*, 259 N.C. 531, 542, 131 S.E.2d 601, 609 (1963) (ellipsis omitted) (citation omitted). For that reason, the Court of Appeals has long recognized that "[a]n administrative agency has no power to promulgate rules and regulations which alter or add to the law it was set up to administer or which have the effect of substantive law." *State of North Carolina ex rel. Comm'r of Ins. v. Integon Life Ins. Co.*, 28 N.C. App. 7, 11, 220 S.E.2d 409, 412 (1975) (citations omitted). Similarly, in the absence of legislative language making the effectiveness of a particular statutory provision contingent upon the promulgation of related administrative regulations, the fact that the provisions of a properly enacted statute are not mirrored in the related administrative regulations has no bearing upon the extent to which the relevant statutory provision is entitled to be given full force and effect. As a result, given that Ms. Rouse was a protected employee for purposes of the North Carolina Human Resources Act,[4] the fact that an administrative law judge is explicitly authorized by N.C.G.S. § 126-34.02(a)(3) to award backpay to a wrongfully discharged state or local government employee conclusively resolves the issue of whether the administrative law judge had the authority to require that Ms. Rouse receive backpay.

Similarly, the Court of Appeals failed to rely upon the relevant statutory provision in determining that the administrative law judge lacked the authority to require the Department to pay attorneys' fees to Ms. Rouse. To be sure, N.C.G.S. § 150B-33(b)(11) provides that "[a]n administrative law judge may . . . [o]rder the assessment of reasonable attorneys' fees . . . against the *State agency* involved in contested cases decided. . . under Chapter 126 where the administrative law judge finds discrimination, harassment, or orders reinstatement or back pay." N.C.G.S. § 150B-33(b)(11) (2019) (emphasis added). Although section 150B-33(b)(11) does not, as the Court of Appeals noted, provide for an award of attorneys' fees to unlawfully discharged local employees, the absence of any reference to such an

4. On 1 July 2018, the Forsyth County Board of Commissioners approved the creation of a consolidated human services agency that combined the existing Forsyth County social services and public health departments. *See* Fran Daniel, *Forsyth County Commissioners Vote to Consolidate DSS and Public Health Departments*, Winston-Salem J., (June 21, 2018), https://perma.cc/MK52-Q97C. Although the North Carolina Human Resources Act does not provide any protections to the employees of such a consolidated human services agency, *see* N.C.G.S. § 126-5(a)(2) (2019), Ms. Rouse was never employed by the consolidated human services agency and retained her rights as an employee of a county department of social services at the time of her termination from the Department's employment.

attorneys' fee award in that statutory provision has no bearing upon the proper resolution of the issue of whether the administrative law judge had the authority to award attorneys' fees to Ms. Rouse given that, as we have already noted, N.C.G.S. § 126-34.02(e) expressly authorizes an administrative law judge to "award attorneys' fees to an employee where reinstatement or back pay is ordered." *Id.* § 126-34.02(e). In other words, the fact that N.C.G.S. § 150B-33(b)(11) makes no reference to the making of an attorneys' fee award to a wrongfully discharged local government employee has no bearing upon the issue of whether such an award is authorized for unlawfully discharged local government employees by N.C.G.S. § 126-34.02(e).

Thus, for the reasons set forth in more detail above, the administrative law judge had ample, express statutory authority to award back pay and attorneys' fees to Ms. Rouse. The fact that such remedies are not provided for in Subchapter I of Title 25 of the North Carolina Administrative Code or authorized by N.C.G.S. § 150B-33(b)(11) provides no basis for the decisions reached by the Court of Appeals in this case and in *Watlington*, the relevant portions of which we expressly overrule. As a result, the Court of Appeals' decision to invalidate the administrative law judge's decision to award back pay and attorneys' fees to Ms. Rouse is reversed and this case is remanded to the Court of Appeals for further proceedings not inconsistent with this opinion.[5]

REVERSED AND REMANDED.

5. In its brief to this Court, the Department argued that the administrative law judge had failed to make certain required findings of fact prior to awarding attorneys' fees to Ms. Rouse, citing *Hunt v. Dep't of Pub. Safety*, 817 S.E.2d 257 (N.C. Ct. App. 2018). The Department did not, however, advance this argument before the Court of Appeals or seek to present it for our consideration in its discretionary review petition. As a result, we decline to entertain this argument and will not address it further. *See Higgins v. Simmons*, 324 N.C. 100, 103, 376 S.E.2d 449, 452 (1989) (stating that "a contention not made in the court below may not be raised for the first time on appeal"); *see also* N.C.R. App. P. 10(a)(1), 16(a).

SCIGRIP, INC. v. OSAE

[373 N.C. 409 (2020)]

SCIGRIP, INC. F/K/A IPS STRUCTURAL ADHESIVES HOLDINGS, INC. AND IPS INTERMEDIATE HOLDINGS CORPORATION

v.

SAMUEL B. OSAE AND SCOTT BADER, INC.

No. 139A18

Filed 28 February 2020

1. Trade Secrets—choice of law—misappropriation of trade secrets —lex loci test

The trial court did not err by determining that the appropriate choice of law test for use in misappropriation of trade secrets cases in North Carolina was lex loci. The Supreme Court's jurisprudence favored the use of the lex loci test in cases involving tort or tort-like claims, and the weight of authority was supported by practical considerations.

2. Trade Secrets—misappropriation—choice of law—application of lex loci test

Applying the lex loci test to plaintiff's misappropriation of trade secrets claim, the trial court properly determined that North Carolina law did not apply. All of the evidence tended to show that any misappropriation of plaintiff's trade secrets by defendants occurred outside North Carolina. The fact that there was sufficient evidence to determine that defendants violated a North Carolina consent order did not render the North Carolina Trade Secrets Protection Act applicable.

3. Unfair Trade Practices—summary judgment—substantial aggravating circumstances—intentional breach of consent order—not alone sufficient

The trial court did not err by granting summary judgment in favor of defendants on plaintiff's unfair and deceptive trade practices (UDTP) claim where plaintiff merely alleged the intentional breach of a consent order, which was not sufficient by itself to establish the required substantial aggravating circumstance to support a UDTP claim.

4. Damages and Remedies—punitive damages—breach of consent order—not a separate tort

Where the trial court granted summary judgment to defendants on a misappropriation of trade secrets claim, the court did not err by also finding for defendants on plaintiff's claim for

punitive damages, because plaintiff's alternative basis for punitive damages—that defendants breached a consent order—did not constitute a separate tort.

5. Trade Secrets—summary judgment—confidentiality of information—public knowledge

The trial court did not err in a misappropriation of trade secrets action related to specialty adhesives by concluding that there was no genuine issue of material fact concerning the extent to which the relevant component was publicly known before defendants used it for their own products.

6. Evidence—expert witnesses—mootness

The trial court did not err in an action for misappropriation of trade secrets, unfair and deceptive trade practices, and breach of a consent order by denying as moot defendant's motions to exclude the testimony of two expert witnesses. The claims for trade secrets and unfair trade practices had been dismissed and the testimony was not relevant to the breach of contract claim (breach of a consent order being a breach of contract claim).

7. Contracts—consent order—breach—trade secrets—genuine issue of material fact

The trial court properly declined to grant summary judgment for plaintiff (the prior employer of a chemist) on a breach of contract claim (arising from breach of a consent order) against defendant chemist. There was a genuine issue of material fact concerning whether the component defendant used in developing a similar product for his later employer was equivalent to a proprietary component developed by defendant for use in plaintiff's products.

8. Contracts—breach of consent order—disclosure of proprietary information—summary judgment

In a dispute over trade secrets involving specialty adhesives, the trial court did not err by entering summary judgment for plaintiff on a breach of contract claim against defendant chemist (plaintiff's former employee) for violating a consent order by disclosing proprietary components in a European patent application.

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) from an interlocutory order entered on 16 January 2018 by Special Superior Court Judge for Complex Business Cases Michael L. Robinson in Superior Court, Durham County, after the case was designated a mandatory complex

business case by the Chief Justice under N.C.G.S. § 45.4(b). Heard in the Supreme Court on 28 August 2019.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, Benjamin Thompson, and J. Blakely Kiefer, for plaintiff-appellants.

Mast, Mast, Johnson, Wells & Trimyer, by George B. Mast, Charles D. Mast, Clint Mast, and Lily Van Patten, for defendant-appellee Samuel B. Osae.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Philip J. Strach and Brodie D. Erwin, for defendant-appellee Scott Bader, Inc.

ERVIN, Justice.

This case involves a dispute between plaintiff SciGrip, Inc. (formerly known as IPS Structural Adhesives Holdings, Inc.), a wholly-owned subsidiary of plaintiff IPS Intermediate Holdings Corporation (collectively, SciGrip); defendant Samuel Osae, a chemist formerly employed by SciGrip; and defendant Scott Bader, Inc., by which Mr. Osae became employed after his departure from SciGrip's employment. SciGrip and Scott Bader were competitors in the development, manufacture, and sale of structural methyl methacrylate adhesives used in the marine and other industries for the purpose of bonding metals, composites, and plastics. As will be discussed in greater detail below, the issues before us in this case involve whether the trial court correctly decided the parties' summary judgment motions relating to the claims asserted in SciGrip's amended complaint for misappropriation of trade secrets, unfair and deceptive trade practices, breach of contract, and punitive damages and Mr. Osae's motions to exclude the testimony of two expert witnesses proffered by SciGrip. After careful consideration of the parties' challenges to the trial court's order in light of the record evidence, we conclude that the challenged trial court order should be affirmed.

I. Factual Background

A. Substantive Facts

In July 2000, SciGrip, a corporation involved in the formulation, manufacture, and sale of structural adhesives, hired Mr. Osae as an Application and Development Manager responsible for formulating structural methyl methacrylate adhesives. Mr. Osae served as the sole formula chemist in SciGrip's Durham office and as the person within the

company with principal responsibility for formulating structural methyl methacrylate adhesives.

At the time that he entered into its employment, Mr. Osae signed a Proprietary Information and Inventions Agreement in which he agreed to refrain from disclosing any of SciGrip's proprietary information to any person or entity at any time during or after his employment with SciGrip.[1] In addition, Mr. Osae assigned all of the intellectual property rights and trade secrets that he learned or developed during his employment to SciGrip. On 21 December 2006 and 4 January 2008, respectively, Mr. Osae signed two Nonqualified Stock Option Agreements in which he agreed to maintain the confidentiality of all non-public information in his possession relating to SciGrip and to refrain from working for a competitor after leaving SciGrip's employment for periods of two years and one year, respectively.

Subsequently, Mr. Osae entered into discussions with Scott Bader about the possibility that Mr. Osae would work for Scott Bader in connection with its efforts to develop a structural methyl methacrylate adhesive product to be known as Crestabond. At the time that he met with Scott Bader representatives, Mr. Osae stated that he was dissatisfied with the recognition that he had received at SciGrip, that he wanted to leave SciGrip's employment, and that he could assist Scott Bader in developing structural methyl methacrylate adhesives.

On 27 August 2008, Mr. Osae resigned from his employment at SciGrip to take a position with Scott Bader as a senior applications chemist. At the time that he left SciGrip's employment, Mr. Osae executed a termination certificate in which he agreed to maintain the confidentiality of SciGrip's proprietary information. While employed with Scott Bader, Mr. Osae remained a North Carolina resident, travelling to the United Kingdom and, after 2009, to Ohio for the purpose of performing any necessary laboratory work. In October 2008, John Reeves, who served as SciGrip's president, encountered Mr. Osae at a trade show, where Mr. Osae told Mr. Reeves that he had joined Scott Bader and was involved in the development of structural methyl methacrylate adhesives.

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1. According to the Proprietary Information and Inventions Agreement, "proprietary information" is defined as "any information, technical or nontechnical, that derives independent economic value, actual or potential, from not being known to the public or other persons outside [SciGrip] who can obtain economic value from its disclosure or use, and includes information of [SciGrip], its customers, suppliers, licensors, licensees, distributors and other persons and entities with whom [SciGrip] does business," including, but not limited to, any "formulas, developmental or experimental work, methods, techniques, processes, customer lists, business plans, marketing plans, pricing information, and financial information."

On 12 November 2008, SciGrip filed a complaint in Superior Court, Durham County, against Mr. Osae and Scott Bader in which it alleged that defendants had misappropriated SciGrip's trade secrets; engaged in unfair and deceptive trade practices; and sought to enforce the provisions of the Proprietary Information and Inventions Agreement and the Nonqualified Stock Options Agreements that Mr. Osae had executed during his employment with SciGrip. *See IPS Structural Adhesives Holdings, Inc. v. Osae*, 2018 NCBC 10, 2018 WL 632950. On 15 December 2008, the parties agreed to the entry of a consent order for the purpose of resolving the issues that were in dispute between them. According to the consent order, which utilized the definition of confidential information contained in the Proprietary Information and Inventions Agreement, Mr. Osae was prohibited from disclosing, and Scott Bader was prohibited from using, any of SciGrip's protected information. On the other hand, the consent order allowed Mr. Osae to continue working for Scott Bader on the condition that he perform all of his laboratory work in the United Kingdom until 1 January 2010. Finally, the consent order prohibited Scott Bader from introducing new products that competed with those offered by SciGrip until September 2009.

After the entry of the consent order, Mr. Osae developed several Crestabond formulations for Scott Bader. In April 2009, Scott Bader began preparing a patent application relating to these newly developed formulations. In February 2010, Scott Bader filed an application for the issuance of a European patent relating to its Crestabond formulations that was published on 1 September 2011. Scott Bader's patent application disclosed the components used in the newly formulated Crestabond products.

After it became concerned about the work that Mr. Osae had been performing for Scott Bader, SciGrip hired Chemir Analytical Services to perform a deformulation analysis of a sample of a new Scott Bader product in order to identify the components utilized in that product and to determine how much of each component was present in it. On 28 April 2011, Chemir provided a report to SciGrip that identified some of the chemicals and materials that had been used in the new Scott Bader product without providing a complete identification of all of the materials that the product contained. Although the Chemir report did not indicate that any of SciGrip's propriety materials had been included in the new Scott Bader product, the report did express concerns about "what [Mr. Osae] was doing."

In June 2011, while he was still employed by Scott Bader, Mr. Osae formed a new structural methyl methacrylate adhesive company named

Engineered Bonding Solutions, LLC. On 26 August 2011, Mr. Osae resigned from his employment with Scott Bader and moved to Florida, where he became Vice President of Technology at Engineered Bonding. However, Mr. Osae continued to be a North Carolina resident through at least 15 December 2014. After becoming associated with Engineered Bonding, Mr. Osae served as the sole formulator and developer of the company's structural methyl methacrylate adhesives product, which was known as Acralock. On 24 September 2012, Engineered Bonding filed a provisional patent application with the United States Patent and Trademark Office relating to an Acralock product, with this application having been published on 21 June 2016.

At approximately the same time that Scott Bader's European patent was published in September 2012, SciGrip began discussions with an entity that was interested in acquiring SciGrip. During the course of these discussions, a representative from the potential acquiring company expressed concern about whether Mr. Osae had disclosed SciGrip's product formulations and indicated that the publication of Scott Bader's European patent application would have a material, negative effect upon SciGrip's value. SciGrip had not been aware of Scott Bader's European patent application until the date of this conversation. Ultimately, the potential acquiring entity decided to refrain from acquiring SciGrip.

B. Procedural History

On 3 May 2013, SciGrip filed a complaint in the Superior Court, Durham County, in which it asserted claims against Mr. Osae for breach of contract, misappropriation of trade secrets, and unfair and deceptive trade practices. On 1 December 2014, SciGrip filed an amended complaint that asserted claims against both Mr. Osae and Scott Bader. Ultimately, SciGrip asserted claims for (1) misappropriation of trade secrets against both defendants; (2) breach of contract against both defendants for violating the consent order during Mr. Osae's employment with Scott Bader; (3) breach of contract against Mr. Osae for violating the consent order during his employment with Engineered Bonding; (4) unfair and deceptive trade practices against both defendants; and (5) claims for punitive damages against both defendants. Mr. Osae and Scott Bader filed answers to SciGrip's amended complaint on 5 January 2015 and 12 March 2015, respectively, in which they denied the material allegations of the amended complaint and asserted various affirmative defenses.

On 31 May 2017, SciGrip filed a motion seeking summary judgment with respect to the issue of liability relating to each of the claims that it had asserted against both defendants aside from its claim for punitive

damages. On the same date, Mr. Osae filed a motion seeking summary judgment in his favor with respect to SciGrip's claims for misappropriation of trade secrets claim, unfair and deceptive trade practices, and punitive damages, and Scott Bader filed a motion seeking summary judgment in its favor with respect to each of the claims that SciGrip had asserted against it in the amended complaint. In addition, Mr. Osae filed a motion seeking to have the testimony of two of SciGrip's experts, Michael Paschall and Edward Petrie, excluded from the evidentiary record. A hearing was held before the trial court for the purpose of considering the parties' motions on 28 September 2017.

On 16 January 2018, the trial court entered a sealed order deciding the issues raised by the parties' motions.[2] With respect to SciGrip's misappropriation of trade secrets claim, the trial court noted that this Court had not yet decided which choice of law test should be applied in connection with misappropriation of trade secret claim: (1) the *lex loci delicti* test (*lex loci* test), which requires the use of the law of the state "where the injury or harm was sustained or suffered," *Harco Nat'l Ins. Co. v. Grant Thornton LLP*, 206 N.C. App. 687, 695, 698 S.E.2d 719, 724 (2010) (quoting 16 Am. Jur. 2d *Conflict of Laws* § 109 (2009)), or (2) the "most significant relationship test," a multi-factor test which requires the use of the law of the state with the most significant ties to the parties and the facts at issue in the case in question. Acting in reliance upon the Business Court's earlier decision in *Window World of Baton Rouge, LLC v. Window World, Inc.*, 2017 NCBC 58, 2017 WL 2979142, the trial court elected to apply the *lex loci* test in identifying the law applicable to SciGrip's misappropriation of trade secrets claim in this case and focused its analysis upon the place at which "the tortious act of misappropriation and use of the trade secret occurred," quoting *Domtar AI Inc. v. J.D. Irving, Ltd.*, 43 F. Supp. 3d 635, 641 (E.D.N.C. 2014). In view of the fact that SciGrip did not argue that Mr. Osae had wrongfully acquired the disputed information in North Carolina, the fact that the patent application in which SciGrip's proprietary information had allegedly been disclosed by Scott Bader had been filed in Europe, and the fact that Mr. Osae's laboratory work for Scott Bader had been performed in England or Ohio rather than North Carolina, the trial court concluded that SciGrip had failed to demonstrate that Mr. Osae and Scott Bader had misappropriated SciGrip's trade secrets in North Carolina and that summary judgment should be entered in favor of Mr. Osae and Scott Bader with respect to this claim. Similarly, the trial court noted that any

2. A redacted version of the same order was filed on 30 January 2018.

purported evidence of misappropriation that might have occurred during Mr. Osae's employment with Engineered Bonding involved actions that occurred outside of North Carolina. As a result, the trial court entered summary judgment in favor of both defendants with respect to SciGrip's misappropriation of trade secrets claim.

In addressing SciGrip's breach of contract claims, the trial court noted that the parties agreed that the claims in question were governed by North Carolina law. According to the trial court, the relevant provisions of the consent order protected legitimate business interests and were, for that reason, valid and enforceable. Similarly, the trial court held that, since the consent order prohibited any use of SciGrip's confidential information in any manner, SciGrip was not required to show that an intentional breach of contract had occurred. In addition, the trial court determined that the record reflected the existence of genuine issues of material fact concerning the date upon which SciGrip had learned that Mr. Osae and Scott Bader had breached their obligations under the consent order, with this dispute being sufficient to preclude an award of summary judgment in favor of SciGrip and against Scott Bader on statute of limitations grounds. Finally, the trial court concluded that, since the record contained undisputed evidence tending to show that certain components used in Crestabond products were unknown to the general public prior to the publication of the European patent application, SciGrip was entitled to the entry of summary judgment in its favor against Mr. Osae for breaching the provisions of the consent order in connection with the development of Crestabond products.

Similarly, in addressing SciGrip's breach of contract claim against Mr. Osae relating to events that occurred after he left Scott Bader to join Engineered Bonding, the trial court concluded that certain components upon which SciGrip's claim was based were either publicly known prior to the filing of Scott Bader's European patent application or had not been used in Engineered Bondings' Acralock product, but that the record did not permit a conclusive determination as to the extent to which another component upon which SciGrip's claim was based was equivalent to a component used in the Acralock product. As a result, the trial court refused to grant summary judgment in favor of either party with respect to the breach of contract claim that SciGrip asserted against Mr. Osae based upon his alleged conduct following his departure from Scott Bader for Engineered Bonding.

Moreover, given that it had already granted summary judgment in Mr. Osae and Scott Bader's favor with respect to SciGrip's trade secrets claim, given that SciGrip's unfair and deceptive trade practices claim

rested upon its misappropriation of trade secrets claim, and given that SciGrip had failed to assert that the breach of contract in which Scott Bader and Mr. Osae had allegedly engaged involved any substantial aggravating circumstances, the trial court granted summary judgment in favor of Scott Bader and Mr. Osae with respect to SciGrip's unfair and deceptive trade practices claim.

In addition, given that SciGrip's only surviving claims sounded in breach of contract; that punitive damages may not be awarded for breach of contract in the absence of an identifiable tort, citing *Cash v. State Farm Mut. Auto Ins. Co.*, 137 N.C. App. 192, 200, 528 S.E.2d 372, 377 (2000) (stating that, "in order to sustain a claim for punitive damages, there must be an identifiable tort which is accompanied by or partakes of some element of aggravation"); and that SciGrip had failed to forecast any evidence tending to show the occurrence of such a tort, the trial court concluded that SciGrip's punitive damages claim did not retain any viability. As a result, the trial court entered summary judgment in favor of Scott Bader and Mr. Osae with respect to SciGrip's request for punitive damages.

Finally, the trial court determined that the expert testimony proffered by Mr. Paschall and Mr. Petrie on behalf of SciGrip only related to SciGrip's misappropriation of trade secrets and unfair and deceptive trade practices claims and had no bearing upon its surviving breach of contract claims. In view of the fact that SciGrip's misappropriation of trade secrets and unfair and deceptive trade practices claims had been dismissed for other reasons, the trial court determined that Mr. Osae's motions to exclude the testimony of Mr. Paschall and Mr. Petrie on behalf of SciGrip had been rendered moot. SciGrip and Mr. Osae noted appeals to this Court from the trial court's order. In addition, SciGrip filed a conditional petition seeking the issuance of a writ of certiorari on 3 July 2018 in which it requested that this Court "treat and accept its appeal of the Order and Opinion on Motion for Summary Judgment [and] Motions to Exclude . . . entered in the above-captioned case" in the event that this Court concluded that no substantial rights of SciGrip were affected by the trial court's decision. On 26 October 2018, this Court allowed SciGrip's conditional petition for writ of certiorari.

II. Substantive Legal Analysis

A. Standard of Review

According to well-established North Carolina law, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits,

if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c). An appellate court reviews a trial court's decision to grant or deny a motion for summary judgment *de novo*. *See Meinck v. City of Gastonia*, 371 N.C. 497, 502, 819 S.E.2d 353, 357 (2018). A trial court's ruling concerning the admissibility of an expert's testimony "will not be reversed on appeal absent a showing of abuse of discretion." *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004), *superseded by statute*, N.C.G.S. § 8C-1, Rule 702, 2011 N.C. Sess. Laws 283). "A trial court's rulings on relevancy are technically not discretionary, though we accord them great deference on appeal." *State v. Lane*, 365 N.C 7, 27, 707 S.E.2d 210, 223 (2011).

B. SciGrip's Claims

In seeking relief from the challenged trial court orders, SciGrip contends that the trial court erred by: (1) applying the *lex loci* test rather than the most significant relationship test in evaluating the merits of its misappropriation of trade secrets claim; (2) granting summary judgment in favor of Scott Bader and Mr. Osae with respect to its misappropriation of trade secrets claim based upon a misapplication of the *lex loci* test; (3) granting summary judgment in favor of Scott Bader and Mr. Osae with respect to its unfair and deceptive trade practices claim given the existence of evidence tending to show the existence of the necessary aggravating circumstances; (4) granting summary judgment in favor of Scott Bader and Mr. Osae with respect to its punitive damages claim given that the record contained sufficient evidence to show that those two parties engaged in sufficiently aggravated or malicious behavior; (5) concluding that one of the components upon which its breach of contract claims rested had been made public prior to the publication of Scott Bader's European patent application; (6) denying as moot Mr. Osae's motions to exclude the testimony of Mr. Paschall and Mr. Petrie given that their testimony was relevant to other claims; and (7) denying SciGrip's motion for summary judgment with respect to its breach of contract claim against Mr. Osae arising from his work for Engineered Bonding on the grounds that one of the components upon which SciGrip's claim relied had not been shown to be equivalent to one of the components used in SciGrip's proprietary products. We will examine the validity of each of SciGrip's challenges to the trial court's order in the order in which SciGrip has presented them before the Court.

1. Misappropriation of Trade Secrets

a. Choice of Law

[1] As an initial matter, SciGrip argues that the trial court erred by entering summary judgment in favor of Scott Bader and Mr. Osae with respect to its misappropriation of trade secrets claim on the grounds that the trial court should have utilized the most significant relationship test, rather than the *lex loci* test, in making this determination.[3] In support of this contention, SciGrip directs our attention to numerous decisions of the Court of Appeals and from courts in other jurisdictions which utilize the most significant relationship test rather than the *lex loci* test in deciding multistate commercial cases. According to SciGrip, these decisions tend to prefer the use of the most significant relationship test on the grounds that it avoids rigidity and makes it possible to use "a more flexible approach which would allow the court in each case to inquire which state has the most significant relationship with the events constituting the alleged tort and with the parties." *Santana, Inc. v. Levi Strauss and Co.*, 674 F.2d 269, 272 (4th Cir. 1982). In addition, SciGrip asserts that the trial court's reliance upon *Window World* was misplaced given that it relied upon a decision of this Court in a products liability case rather than a case in which the court was called upon to decide issues arising from commercial relations involving entities located in and events occurring in multiple jurisdictions.

Mr. Osae responds that, under the conflict of laws principles traditionally utilized in this jurisdiction, the *lex loci* test has been deemed applicable in dealing with claims that affect the substantial rights of the parties, citing *Harco Nat'l Ins. Co.*, 206 N.C. App. at 692, 698 S.E.2d at 722. In addition, Mr. Osae asserts that the federal courts sitting in this and other states have tended to apply the *lex loci* test in determining whether particular misappropriation of trade secrets claims are encompassed within the ambit of the North Carolina Trade Secrets Protection Act, citing *Domtar Al Inc.*, 43 F. Supp. 3d at 641, *Chattery Int'l Inc. v. JoLida, Inc.*, No. WDQ-10-2236, 2012 U.S. Dist. WL 1454158 (D. Md. Apr. 2 2012), and 3A *Composites USA, Inc. v. United Indus., Inc.*, No. 5:14-CV-5147, 2015 U.S. Dist. WL 5437119 (W.D. Ark. Sept. 15 2015). Mr. Osae argues that, when taken in their entirety, these cases demonstrate

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3. The trial court deemed the choice of law issue in this case dispositive on the grounds that, since "the undisputed evidence demonstrates that the alleged misappropriation occurred outside the State of North Carolina," "[SciGrip] cannot bring a claim under the North Carolina [Trade Secrets Protection Act]." In view of the fact that none of the parties have challenged the validity of this portion of the trial court's analysis on appeal, we assume, without deciding, that it is correct.

that, under North Carolina law, the ultimate issue for choice of law purposes is the location at which the act of misappropriation occurred rather than the location at which the defendant obtained the information that he or she misappropriated. In the same vein, Scott Bader emphasizes that misappropriation of trade secrets claims sound in tort and that North Carolina precedent unequivocally calls for the use of the *lex loci* test to decide conflict of laws issues arising in tort cases.

According to the *lex loci* test, the substantive law of the state "where the injury or harm was sustained or suffered," which is, ordinarily, "the state where the last event necessary to make the actor liable or the last event required to constitute the tort takes place," applies. *Harco Nat'l Ins. Co.*, 206 N.C. App. at 695, 698 S.E.2d at 724 (quoting 16 Am. Jur. 2d *Conflict of Laws* § 109 (2009)). The most significant relationship test, on the other hand, provides for the use of the substantive law of the state with the most significant relationship to the claim in question, with that determination to be made on the basis of an evaluation of "(a) the place where the injury occurred; (b) the place where the conduct giving rise to the injury occurred; (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; [and] (d) the place where the relationship, if any, between the parties is centered." *Henry v. Henry*, 291 N.C. 156, 163–64, 229 S.E.2d 158, 163 (1979) (quoting Restatement, Conflict of Laws 2d, § 145). We agree with the trial court that the proper choice of law rule for use in connection with our evaluation of SciGrip's misappropriation of trade secrets claim is the *lex loci* test.

As the trial court noted, this Court's jurisprudence favors the use of the *lex loci* test in cases involving tort or tort-like claims. *See*, *e.g.*, *Boudreau v. Baughman*, 322 N.C. 331, 335–36, 368 S.E.2d 849, 853–54 (1988) (noting that "[o]ur traditional conflict of laws rule is that matters affecting the substantial rights of the parties are determined by *lex loci*," with this Court having "consistent[ly] adhere[d]" to the *lex loci* test in tort actions" and with there being "no reason to abandon this well-settled rule at this time"); *Braxton v. Anco Electric*, *Inc.*, 330 N.C. 124, 126–27, 409 S.E.2d 914, 915 (1991) (stating that "[w]e do not hesitate in holding that as to the tort law controlling the rights of the litigants in the lawsuit . . . the long-established doctrine of *lex loci delicti commissi* applies"); *see also GYBE v. GYBE*, 130 N.C. App. 585, 587–88, 503 S.E.2d 434, 435 (1998) (noting that a "review of North Carolina caselaw reveals a steadfast adherence by our courts to the traditional application of the *lex loci delicti* doctrine" in matters affecting the substantive rights of the parties). Consistent with our traditional approach, a number of

federal district courts have applied the *lex loci* test when assessing North Carolina trade secrets misappropriation claims. For example, a federal district court held in *Domtar AI Inc.* that "North Carolina's choice of law rules call for the application of the *lex loci delicti* (or 'law of the place of the wrong') test to determine which law should apply to claims for misappropriation of trade secrets," with "the *lex loci* [in trade secrets cases being] where the actual misappropriation and use of the trade secret occurs" rather than the place at which the defendant obtained the relevant information. *Domtar AI Inc.*, 43 F. Supp. 3d at 641 (citing *Merck & Co. Inc. v. Lyon*, 941 F. Supp. 1443, 1456 n.3 (M.D.N.C. 1996), and *Salsbury Laboratories*, *Inc. v. Merieux Laboratories*, *Inc.*, 735 F. Supp. 1555, 1568 (M.D. Ga. 1989), *aff'd as modified*, 908 F.2d 706 (11th Cir. 1990)). Similarly, in *3A Composites USA*, 2015 U.S. Dist. WL 5437119 at *1, a federal district court concluded that a North Carolina court "would have applied the *lex loci delicti* rule to determine which state's laws govern all of [the North Carolina employer's] claims other than breach of contract," including the plaintiff's misappropriation of trade secrets claim, id. at *3–4 (citing *United Dominion Indus.*, *Inc. v. Overhead Door Corp.*, 762 F. Supp. 126, 129 (W.D.N.C. 1991) (predicting that this Court "would apply the traditional *lex loci* rule rather than the most significant relationship test" in a deceptive trade practices case); *Martinez v. Nat'l Union Fire Ins. Co.*, 911 F. Supp. 2d 331, 338 (E.D.N.C. 2012) (noting that this Court "has affirmed the continuing validity" of the *lex loci* test in deceptive trade practices cases); and *Domtar AI Inc.*, 43 F. Supp. 3d at 641 (applying *lex loci* test to a misappropriation of trade secrets claim)). As a result, the weight of this Court's decisions and those of federal courts predicting how this Court would address misappropriation of trade secrets claims tends to support the application of the *lex loci* test, rather than the most significant relationship test, in the misappropriation of trade secrets context.

The result suggested by the weight of authority is supported by more practical considerations. In rejecting the Second Restatement approach to conflict of laws issues, of which the most significant relationship test is an example, in *Boudreau*, we stated that the *lex loci* test "is an objective and convenient approach which continues to afford certainty, uniformity, and predictability of outcome in choice of law decisions." *Boudreau*, 322 N.C. at 336, 368 S.E.2d at 854. Although we cannot disagree with SciGrip's contention that use of the most significant relationship test would provide North Carolina courts with greater flexibility in identifying the state whose law should apply in any particular instance, that increased flexibility is achieved at the cost of introducing significant uncertainties into the process of identifying the state whose law

should apply, which we do not believe would be beneficial. Moreover, while the application of the *lex loci* test can be difficult in some circumstances, including cases involving events that occur in and entities associated with multiple jurisdictions, those difficulties pale in comparison with the lack of certainty inherent in the application of a totality of the circumstances test such as the most significant relationship test. As a result, we hold that the trial court did not err by determining that the appropriate choice of law test for use in misappropriation of trade secrets cases is the *lex loci* test.

b. Application of the *Lex Loci* Test

[2] Secondly, SciGrip argues that, even if the *lex loci* test, rather than the most significant relationship test, should be utilized in identifying the state whose law should be deemed controlling in this case, a proper application of the *lex loci* test compels the conclusion that North Carolina is the state in which the last act necessary to establish its claim occurred. According to SciGrip, the last act giving rise to its misappropriation of trade secrets claim was not the development work that Mr. Osae performed for Scott Bader in the United Kingdom and Ohio or the filing of Scott Bader's European patent application. Instead, SciGrip argues that the last act in this case was, for *lex loci* purposes, the "acquisition, disclosure or use" of another's trade secret without the owner's consent, citing N.C.G.S. § 66-152(1), which SciGrip contends occurred when Scott Bader and Mr. Osae violated the consent order, which had been entered by a North Carolina court.[4] In addition, SciGrip argues that, unlike the situation that existed in cases such as *Domtar AI Inc.*, *3A Composites*, and *Chattery*, in which the defendant-employees had each relocated to another state in order to work for a competitor, Mr. Osae remained a resident of North Carolina throughout the period during which the misappropriation of SciGrip's trade secrets allegedly occurred. SciGrip further argues that, since its principal place of business is located in North Carolina, the ultimate injury caused by the alleged misconduct of Scott Bader and Mr. Osae occurred in this jurisdiction, citing *Verona v. U.S. Bancorp*, No. 7:09-CV-057-BR, 2011 WL 1252935 (E.D.N.C. Mar. 29, 2011) (holding that the place of the injury in a defamation case was the state in which the defamatory statement was published); and *Harco*, 206 N.C. App. at 697, 698 S.E.2d at 725–26 (stating that the location of the plaintiff's place of business "may be useful for determining the place of

4. SciGrip does not appear to contend that Mr. Osae performed any act of misappropriation in North Carolina during the time that he was employed by Engineered Bonding and has not, for that apparent reason, argued that, under the *lex loci* test, there is any basis for finding that North Carolina law applies to that portion of its claim against Mr. Osae.

plaintiff's injury in those rare cases where, even after a rigorous analysis, the place of injury is difficult or impossible to discern"). In SciGrip's view, a decision to apply the law of another jurisdiction would frustrate the purpose of the North Carolina Trade Secrets Protection Act, which it asserts is intended to protect the trade, commerce, and residents of North Carolina. Finally, SciGrip asserts that, even if North Carolina law does not apply in this instance, the trial court should have applied the law of the applicable state rather than simply dismissing its claim, citing *Charnock v. Taylor*, 223 N.C. 360, 362, 26 S.E.2d 911, 913 (1943) (stating that, "[i]f under the *lex loci* [test] there [is] a right of action, comity permits it to be prosecuted in another jurisdiction").

Mr. Osae, on the other hand, argues that, while North Carolina law governs SciGrip's breach of contract claim, the mere fact that North Carolina law applies to that claim does not render North Carolina law applicable to any other claim, citing *Domtar AI Inc.*, 43 F. Supp. 3d at 641–42. In addition, Mr. Osae argues that the plaintiff's principal place of business is not determinative for choice of law purposes under the *lex loci* test, with the identification of the relevant state instead being dependent upon the place at which the use and disclosure of the misappropriation of the proprietary information occurred instead, citing *id.*; *Harco Nat'l Ins. Co.*, 206 N.C. App. at 697, 698 S.E.2d at 725–26 (declining to create a bright line rule for purposes of the *lex loci* test that a plaintiff's injury is suffered at its principal place of business); and *United Dominion Indus.*, 762 F. Supp. at 129–31 (rejecting an argument advanced in the context of an unfair and deceptive practices case that, for purposes of the *lex loci* test, the location of the corporation's "pocketbook" should determine the location at which the offending conduct occurred), and with any unlawful use or disclosure of SciGrip's information having occurred in the United Kingdom, Ohio, or Florida rather than in North Carolina. Mr. Osae criticizes SciGrip's reliance upon decisions in defamation cases, which he contends are not analogous to cases involving misappropriation of trade secrets claims. Finally, Mr. Osae responds to SciGrip's public policy discussion by arguing that the trial court acted reasonably by declining to extend the scope of the North Carolina Trade Secrets Protection Act to the United Kingdom, Ohio, and Florida.

In addition to echoing a number of the arguments advanced by Mr. Osae, Scott Bader asserts that the fact that Mr. Osae continued to own property and reside in North Carolina during his period of employment with Scott Bader and Engineered Bonding did not tend to show that he had impermissibly used or disclosed SciGrip's confidential information

in North Carolina. Instead, Scott Bader argues that the only work that Mr. Osae did for Scott Bader in North Carolina involved sales rather than product formulation. In Scott Bader's view, SciGrip's contention that Mr. Osae possessed and used his company-issued laptop computer and laboratory books to formulate adhesives in North Carolina lacks any support in the record evidence. Scott Bader contends that any breach of the consent order that either Scott Bader or Mr. Osae may have committed did not convert SciGrip's breach of contract claim into a misappropriation of trade secrets claim. Finally, Scott Bader argues that SciGrip's failure to request the trial court to consider a misappropriation of trade secrets claim on any theory other than as a violation of the North Carolina Trade Secrets Protection Act precludes it from asserting such a claim under the law of any other jurisdiction, citing *Leonard v. Johns-Manville Sales Corp.*, 309 N.C. 91, 95, 305 S.E.2d 528, 531 (1983) (stating that "[t]he party seeking to have the law of a foreign jurisdiction apply has the burden of bringing such law to the attention of the court").

Having determined that the *lex loci* test, rather than the most significant relationship test, should be utilized to determine whether North Carolina law applies to SciGrip's misappropriation of trade secrets claim, we have no hesitation in concluding that North Carolina law does not apply to this claim. Our conclusion to this effect rests upon the fact that all of the evidence tends to show that any misappropriation of SciGrip's trade secrets in which Mr. Osae and Scott Bader may have engaged occurred outside North Carolina and the fact that such a determination is consistent with the applicable decisions of courts applying North Carolina law. *See Domtar AI Inc.*, 43 F. Supp. 3d at 641; *Harco Nat'l Ins. Co.*, 206 N.C. App. at 692, 698 S.E.2d at 722. As a result, the North Carolina Trade Secrets Protection Act does not provide a source of liability given the facts of this case.

SciGrip's arguments fail to persuade us to reach a different conclusion. First, SciGrip urges us to conclude that the fact that Mr. Osae continued to reside in North Carolina and that he might have brought his laptop computer and laboratory notebook to North Carolina on his trips home suggests that he impermissibly used SciGrip's proprietary information in North Carolina while working for Scott Bader. However, the factual basis upon which this aspect of SciGrip's argument rests is simply insufficient to permit an inference that any misappropriation of SciGrip's trade secrets occurred in North Carolina. Secondly, the fact that Scott Bader's European patent application was published worldwide, including in North Carolina, does not suffice to render North Carolina law applicable to this law. On the contrary, acceptance of this logic would

make the law of every jurisdiction in the United States or, perhaps, the entire world applicable to SciGrip's misappropriation of trade secrets claim. Similarly, the fact that the record contains sufficient evidence to permit a determination that Scott Bader and Mr. Osae violated a North Carolina consent order does not somehow render the North Carolina Trade Secrets Protection Act applicable to its misappropriation of trade secrets claim given that different choice of law rules govern tort or tort-like actions and breach of contract claims. As a result, the trial court did not err by determining that North Carolina law did not apply to SciGrip's misappropriation of trade secrets claim.[5]

Although SciGrip argues, in the alternative, that the trial court should have applied the law of the jurisdiction in which the last act necessary to support its misappropriation of trade secrets claim occurred rather than granting summary judgment in favor of Scott Bader and Mr. Osae with respect to that claim, that argument is equally unavailing. At the time that SciGrip filed its amended complaint in this case, it had ample knowledge of the basic facts underlying its misappropriation of trade secrets claim. Instead of seeking relief under the law of another relevant jurisdiction, SciGrip asserted a claim under the North Carolina Trade Secrets Protection Act. Having pled and argued its claim in this manner before the trial court, SciGrip is not entitled to seek relief from the trial court's summary judgment order on the grounds that the trial court should have evaluated the validity of SciGrip's misappropriation of trade secrets claim on the basis of a different legal theory. As a result, for all of these reasons, the trial court did not err by granting summary judgment in favor of Scott Bader and Mr. Osae with respect to SciGrip's misappropriation of trade secrets claim.

2. Unfair and Deceptive Trade Practices Claim

[3] SciGrip contends that the trial court erred by granting summary judgment in favor of Scott Bader and Mr. Osae with respect to its unfair

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5. In addition to the arguments discussed in the text, Scott Bader has also argued that SciGrip waived any claim for misappropriation of trade secrets that it might have otherwise had when it disclosed its allegedly proprietary information in public filings and in open court during the litigation of this case, citing *Krawiec v. Manly*, 370 N.C. 602, 611, 811 S.E.2d 542, 549 (2018) and *Glaxo, Inc. v. Novopharm Ltd.*, 931 F. Supp. 1280, 1301–02 (E.D.N.C. 1996), *aff'd*, 110 F.3d 1562 (Fed. Cir. 1997); that SciGrip's misappropriation of trade secrets claim was barred by the statute of limitations and rested upon inadmissible hearsay; and that SciGrip's misappropriation of trade secrets claim was barred by the economic loss rule. In view of our decision to affirm the trial court's decision to grant summary judgment in favor of Scott Bader and Mr. Osae with respect to SciGrip's misappropriation of trade secrets claim on the grounds discussed in the text of this opinion, we need not address these additional arguments any further in this opinion.

and deceptive trade practices claim on the grounds that SciGrip had, in fact, forecast evidence tending to show the existence of the aggravating circumstances needed to support that claim.[6] We do not find this argument persuasive.

"In order to establish a prima facie claim for unfair trade practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001) (citing *Spartan Leasing Inc. v. Pollard*, 101 N.C. App. 450, 460–61, 400 S.E.2d 476, 482 (1991)). As a general proposition, unfairness or "deception either in the formation of the contract or in the circumstances of its breach" may establish the existence of substantial aggravating circumstances sufficient to support an unfair and deceptive trade practices claim. *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989) (citing *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985, 992 (4th Cir. 1981)). Moreover, in some circumstances, a continuous transaction may constitute an unfair or deceptive act in addition to a breach of contract. *See Garlock v. Henson*, 112 N.C. App. 243, 246, 435 S.E.2d 114, 116 (1993). In the event that the same act or transaction supports a claim for both breach of contract and unfair or deceptive trade practices, "damages may be recovered either for the breach of contract, or for violation of [N.C.G.S. § 75-1.1]." *Id.* (quoting *Marshall v. Miller*, 47 N.C. App. 530, 542, 268 S.E.2d 97, 103 (1980), *modified and aff'd*, 302 N.C. 539, 276 S.E.2d 397 (1981)).

According to SciGrip, the breaches of contract committed by Scott Bader and Mr. Osae constituted such "immoral, unethical, oppressive, unscrupulous, or substantially injurious" conduct as to establish the substantial aggravating circumstances needed to support the maintenance of an unfair and deceptive trade practices claim in the present context, particularly given that the conduct in question resulted in significant damage to SciGrip and reflected a complete failure on the part of Scott Bader and Mr. Osae to comply with the consent order, quoting *Process Components, Inc v. Baltimore Aircoil Co.*, 89 N.C. App. 649, 654, 366 S.E.2d 907, 911, *aff'd per curiam*, 323 N.C. 620, 374 S.E.2d 116

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6. In addition, SciGrip argued that its unfair and deceptive trade practices claim rested upon its misappropriation of trade secrets claim and that the trial court had erred by dismissing that claim. Having held that the trial court properly dismissed SciGrip's misappropriation of trade secrets claim, we need not address this aspect of SciGrip's challenge to the dismissal of its unfair and deceptive trade practices claim any further in this opinion.

(1988). On the other hand, Mr. Osae and Scott Bader assert that SciGrip failed to argue that their alleged breaches of contract constituted substantial aggravating circumstances before the trial court and that, even if such an argument had been advanced, the trial court properly found that SciGrip's breach of contract claim, standing alone, did not suffice to support the maintenance of an unfair and deceptive trade practices claim, citing *Mitchell v. Linville*, 148 N.C. App. 71, 74–75, 557 S.E.2d 620, 623 (2001) (holding that an intentional breach of contract claim cannot, in and of itself, provide the basis for an unfair and deceptive trade practices claim), and *Griffith v. Glen Wood Co.*, 184 N.C. App. 206, 217, 646 S.E.2d 550, 558 (2007) (holding that a plaintiff had to show both a breach of contract and the presence of substantial aggravating circumstance in order to support its unfair and deceptive trade practices claim). In addition, Mr. Osae argues that, even if SciGrip had forecast sufficient evidence to show the existence of the necessary substantial aggravating circumstances, it failed to prove that it had sustained an actual injury proximately caused by the conduct of Scott Bader and Mr. Osae.

Assuming, without in any way deciding, that SciGrip has properly preserved its "substantial aggravating circumstances" argument for purposes of appellate review, we are not persuaded that the record contains sufficient evidence to show that the necessary substantial aggravating circumstances existed. In essence, the evidence that SciGrip relies upon in support of its argument for the existence of the necessary substantial aggravating circumstances amounts to nothing more than an assertion that Mr. Osae and Scott Bader intentionally breached the consent order while knowing of its existence. As the Court of Appeals correctly held in *Mitchell*, such an intentional breach of contract, standing alone, simply does not suffice to support the assertion of an unfair and deceptive trade practices claim. As a result, we conclude that the trial court did not err by granting summary judgment in favor of Scott Bader and Mr. Osae with respect to SciGrip's unfair and deceptive trade practices claim.

3. Punitive Damages

[4] SciGrip contends that the trial court erred by granting summary judgment in favor of Scott Bader and Mr. Osae with respect to its punitive damages claim. Once again, we are not persuaded by SciGrip's argument.[7]

7. In addition to the argument discussed in the text of this opinion, SciGrip argues that the trial court erred by granting summary judgment in favor of Scott Bader and Mr. Osae with respect to its misappropriation of trade secrets and unfair and deceptive trade practices claims, either of which would suffice to support a punitive damages award. In view of our decision to affirm the trial court's order with respect to these two claims, we need not address this aspect of SciGrip's argument any further.

In seeking to persuade us of the merits of its challenge to the trial court's decision with respect to this issue, SciGrip argues that the conduct of both Scott Bader and Mr. Osae at the time that they breached their obligations under the consent order was sufficiently egregious to merit an award of punitive damages, citing *Cash*, 137 N.C. App. at 200–01, 528 S.E.2d 377), and *Oakeson v. TBM Consulting Crp.*, *Inc.*, 2009 NCBC 23, ¶52, 2009 WL 464558, *9 (stating that, "when a breach of contract claim reflects potential fraud or deceit, or other aggravated or malicious behavior, a claim for punitive damages may lie"). According to SciGrip, Mr. Osae was angry at SciGrip because he believed that he had been treated unfairly and inadequately compensated for his work, with his decision to utilize SciGrip's proprietary information in violation of the consent order while in Scott Bader's employment and to attempt to conceal the nature of his activities by backdating his laboratory notebooks reflecting his high degree of personal animosity against his former employer. Moreover, SciGrip asserts that Mr. Osae acted maliciously when he provided Scott Bader with photographs of SciGrip's equipment and its customer lists and when he formed Engineered Bonding to compete with SciGrip using SciGrip's proprietary information. Similarly, SciGrip contends that Scott Bader's conduct in soliciting, accepting, using, and disclosing SciGrip's confidential information in violation of the consent order constituted aggravating conduct sufficient to support an award of punitive damages.

Mr. Osae argues that punitive damages may not be awarded for a breach of contract in the absence of a separate, identifiable tort and an allegation that the defendant engaged in aggravated or malicious behavior, citing *Cash*, 137 N.C. App. at 200, 528 S.E.2d at 277 (stating that "[p]unitive damages are not allowed [for breaches of contract] even when the breach is wil[l]ful[l], malicious or oppressive"). Similarly, Scott Bader points out that N.C.G.S. § 1D-15(d) specifically states that "[p]unitive damages shall not be awarded against a person solely for breach of contract." N.C.G.S. § 1D-15(d).

According to well-established North Carolina law, punitive damages may not be awarded based upon the breach of a contract in the absence of the commission of an identifiable tort. *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 111, 229 S.E.2d 297, 301 (1976) (stating that, even though "North Carolina follows the general rule that punitive or exemplary damages are not allowed for breach of contract, with the exception of a contract to marry," "where there is an identifiable tort even though the tort also constitutes, or accompanies, a breach of contract, the tort itself may give rise to a claim for punitive damages") (citing

Oestreicher v. Stores, 290 N.C. 118, 134–35, 225 S.E.2d 797, 808 (1976)). SciGrip has not forecast sufficient evidence to establish that Scott Bader and Mr. Osae committed a separate tort at the time that they allegedly breached their contractual obligations under the consent order. Instead, as we noted in our discussion of SciGrip's challenge to the trial court's decision to grant summary judgment in favor of Scott Bader and Mr. Osae with respect to SciGrip's unfair and deceptive trade practices claim, the evidence upon which SciGrip relies in support of its challenge to the trial court's decision to grant summary judgment in favor of Mr. Osae and Scott Bader with respect to SciGrip's punitive damages claim consists of little more than a contention that Mr. Osae and Scott Bader intentionally breached the consent judgment. No matter how deplorable such an act may be, an intentional breach of contract does not constitute a separate tort. As a result, the trial court did not err by granting summary judgment in favor of Scott Bader and Mr. Osae with respect to SciGri's punitive damages claim.

4. Confidentiality of Information

[5] SciGrip contends that the trial court erred by finding in favor of Scott Bader and Mr. Osae with respect to the issue of whether one of the components underlying SciGrip's breach of contract claim against Scott Bader and Mr. Osae arising from Mr. Osae's employment with Scott Bader was, in fact, proprietary information. Once again, we are not persuaded that SciGrip's contention has merit.

In support of this contention, SciGrip argues that the trial court's decision rested upon an erroneous determination that the fact that the relevant component was equivalent to another, publicly known component, meant that the relevant component was publicly known as well. SciGrip asserts that it is undisputed that, prior to the publication of Scott Bader's European patent application, the fact that the relevant component was equivalent to the publicly known component was not publicly known. At the very least, SciGrip contends that a genuine issue of material fact exists with respect to this issue sufficient to preclude summary judgment.

Mr. Osae, on the other hand, contends that the fact that the record contains evidence tending to show that another entity discussed the use of the relevant component as a replacement for the publicly known component provides ample support for the trial court's decision. In addition, Mr. Osae argues that SciGrip lacks the ability to demonstrate that the relevant component possesses any independent economic value given that SciGrip has not attempted to sell the product and given that there is

no other evidence tending to show that the relevant component has any independent economic value.

A careful review of the record demonstrates that the undisputed evidence establishes that the interchangeability of the two components was publicly known in that at least one other industry participant had discussed using the relevant component for the same purpose as the publicly known component. More specifically, the record contains undisputed evidence tending to show that the prior substance, which was chemically equivalent to the substance upon which SciGrip's claim rests, had been publicly disclosed in a number of prior patents. In addition, the record reflects that a sales representative for the company selling both the earlier and discontinued substance had stated that the new substance was intended to be used as a replacement for the earlier one. As a result, we agree with the trial court's conclusion that there is no genuine issue of material fact concerning the extent to which the relevant component was publicly known prior to the time at which Scott Bader and Mr. Osae used it in Scott Bader's Crestabond products.

5. Admissibility of Expert Testimony

[6] Next, SciGrip contends that the trial court erred by denying Mr. Osae's motions to exclude the testimony of two of its expert witnesses on the grounds that the motion in question had been rendered moot. The trial court reached this conclusion on the grounds that the testimony offered by Mr. Petrie and Mr. Paschall was only relevant to SciGrip's misappropriation of trade secrets claim and had no bearing upon its claims for breach of contract. We are unable to agree with SciGrip's argument concerning the expert testimony that it sought to elicit from Mr. Paschall and Mr. Petrie.

According to SciGrip, the testimony of Mr. Petrie concerning the extent to which Mr. Osae had the ability to independently develop adhesive products and whether the composition of one of the components used in Engineered Bonding's United States patent application was readily ascertainable through reverse engineering was relevant to SciGrip's claim against Mr. Osae for breaching the consent order during his employment with Engineered Bonding. Mr. Osae, on the other hand, argues that Mr. Petrie's testimony did not express any opinion concerning the extent, if any, to which Mr. Osae violated the consent order during his period of employment with Engineered Bonding.

Similarly, SciGrip argues that the testimony of Mr. Paschall, which addressed the amount of damages that SciGrip sustained as the result of the misappropriation of its trade secrets, was also relevant to SciGrip's

claim for breach of contract relating to the period of time during which Mr. Osae worked for Engineered Bonding. More specifically, SciGrip argues that it has been unable to ascertain the full extent of the loss that it sustained as a result of Mr. Osae's breach of the consent order during his association with Engineered Bonding and that Mr. Paschall's testimony contains information directly relevant to this issue, citing *Potter v. Hileman Labs., Inc.*, 150 N.C. App. 326, 336, 564 S.E.2d 259, 266 (2002) (holding that, in a case in which one party allegedly profited from the violation of a consent order relating to the use of the other party's confidential information, a trial court could appropriately consider the profits earned by the breaching party in determining the amount of damages that the plaintiff was entitled to recover). In response, Mr. Osae asserts that any opinion that Mr. Paschall might express concerning the amount by which Engineered Bonding has been unjustly enriched as the result of Mr. Osae's breach of the consent order during the time that he was employed by Engineered Bonding has no bearing upon the amount of damages that SciGrip would be entitled to recover as the result of any breach of contract that occurred during that time, particularly given that Engineered Bonding is not a party to this case and that Mr. Paschall did not render an opinion concerning the extent to which Mr. Osae might have been personally enriched.

Although the parties have discussed this issue as if it involved issues relating to the admissibility of expert testimony, their arguments focus upon the relevance of the challenged evidence rather than upon whether the challenged evidence satisfied the requirements for the admission of expert testimony set out in our recent decision in *State v. McGrady*, 368 N.C. 880, 787 S.E.2d 1 (2016). As a result, the ultimate question for our consideration with respect to this issue is whether the proffered evidence had "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401.

The expert testimony of Mr. Petrie was proffered for the purpose of determining whether the allegedly proprietary information upon which SciGrip's misappropriation of trade secrets claim rested was commonly known to SciGrip's competitors prior to its disclosure, the potential value of the allegedly proprietary information, and the extent to which Scott Bader and Mr. Osae had misappropriated SciGrip's trade secrets. Although some of the information contained in Mr. Petrie's expert testimony touches upon information relevant to SciGrip's breach of contract claims, the opinions that Mr. Petrie expressed concerning whether the information in question constituted a trade secret has no bearing upon

the validity of SciGrip's breach of contract claim, which is governed by the provisions of the consent judgment rather than by the statutory definition of a trade secret contained in N.C.G.S § 66-152(3). As a result, the trial court did not err by determining that Mr. Petrie's testimony related to SciGrip's misappropriation of trade secrets, rather than its breach of contract, claim.

The expert testimony of Mr. Paschall was proffered for the purpose of determining the amount of damages that SciGrip was entitled to recover as the result of the misappropriation of its trade secrets. A successful plaintiff in a misappropriation of trade secrets action pursuant to N.C.G.S. § 66-154(b)—similar to a claim sounding in quasi-contract or resting upon an implied contract, in which the plaintiff's claim "is *not* based on a promise but is imposed by law to prevent an unjust enrichment," *see Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 555–56 (1988)—is entitled to a recovery that considers the amount by which the wrongdoer has been unjustly enriched. However, since "[a]n action for unjust enrichment is quasi-contractual in nature," it "may not be brought in the face of an express contract." *Acorn Structures, Inc. v. Swantz*, 846 F.2d 923, 926 (4th Cir. 1988) (citing *In re Virginia Block Co.*, 16 B.R. 771, 774 (W.D. Va. 1982)). For that reason, "[i]f there is a contract between the parties[,] the contract governs the claim and the law will not imply a contract." *Booe*, 322 N.C. at 570, 369 S.E.2d at 156 (citing *Vetco Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 124 S.E.2d 905 (1962)). In view of the fact that the consent order constituted an express contract,[8] evidence tending to show that Engineered Bonding was unjustly enriched as the result of Mr. Osae's conduct is simply not relevant to SciGrip's breach of contract claim given that the consent order here, unlike the contract at issue in *Potter*, does not contain a provision authorizing the trial court to "determine the appropriate remedy" for any violation of its provisions. *Potter*, 150 N.C. App. at 334, 564 S.E.2d at 265. As a result, the trial court did not err by determining that Mr. Osae's motions to exclude the testimony of Mr. Petrie and Mr. Paschall should be denied on mootness grounds.

6. Breach of Contract Claim Arising From Mr. Osae's Work for Engineered Bonding

[7] Finally, SciGrip argues that the trial court erred by failing to grant summary judgment in its favor with respect to its breach of contract claim

8. Although Scott Bader contested the enforceability of the consent order before the trial court, the issue of whether the consent order constitutes a valid and enforceable contract was not in dispute before this Court.

against Mr. Osae relating to the work that he performed after becoming associated with Engineered Bonding. In support of this contention, SciGrip argues that Mr. Osae violated the consent order in developing Engineered Bonding's Acralock product because he used a component that was equivalent to one in which SciGrip had proprietary rights in the course of developing that product. Mr. Osae, on the other hand, denies SciGrip's contention that the two components are equivalent, so that the use of the component incorporated in Engineered Bonding products did not constitute a misappropriation of proprietary information.

After carefully reviewing the evidence forecast by the parties, we agree with the trial court's determination that the record reflects the existence of a genuine issue of material fact concerning whether the component that Mr. Osae used in formulating Engineered Bonding's Acralock product is equivalent to the proprietary component incorporated into SciGrip's products. Among other things, the record reflects that both components are still on the market and that neither has completely replaced the other. In addition, the record contains evidence tending to show that the two components are not equivalent and that SciGrip spent considerable time and effort determining that the product that it claims to constitute protected information could be used as a substitute for the product disclosed in Engineered Bonding's United States patent application. As a result, the trial court did not err by denying SciGrip's motion for summary judgment in its favor with respect to the claim that Mr. Osae violated the consent order while associated with Engineered Bonding.

C. Mr. Osae's Claim

In his own challenge to the trial court's order, Mr. Osae argues that the trial court erred by allowing summary judgment in favor of SciGrip with respect to its breach of contract claim against Mr. Osae predicated upon Mr. Osae's actions during his employment with Scott Bader.[9] We do not find Mr. Osae's contention persuasive.

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9. Mr. Osae contends that the trial court's decision to grant summary judgment in SciGrip's favor with respect to the breach of contract claim that SciGrip asserted against him based upon the conduct in which he engaged during his employment with Scott Bader is immediately appealable because that portion of the trial court's order affects a substantial right. More specifically, Mr. Osae contends that, unless the relevant portion of the trial court's order is immediately appealable, there is a risk that there will be inconsistent verdicts concerning his liability and that of Scott Bader with respect to the same claim, citing *Hamby v. Profile Prods., L.L.C.*, 361 N.C. 630, 634, 652 S.E.2d 231, 234 (2007) (stating that "a substantial right is affected if the trial court's order granting summary judgment to some, but not all, defendants creates the possibility of separate trials involving the same issues which could lead to inconsistent verdicts"). In response, SciGrip argues that there are no

According to Mr. Osae, the record reveals the existence of a genuine issue of material fact concerning the extent, if any, to which certain components upon which SciGrip's claim rests, and upon which the trial court's decision to grant summary judgment in favor of SciGrip with respect to this claim rested, constituted economically valuable information at the time that the alleged breach of contract occurred. More specifically, Mr. Osae contends that the record contains conflicting evidence concerning the extent to which the allegedly confidential components have commercial value as a result of their secrecy. In support of this argument, Mr. Osae asserts that SciGrip and its technical experts admitted during their depositions that the relevant components lacked any standalone commercial value; that SciGrip admitted that the value of the relevant components hinged upon their combination with other substances rather than their independent worth; and that, even when the components are combined with other ingredients to create a successful product, the value of the product hinges upon their trade names rather than the inherent value of the relevant components, considered generically.

[8] Secondly, Mr. Osae contends that there is a genuine issue of material fact as to whether the relevant components were publicly known or were known by persons outside of SciGrip who could obtain economic value from their use prior to the performance of his own work for Scott Bader. More specifically, Mr. Osae asserts that the use of one of the relevant components had been disclosed in other patents prior to its use by Mr. Osae while working at Scott Bader; that the use of the specific chemicals contained in the relevant components had been disclosed in their generic form in prior patents as well; that the manufacturer of each of the specific trade name chemicals used in the relevant components had disclosed their use and benefits to at least three of SciGrip's competitors; and that, according to a chemical expert proffered by Mr. Osae,

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overlapping factual issues between SciGrip's breach of contract claim against Mr. Osae relating to the work which he performed while employed by Scott Bader and SciGrip's breach of contract claim against Scott Bader given that the only issue that remains to be decided with respect to SciGrip's breach of contract claim against Scott Bader involves the question of whether that claim is time-barred. However, even though SciGrip has correctly described the reason for the trial court's refusal to grant summary judgment in SciGrip's favor with respect to its breach of contract claim against Scott Bader, SciGrip will have to prove its entire case against Scott Bader when this case is called for trial rather than being able to limit its proof to the issue of whether the applicable statute of limitations has expired. As a result, in light of the fact that there is at least some risk of an inconsistent verdict with respect to SciGrip's breach of contract claims against Mr. Oase and Scott Bader, we hold that Mr. Osae is entitled to seek appellate review of the relevant portion of the trial court's order despite the interlocutory character of that order.

the relevant components were "obvious combinations" of chemicals that any skilled chemist in the industry would have either been aware of or been able to develop.

SciGrip, on the other hand, contends that the relevant components were subject to protection under the consent order regardless of whether they were publicly known or had independent economic value. Instead, SciGrip asserts that the mere fact that Mr. Osae developed these components while employed by SciGrip and then disclosed them while working for Scott Bader constituted a violation of the terms of the consent order. In addition, SciGrip argues that the relevant components were not known outside of SciGrip prior to the time when Mr. Osae used and disclosed them in connection with the development of the Crestabond products given that a mere reference to certain components in other patent applications does not mean that SciGrip's unique combination of the relevant components was publicly known or known by persons outside of SciGrip who could otherwise obtain economic value from their use, citing, among other decisions, *Rivendell Forest Prods., Ltd. v. Georgia-Pacific Corp.*, 28 F.3d 1042, 1045 (10th Cir. 1994) (holding that a trade secret "can consist of a combination of elements which are in the public domain").

Similarly, SciGrip argues that the existence of the same raw materials in different components does not make the components chemically equivalent or indicate that the significance of one of the components is publicly known. Moreover, SciGrip contends that the fact that a manufacturer's disclosure of the potential use and benefits of the raw materials that it supplies does not render the components that SciGrip has created using those materials non-confidential. In the same vein, SciGrip argues that the "obviousness" of the chemical combinations involved in the relevant components is a patent law concept that has no basis in trade secrets law, citing *Basic Am., Inc. v. Shatila*, 992 P.2d 175, 183 (Idaho 1993) (holding that "obviousness" is a patent law concept not relevant to the Idaho Trade Secrets Act). Finally, SciGrip contends that the components at issue in this case derived both actual and potential independent economic value from not being known prior to their disclosure in Scott Bader's European patent application given that one of the relevant components has a unique structure and the other is superior to comparable products on the market.

A careful review of the record shows that the undisputed evidence tends to demonstrate that the relevant components have both potential and actual economic value by virtue of the fact that the resulting products have superior properties and performance compared to the

comparable products available in the market, with this superiority being demonstrated by the fact that SciGrip won two new customers as a result of the development of the products in question and the fact that Scott Bader was interested in using those components in its own products. In addition, we agree with SciGrip that the proper inquiry for purposes of determining whether the relevant components are entitled to protected status is whether those components, considered in their totality rather than on the basis of a separate evaluation of each of the individual raw materials from which they are made, constitute confidential information. When viewed in that light, the blended materials upon which SciGrip's claim rests clearly constitute proprietary information as that term is used in the consent judgment. Thus, we hold that the trial court properly determined that, at the time that Mr. Osae disclosed the relevant components in the European patent application, he breached the consent order. As a result, the trial court did not err by entering summary judgment in SciGrip's favor with respect to its claim that Mr. Osae breached the consent order during the time that he was employed by Scott Bader.

III. Conclusion

Thus, for all of these reasons, we conclude that the trial court did not err by granting summary judgement in favor of Scott Bader and Mr. Osae with respect to SciGrip's claims for misappropriation of trade secrets, unfair and deceptive trade practices, and punitive damages; entering summary judgment in SciGrip's favor with respect to its claim for breach of contract against Mr. Osae for violating the consent judgment during his period of employment with Scott Bader; refusing to grant summary judgment in favor of SciGrip or Mr. Osae with respect to SciGrip's claim for breach of contract against Mr. Osae for violating the consent judgment during his period of employment with Engineered Bonding; and denying Mr. Osae's motion to preclude the admission of certain expert testimony proffered on behalf of SciGrip on mootness grounds. As a result, the challenged trial court order is affirmed.

AFFIRMED.

STATE v. ALONZO

[373 N.C. 437 (2020)]

STATE OF NORTH CAROLINA
v.
EDWARD M. ALONZO

No. 288PA18

Filed 28 February 2020

1. Sexual Offenses—child abuse by sexual act—definition of "sexual act"

The Court of Appeals erred by holding that the trial court was required to instruct the jury according to the definition of "sexual act" contained in N.C.G.S. § 14-27.1(4) in a felony child abuse by sexual act (N.C.G.S. § 14-318.4(a2)) case. The legislature intended section 14-27.1(4)'s definition of "sexual act" to apply only within its own article, of which felony child abuse by sexual act was not a part.

2. Appeal and Error—discretionary review—issues not presented in petitions

The Supreme Court declined to address defendant's argument on an issue that was not presented in either of the parties' petitions for discretionary review.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 819 S.E.2d 584 (N.C. Ct. App. 2018), affirming judgments entered on 11 January 2017 by Judge Gale M. Adams in Superior Court, Cumberland County. On 5 December 2018, the Supreme Court allowed both the State's petition for discretionary review and defendant's conditional petition for discretionary review as to an additional issue. Heard in the Supreme Court on 5 November 2019.

Joshua H. Stein, Attorney General, by Anne M. Middleton, Special Deputy Attorney General, and Ellen A. Newby, Assistant Attorney General, for the State-appellant.

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

HUDSON, Justice.

Here, we review the following issues: (1) whether the trial court erred in its instruction to the jury on the definition of "sexual act" under N.C.G.S. § 14-318.4(a2), which sets out the offense of felony child abuse

by sexual act; and (2) whether the trial court's instruction on felony child abuse by sexual act amounted to plain error. We affirm the Court of Appeals decision upholding defendant's convictions. However, we modify that decision because the trial court did not err by not instructing the jury on the definition of "sexual act" according to N.C.G.S. § 14-27.1(4).[1] Therefore, we need not—and do not—address the Court of Appeals' prejudice analysis under the plain error standard. Accordingly, the North Carolina Conference of Superior Court Judges Committee on Pattern Jury Instructions need not turn its attention to the definition of "sexual act" in N.C.G.S. § 14-318.4(a2) as it was instructed to do by the Court of Appeals.

Factual and Procedural Background

On 3 January 2017, the Cumberland County grand jury returned bills of indictment charging defendant with committing the following crimes against his daughter, Sandy[2]: (1) taking indecent liberties with a child in violation of N.C.G.S. § 14-202.1(a)(1)-(2); (2) felony child abuse by sexual act in violation of N.C.G.S. § 14-318.4(a2); and (3) first-degree statutory sexual offense.

At trial, the evidence showed that defendant engaged in a sustained pattern of sexually abusing Sandy while the family—which included Sandy's mother and Sandy's two siblings—lived in Fayetteville, North Carolina, during the years of 1990 to 1993.

Near the end of the trial, the trial court instructed the jury, in pertinent part, on the charge of felony child abuse by sexual act. At the time that defendant committed the underlying acts of sexual misconduct, the General Statutes provided that a defendant committed felony child abuse by sexual act when the defendant was "[a]ny parent or legal guardian of a child less than 16 years of age who commits or allows the commission of any *sexual act* upon a juvenile . . . ." N.C.G.S. § 14-318.4(a2) (1990) (emphasis added). In instructing the jury, the trial court defined "sexual act" as "an immoral, improper or indecent act by the defendant upon [Sandy] for the purpose of arousing, gratifying sexual desire."

On 11 January 2017, the jury found defendant (1) guilty of taking indecent liberties with a child; (2) guilty of felony child abuse by sexual act; but (3) not guilty of first-degree statutory sexual offense. Defendant appealed his convictions to the Court of Appeals.

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1. This statute was recodified in 2015 as N.C.G.S. § 14-27.20(4).

2. The Court of Appeals used the pseudonym "Sandy" to refer to the victim in this case. *State v. Alonzo*, 819 S.E.2d 584, 586 (N.C. Ct. App. 2018). We will do the same.

At the Court of Appeals, defendant contended, in pertinent part, that the trial court committed plain error in defining "sexual act" and did not accurately define the phrase in the context of felony child abuse under N.C.G.S. § 14-318.4(a2). Specifically, defendant argued that prior decisions of the Court of Appeals recognized that N.C.G.S. § 14-27.1(4) provided the correct definition of "sexual act" for an offense under N.C.G.S. § 14-318.4(a2). N.C.G.S. § 14-27.1(4) provided that

> "Sexual act" means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes.

N.C.G.S. § 14-27.1(4) (1990). Defendant further contended that the trial court's error in failing to instruct the jury according to the definition of "sexual act" under N.C.G.S. § 14-27.1(4) constituted plain error.

The Court of Appeals agreed with defendant that its prior case law recognized that N.C.G.S. § 14-27.1(4) provided the correct definition of "sexual act" for felony child abuse under N.C.G.S. § 14-318.4(a2). *State v. Alonzo*, 819 S.E.2d 584, 587 (N.C. Ct. App. 2018). The Court of Appeals noted that the trial court's definition of "sexual act" was one that "track[ed], almost precisely, the language of the North Carolina Pattern Jury Instruction, N.C.P.I.—Crim. 239.55B, the suggested instructions for the charge of felonious child abuse." *Id.* However, the Court of Appeals concluded that its prior decision in *State v. Lark* held that N.C.G.S. § 14-27.1(4) contained the proper definition of "sexual act" under N.C.G.S. § 14-318.4(a2). *Id.* (citing *State v. Lark*, 198 N.C. App. 82, 88, 678 S.E.2d 693, 698 (2009)). The Court of Appeals then reasoned that even though its later decision in *State v. McClamb* conflicted with *Lark* by failing to extend the definition of "sexual act" in N.C.G.S. § 14-27.1(4) to N.C.G.S. § 14-318.4(a2), *id.* (citing *State v. McClamb*, 234 N.C. App. 753, 758-59, 760 S.E.2d 337, 341 (2014)), it was bound by its decision in *Lark* because *Lark* was the earlier precedent. *Id.* (citing *State v. Meadows*, 806 S.E.2d 682, 693 (N.C. Ct. App. 2017), *aff'd in part*, 371 N.C. 742 (2018)).

Accordingly, the Court of Appeals held that the trial court erred in failing to instruct the jury according to the definition of "sexual act" contained in N.C.G.S. § 14-27.1(4). *Alonzo*, 819 S.E.2d at 587. However, it ultimately held that the trial court's error did not amount to plain error. *Id.* at 588–89. Both defendant and the State sought discretionary review of the Court of Appeals' opinion. We allowed both parties petitions for

discretionary review on 5 December 2018. However, in allowing defendant's petition for discretionary review, we limited our review to the first issue listed in his petition. Pursuant to the parties' petitions, we review (1) whether the trial court erred in instructing the jury on the charge of felony child abuse by sexual act by not defining "sexual act" according to the definition contained in N.C.G.S. § 14-27.1(4); and (2) whether the trial court's error amounted to plain error. Because we conclude that the trial court did not err by not instructing the jury on the meaning of "sexual act" according to the definition found in N.C.G.S. § 14-27.1(4), we modify and affirm the decision of the Court of Appeals. Therefore, we need not—and do not—address the Court of Appeals' prejudice analysis under the plain error standard.

Analysis

[1] "This Court reviews the decision of the Court of Appeals to determine whether it contains any errors of law." *State v. Melton*, 371 N.C. 750, 756, 821 S.E.2d 424, 428 (2018) (citing N.C. R. App. P. 16(a); *State v. Mumford*, 364 N.C. 394, 398, 699 S.E.2d 911, 914 (2010)).

Because the Court of Appeals rested its holding that N.C.G.S. § 14-27.1(4) provided the definition of "sexual act" for an offense under N.C.G.S. § 14-318.4(a2) on the reasoning of its prior decision in *Lark*, it did not engage in a statutory construction analysis to reach its determination. *See Alonzo*, 819 S.E.2d at 587 (citing *Lark*, 198 N.C. App. at 88, 678 S.E.2d at 698). We are not bound by the Court of Appeals' decision in *Lark*, and the issue of whether N.C.G.S. § 14-27.1(4) provides the definition of "sexual act" applicable to an offense under N.C.G.S. § 14-318.4(a2) is an issue of first impression for this Court. Accordingly, we now engage in a statutory construction analysis to determine whether subsection 14-27.1(4) provides the applicable definition of "sexual act."

"Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) (citing *Utils. Comm'n v. Edmisten*, 291 N.C. 451, 232 S.E.2d 184 (1977)). "But where a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *Id.* at 209, 388 S.E.2d at 136-37 (citing *Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E.2d 797 (1948)). Accordingly, in construing the meaning of ambiguous statutory language, our task is "to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Id.* at 209, 388 S.E.2d at 137 (citing *Buck v. Guar. Co.*, 265 N.C. 285, 144 S.E.2d 34 (1965)). Under a statutory construction analysis, legislative

intent "must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied." *Id.* at 209, 388 S.E.2d at 137 (quoting *Milk Comm'n v. Food Stores*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967)). We have further stated that "when technical terms or terms of art are used in a statute they are presumed to have been used with their technical meaning in mind, absent a legislative intent to the contrary." *Black v. Littlejohn*, 312 N.C. 626, 639, 325 S.E.2d 469, 478 (1985) (quoting *In re Appeal of Martin*, 286 N.C. 66, 77–78, 209 S.E.2d 766, 774 (1974)).

Here, defendant argues that we should affirm the Court of Appeals' holding concerning the definition of "sexual act" because "sexual act" is a technical term that takes its meaning from N.C.G.S. § 14-27.1(4). Specifically, defendant argues that when N.C.G.S. § 14-318.4(a2) was enacted, N.C.G.S. § 14-27.1 was already in effect and provided a narrow, statutory definition of "sexual act." Accordingly, defendant asserts that the legislature was aware of this technical definition of "sexual act" at the time that it enacted N.C.G.S. § 14-318.4(a2), and we should assume that the legislature intended to incorporate it into the crime of felony child abuse by sexual act.

We begin by noting that N.C.G.S. § 14-27.1(4) did provide a definition of "sexual act" at the time that the legislature enacted N.C.G.S. § 14-318.4(a2). *See* N.C.G.S. 14-27.1(4) (1983); *see also* An Act Entitled the Child Protection Act of 1983, ch. 916, § 1, 1983 N.C. Sess. Laws 1265, 1265 (adding subsection (a2) to N.C.G.S. § 14-318.4). However, assuming *arguendo* that N.C.G.S. § 14-27.1(4) provided a technical definition of "sexual act," we conclude that the legislative history of the statute provides dispositive evidence of "a legislative intent to the contrary" of defendant's argument that its definition of "sexual act" applies in the context of an offense under N.C.G.S. § 14-318.4(a2). *Black*, 312 N.C. at 639, 325 S.E.2d at 478 (quoting *In re Appeal of Martin*, 286 N.C. at 77–78, 209 S.E.2d at 774).

The legislative history of N.C.G.S. § 14-27.1(4) reveals that the legislature only intended for the statute's definition of "sexual act" to apply within its own article. Specifically, N.C.G.S. § 14-27.1 was enacted as part of a new article to Chapter 14 of the General Statutes—Article 7A. An Act to Clarify, Modernize and Consolidate the Law of Sex Offenses, ch. 682. § 1, 1979 N.C. Sess. Laws 725, 725. When it was enacted, N.C.G.S. § 14-27.1 expressly limited the applicability of all of its definitions—including the definition of "sexual act"—to Article 7A. *Id.* ("*As used in this Article*, unless the context requires otherwise . . . ." (emphasis added)); *see also* N.C.G.S. § 14-27.1 (1980). The language limiting the applicability of the

statute's definitions to Article 7A was still present when subsection (a2) of N.C.G.S. § 14-318.4 was added in 1983. *See* N.C.G.S. § 14-27.1 (1983); *see also* An Act Entitled the Child Protection Act of 1983, ch. 916, § 1, 1983 N.C. Sess. Laws 1265, 1265.

Further, the legislature amended N.C.G.S. § 14-27.1 three times after N.C.G.S. § 14-318.4(a2) was enacted, and the legislature did not remove the language limiting the applicability of the statute's definitions to Article 7A any of those times.[3] Additionally, in 2015, when the legislature recodified Article 7A as Article 7B—and recodified N.C.G.S. § 14-27.1 as N.C.G.S. § 14-27.20—the legislature did not remove the language limiting the applicability of the statute's definitions to the new article.[4] Further, the current version of the statute continues to limit the application of its definitions to Article 7B. *See* N.C.G.S. § 14-27.20 (2017) ("The following definitions apply in this Article . . . .").[5] Therefore, the legislative history demonstrates that from the time N.C.G.S. § 14-27.1 was enacted in 1980, until it took its current form in N.C.G.S. § 14-27.20, the legislature intended for the definitions in the statute to apply only within the respective article. Accordingly, it was error for the Court of Appeals to conclude that the definition of "sexual act" contained in N.C.G.S. § 14-27.1(4) was applicable to offenses under N.C.G.S. § 14-318.4(a2), which is contained in a separate article, Article 39.

Moreover, we have interpreted the definition of "sexual act" in N.C.G.S. § 14-27.1(4) as arising from the specific elements of the crimes listed in Article 7A. *See State v. Lucas*, 302 N.C. 342, 346, 275 S.E.2d 433, 436 (1981). "It is noted that all sexual acts specifically enumerated in the statute relate to sexual activity involving parts of the human

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3. *See* An Act to Make Technical Corrections and Conforming Changes to the General Statutes as Recommended by the General Statutes Commission; to Restore the Definition of Family Care Home to its Original Language as Recommended by the General Statutes Commission; and to Make Various Other Changes to the General Statutes and Session Laws, S.L. 2002-159, § 2.(a), 2002 N.C. Sess. Laws 635, 635; *see also* An Act to Create the Offense of Sexual Battery, S.L. 2003-252, § 1, 2003 N.C. Sess. Laws 426, 426; An Act to Protect North Carolina's Children/Sex Offender Law Changes, S.L. 2006-247, § 12.(a), 2006 N.C. Sess. Laws 1065, 1074.

4. *See* An Act to Reorganize, Rename, and Renumber Various Sexual Offenses to Make Them More Easily Distinguishable From One Another as Recommended by the North Carolina Court of Appeals in "State of North Carolina v. Slade Weston Hicks, Jr.," and to Make Other Technical Changes, S.L. 2015-181, §§ 1, 2, 2015 N.C. Sess. Laws 460, 460.

5. *See also* An Act to Update the General Statutes of North Carolina with People First Language by Changing the Phrase "Mental Retardation" to "Intellectual Disability" in Certain Sections and to Make Other People First Language Amendments and Technical Amendments in Those Sections, as Recommended by the General Statutes Commission, S.L. 2018-47, § 4.(a), 2018 N.C. Sess. Laws 457, 464.

body." *Id.* "The only sexual act excluded from the statutory definition relates to vaginal intercourse, a necessary omission because vaginal intercourse is an element of the crimes of first and second degree rape which are defined in [the relevant statutes]." *Id.* "The words 'sexual act' do not appear in these rape statutes. The words do appear in [N.C.]G.S. [§] 14-27.4 and [N.C.]G.S. [§] 14-27.5 which define the crimes of first and second degree 'sexual offense.' " *Id.* The fact that the definition of "sexual act" in N.C.G.S. § 14-27.1(4) arose from the specific elements of other crimes in Article 7A is a further reason to reject the proposition that N.C.G.S. § 14-27.1(4) provides a definition of "sexual act" that is applicable to offenses under N.C.G.S. § 14-318.4(a2).

[2] Accordingly, we conclude that the Court of Appeals erred when it held that the trial court erred by failing to instruct the jury on the definition of "sexual act" according to N.C.G.S. § 14-27.1(4). In so concluding, we decline to address defendant's argument that the trial court's instruction on the definition of "sexual act" was erroneous because it seemed to match the definition of indecent liberties under N.C.G.S. § 14-202.1 and, accordingly, it was overly broad. Assuming *arguendo* that defendant properly raised this issue at the Court of Appeals, defendant did not present this issue in his petition for discretionary review. N.C. R. App. P. 28(a) ("Similarly, issues properly presented for review in the Court of Appeals, *but not then stated in* the notice of appeal or *the petition* accepted by the Supreme Court for review *and* discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court, are deemed abandoned." (emphases added)). The only issue listed in defendant's petition for discretionary review that this Court accepted for review was "[w]hether the Court of Appeals erred by holding that the erroneous instruction on the child abuse by sexual act charge was not sufficiently prejudicial to warrant relief under the plain error standard." Defendant's challenge to the Court of Appeals' holding under its prejudice analysis did not present the additional assignment of error that the trial court erred by giving a definition of "sexual act" that seemed to match the definition for indecent liberties under N.C.G.S. § 14-202.1.

Further, the only issue listed in the State's petition for discretionary review was the following: "Did the Court of Appeals err in holding the trial court erred in following the pattern jury instructions for felony child abuse by sexual act because these instructions are purportedly erroneous and require revision?" The sole basis for the Court of Appeals' holding was its determination that "sexual act" in N.C.G.S. § 14-318.4(a2) must be defined according to the definition set out in N.C.G.S. § 14-27.1(4).

Alonzo, 819 S.E.2d at 587. Therefore, the State's petition for discretionary review did not present the issue of whether the trial court's instruction was erroneous because it seemed to match the definition for indecent liberties under N.C.G.S. § 14-202.1. Because that issue was not presented in either of the parties' petitions for discretionary review, it is not properly before this Court. *See* N.C. R. App. P. 28(a). To the extent that defendant's argument on that issue is now raising a constitutional challenge to the trial court's instruction, "this Court has consistently held that '[c]onstitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal.' " *State v. Meadows*, 371 N.C. 742, 749, 821 S.E.2d 402, 407 (2018) (quoting *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010)). Therefore, defendant's failure to object to the jury instruction and raise a constitutional issue at trial is another reason that the Court declines to review this additional issue.

Conclusion

Accordingly, we affirm the Court of Appeals' decision upholding defendant's convictions. However, we modify the decision of the Court of Appeals because we hold that the trial court did not err by not instructing the jury on the definition of "sexual act" according to N.C.G.S. § 14-27.1(4). Therefore, we need not—and do not—address the Court of Appeals' prejudice analysis under the plain error standard. Accordingly, the North Carolina Conference of Superior Court Judges Committee on Pattern Jury Instructions need not turn its attention to the definition of "sexual act" in N.C.G.S. § 14-318.4(a2), as it was instructed to do by the Court of Appeals.

MODIFIED AND AFFIRMED.

STATE v. CAREY

[373 N.C. 445 (2020)]

STATE OF NORTH CAROLINA
v.
ADAM RICHARD CAREY

No. 293A19

Filed 28 February 2020

Firearms and Other Weapons—flash bang grenade—weapon of mass destruction

The State presented substantial evidence that defendant possessed a weapon of mass death and destruction in violation of N.C.G.S. § 14-288.8 where a "flash bang" grenade was found in his car. The statute explicitly provided that any explosive or incendiary grenade was a weapon of mass death and destruction. Evidence that the grenade was explosive or incendiary included the label on the grenade and the testimony of a Highway Patrol Trooper who had been in the military.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 831 S.E.2d 597 (N.C. Ct. App. 2019), finding no error, in part, and reversing, in part, judgments entered on 18 May 2018 by Judge Leonard L. Wiggins in Superior Court, Onslow County, and remanding for resentencing. Heard in the Supreme Court on 8 January 2020.

Joshua H. Stein, Attorney General, by E. Burke Haywood, Special Deputy Attorney General, for the State-appellant.

Guy J. Loranger for defendant-appellee.

ERVIN, Justice.

This case presents the question of whether a "flash bang" grenade is a weapon of mass death and destruction as defined in N.C.G.S. § 14-288.8(c)(1). After carefully considering the record, transcripts, briefs, and arguments of the parties, we conclude that such a grenade is a weapon of mass death and destruction and that the Court of Appeals erred by making a contrary determination. As a result, we reverse the decision of the Court of Appeals and remand this case to that court for consideration of defendant's remaining challenges to the trial court's judgments.

At around 2:20 a.m. on 16 July 2016, Trooper Christopher Cross of the North Carolina State Highway Patrol noticed two vehicles traveling in close proximity to each other at a rate of speed that appeared to exceed the applicable speed limit on Highway 258 between Richlands and Jacksonville. After measuring the vehicles' speed at sixty-eight miles per hour, Trooper Cross decided to initiate a traffic stop.

As he approached the speeding vehicles, Trooper Cross observed that both of the vehicles had slowed down and moved over to the right shoulder of the highway. After activating his emergency lights, Trooper Cross saw lights on the rear deck of one of the vehicles that appeared to flash blue. Assuming that he had encountered another law enforcement officer, Trooper Cross pulled up beside the vehicle, which was a Dodge Charger, and asked the occupant, who turned out to be defendant Adam Richard Carey, what was going on. In response, defendant stated that he had pulled over the other vehicle because the driver was speeding and had been driving left of the center line.

Upon nearing defendant's vehicle, Trooper Cross noticed that, like unmarked State Highway Patrol vehicles, the Dodge Charger had a "regular North Carolina First in Flight tag on it." However, unlike unmarked State Highway Patrol vehicles, the license plate on the Dodge Charger was not stamped "SHP." At that point, Trooper Cross asked defendant which agency he was employed by and was told that defendant was a member of Duplin County Search and Rescue. After speaking to the driver of the other vehicle and allowing him to proceed on his way, Trooper Cross returned to the Dodge Charger for the purpose of having a further discussion with defendant.

In the course of the ensuing conversation, defendant denied that the lights on his vehicle were blue. As a result, Trooper Cross directed defendant to move his vehicle to a side road while he reviewed the video generated by his dashboard camera to confirm the color of the lights on the Dodge Charger. Although the dashboard camera video appeared to show that the lights were blue, Trooper Cross concluded that condensation on his windshield had caused this result. When Trooper Cross had defendant activate the lights in his vehicle, they flashed "clear and red."

After arresting defendant for impersonating a law enforcement officer, Trooper Cross, assisted by his partner, began searching defendant's vehicle incident to arrest. During the ensuing search, Trooper Cross discovered, among other items, an emergency medical technician's badge; a number of firearms, including several handguns and rifles with

suppressors; three diversionary or "flash bang" grenades; firearm magazines and ammunition; handcuffs; knives; and body armor.

On 9 May 2017, the Onslow County grand jury returned a bill of indictment charging defendant with two counts of possession of a weapon of mass death and destruction arising from defendant's possession of a silenced long rifle and a silenced pistol; one count of possession of a weapon of mass death and destruction arising from defendant's possession of three "flash bang" grenades; one count of impersonating a law enforcement officer; one count of following too closely; and one count of speeding in excess of thirty-five miles per hour while within the corporate limits of a municipality. On 15 May 2018, the State voluntarily dismissed the charges of possession of a weapon of mass death and destruction stemming from defendant's possession of a silenced long rifle and a silenced pistol, the charge of following too closely, and the charge of speeding.

The charges that had been lodged against defendant came on for trial before the trial court and a jury at the 14 May 2018 criminal session of the Superior Court, Onslow County. At the conclusion of the State's evidence, defendant unsuccessfully moved to dismiss the remaining possession of a weapon of mass death and destruction charge, which stemmed from defendant's possession of the "flash bang" grenades, and the impersonating a law enforcement officer charge for insufficiency of the evidence. In addition, defendant unsuccessfully renewed his dismissal motions at the close of all the evidence. On 18 May 2018, the jury returned a verdict convicting defendant of possessing a weapon of mass death and destruction and impersonating a law enforcement officer. After accepting the jury's verdict, the trial court entered a judgment sentencing defendant to a term of sixteen to twenty-nine months imprisonment based upon his conviction for possession of a weapon of mass death and destruction, suspending that active sentence, and placing defendant on supervised probation for a period of twenty-four months on the condition that he serve an active term of 120 days imprisonment, perform forty-eight hours of community service, obtain a mental health assessment and comply with any treatment recommendations, not possess any non-standard light systems, not possess on his person any item suggesting an association with a law enforcement agency, surrender any firearms in his possession, and comply with the usual terms and conditions of probation. In addition, the trial court entered a second judgment based upon defendant's conviction for impersonating a law enforcement officer sentencing defendant to a consecutive term of forty-five days imprisonment, suspending that sentence, and placing defendant on

supervised probation for a consecutive period of twenty-four months on the condition that defendant comply with the usual terms and conditions of probation. Defendant noted an appeal to the Court of Appeals from the trial court's judgments.

In seeking relief from the trial court's judgments before the Court of Appeals, defendant argued that the trial court had erred by denying his motion to dismiss the charge of possession of a weapon of mass death and destruction on the grounds that the State had failed to elicit sufficient evidence to establish that the three "flash bang" grenades that he had possessed constituted weapons of mass death and destruction as defined in N.C.G.S. § 14-288.8(c)(1); that the trial court had committed plain error by failing to instruct the jury in such a manner as to properly define a weapon of mass death and destruction; and that the trial court had committed plain error by instructing the jury that it could convict defendant of possession of a weapon of mass death and destruction on the basis of a theory that had not been alleged in the relevant count of the indictment that had been returned against defendant.

On 16 July 2019, the Court of Appeals filed an opinion finding no error, in part; reversing the trial court's judgments, in part; and remanding this case to the Superior Court, Onslow County, for resentencing. *State v. Carey*, 831 S.E.2d 597 (N.C. Ct. App. 2019). After concluding that defendant had abandoned his challenge to his conviction for impersonating a law enforcement officer, *id.* at 599 (citing N.C.R. App. P. 28(a)), the majority at the Court of Appeals held that the trial court had erred by denying defendant's motion to dismiss the possession of a weapon of mass death and destruction charge for insufficiency of the evidence because "[t]he flash bang grenades found in [d]efendant's car were not devices or weapons or 'Grenades' capable of causing mass death and destruction when construing N.C.[G.S.] § 14-288.8(c)(1)." *Id.* at 602. In reaching this conclusion, the majority reasoned that, in light of the *ejusdem generis* canon of statutory construction, which provides that, "where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated," *id.* at 601 (quoting *State v. Lee*, 277 N.C. 242, 244, 176 S.E.2d 772, 774 (1970)), the fact that "grenade" appeared in N.C.G.S. § 14-288.8(c)(1) under the general definition of a "weapon of mass death and destruction" means that any grenade subject to the relevant statutory prohibition "must be capable of causing catastrophic damage and consistent with the highly deadly and destructive nature of the other

enumerated items in the list." *Id.* In view of the fact that the "flash bang" grenades that defendant was convicted of possessing were "not consistent with the purpose, do not fit within, and do not rise" to the level of harmfulness associated with the other items included within the definition of a weapon of mass death and destruction, the possession of "flash bang" grenades was not prohibited by N.C.G.S. § 14-288.8(c)(1). *Id.* The majority at the Court of Appeals also concluded that the result that it deemed appropriate was required by the rule of lenity given that the "general and undefined term[ ] [contained in N.C.G.S. § 14-288.8(c)(1)] could include possession of items within its provisions, which are neither dangerous nor deadly weapons, and yet be included and sanctioned as a weapon of mass death and destruction." *Id.* (stating that "[t]he rule of lenity requires courts to read criminal statu[t]es narrowly and restrictively")). In light of its determination that the trial court had erred by denying defendant's dismissal motion, the majority at the Court of Appeals refrained from addressing defendant's remaining challenges to the trial court's judgments. *Id.* at 602. Judge Young dissented from the majority's determination that the trial court had erred by denying defendant's dismissal motion on the grounds that, "[p]ursuant to the plain language of the statute, a 'flash bang grenade' is, by law, a 'grenade,' and therefore a weapon of mass death and destruction." *Id.* at 603 (Young, J., dissenting).

In seeking to persuade this Court to overturn the Court of Appeals' decision, the State contends that "flash-bang grenades are weapons of mass death and destruction . . . because the General Assembly has defined them as such." The State urges us to adopt this conclusion on the grounds that N.C.G.S. § 14-288.8(c)(1) "provides that a 'weapon of mass death and destruction' includes *any* explosive or incendiary grenade." The State asserts that the statutory language contained in N.C.G.S. § 14-288.8(c)(1) is unambiguous and that the Court of Appeals erred by treating the statutory language as ambiguous and utilizing various rules of statutory construction to interpret it.

Defendant, on the other hand, contends that "N.C.[G.S.] § 14-288.8(c)(1) is ambiguous where it lists 'grenade' as a type of explosive or incendiary device that is banned as a weapon of mass death and destruction." According to defendant, the evidence elicited by the State at trial established that there are many different types of grenades, so that "the Court of Appeals made no error of law by turning to rules of statutory construction . . . in order to determine whether . . . the flash bang grenades found in [defendant's] car fell within the definition of a weapon of mass death and destruction under N.C.[G.S.] § 14-288.8(c)(1)." In defendant's

view, "the State's evidence established that a flash bang grenade is not, in and of itself, a weapon capable of causing mass death and destruction" in light of the fact that its intended purpose is "to merely stun, disable or disorient others." Defendant asserts that, in the event that a "flash bang" grenade is used for its intended purpose, it is "unlike the other deadly and destructive devices listed in N.C.[G.S.] § 14-288.8(c)(1)" and clearly falls outside the scope of the relevant statutory prohibition.

The first step that must be undertaken in construing any statutory provision is to examine the language in which that provision is couched. *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) (citing *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991)). According to well-established North Carolina law, "[w]hen the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *State v. Jackson*, 353 N.C. 495, 501, 546 S.E.2d 570, 574 (2001) (quoting *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388–89 (1978)). On the other hand, when the words of a statute are unclear or ambiguous, "courts must resort to statutory construction to determine legislative will and the evil the legislature intended the statute to suppress." *Id.* (citing *In re Banks*, 295 N.C. at 239, 244 S.E.2d at 389)).

Section 14-288.8 of the North Carolina General Statutes makes "it . . . unlawful for any person to manufacture, assemble, possess, store, transport, sell, offer to sell, purchase, offer to purchase, deliver or give to another, or acquire any weapon of mass death and destruction." N.C.G.S. § 14-288.8(a) (2019).

> The term "weapon of mass death and destruction" includes:
>
> (1) *Any explosive or incendiary*:
>
> a. Bomb; or
>
> b. *Grenade*; or
>
> c. Rocket having a propellant charge of more than four ounces; or
>
> d. Missile having an explosive or incendiary charge of more than one-quarter ounce; or
>
> e. Mine; or
>
> f. Device similar to any of the devices described above . . .

. . . .

> The term "weapon of mass death and destruction" does not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line-throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of Title 10 of the United States Code; or any other device which the Secretary of the Treasury finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting purposes, in accordance with Chapter 44 of Title 18 of the United States Code.

Id. § 14-288.8(c) (emphasis added). Although the definition of a "weapon of mass death and destruction" provided by the General Assembly consists of a list delineating a variety of weapons, only one of the weapons contained in that list is relevant to the resolution of the issue that is before us in this case.

The statutory definition contained in N.C.G.S. § 14-288.8(c)(1) explicitly provides that "[a]ny explosive or incendiary . . . [g]renade" is a weapon of mass death and destruction for purposes of the prohibition set out in N.C.G.S. § 14-288.8(a). *Id.* § 14-288.8(c)(1). As should be obvious from an examination of the plain meaning of the relevant statutory language, the General Assembly did not differentiate between different types of grenades and, instead, simply prohibited the possession of "*[a]ny* explosive or incendiary . . . [g]renade." *Id.* (emphasis added). Contrary to the reasoning employed by the majority of the Court of Appeals, nothing in the relevant statutory language suggests that the General Assembly intended to require the existence of a causal link between the use of a weapon explicitly listed in N.C.G.S. § 14-288.8(c)(1) and the ability of that weapon, as a matter of fact, to cause mass death and destruction. By focusing upon the extent to which "flash bang" grenades "are capable of and can result in widespread and catastrophic deaths and destruction of property," *Carey*, 831 S.E.2d at 600–01, the majority at the Court of Appeals injected into its analysis the kind of "judicial construction" that our precedent cautions against in cases involving clear and unambiguous statutory language. *Jackson*, 353 N.C. at 501, 546 S.E.2d at 574 (quoting *In re Banks*, 295 N.C. at 239, 244 S.E.2d at 388–89). Simply put, instead of requiring trial courts to

engage in a fact-intensive examination of the extent to which any particular weapon is capable of causing mass death and destruction, the General Assembly provided a straightforward list of weapons that it thought that the people of North Carolina should be prohibited from possessing which includes any "explosive or incendiary" grenade. As a result, we hold that any "explosive or incendiary" grenade is a weapon of mass death and destruction for purposes of the prohibition set out in N.C.G.S. § 14-288.8(a).

Having concluded that any "explosive or incendiary" grenade is a weapon of mass death and destruction as that term is defined in N.C.G.S. § 14-288.8(c)(1), we must next decide whether the State presented "substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Campbell*, 835 S.E.2d 844, 848 (N.C. 2019) (quoting *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Bradshaw*, 366 N.C. 90, 93, 728 S.E.2d 345, 347 (2012) (quoting *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990)). In view of the fact that defendant has never contested the validity of the State's contention that he actually possessed the "flash bang" grenades that are at issue in this case, the only remaining question for our consideration is whether the State's evidence establishes that the items that defendant admittedly possessed were "explosive or incendiary" grenades.

The evidence elicited by the State at trial tended to show that the items found in defendant's trunk bore a written label that stated "GRENADE, HAND, DIVERSIONARY" and "IF FOUND DO NOT HANDLE NOTIFY POLICE OR MILITARY." Trooper Cross, who had previously served in the military and taught at the School of Infantry, testified that he was familiar with "flash bang" grenades, that they were used in combat, and that such grenades, when thrown, would explode and "make a bright flash and a very loud bang, for the purpose of rendering the people—or whoever is in that room—stunned, disabled, [and] disoriented." As a result, we have no hesitation in holding that the State presented substantial evidence tending to show that defendant possessed an "explosive or incendiary" grenade in violation of N.C.G.S. § 14-288.8(a). For that reason, we reverse the Court of Appeals' decision to the contrary and remand this case to the Court of Appeals for consideration of defendant's remaining challenges to the trial court's judgments.

REVERSED AND REMANDED.

STATE v. CARVER

[373 N.C. 453 (2020)]

STATE OF NORTH CAROLINA
v.
DAVID LEROY CARVER

No. 196A19

Filed 28 February 2020

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 828 S.E.2d 195 (N.C. Ct. App. 2019), reversing and remanding an order entered on 9 February 2018 by Judge Wayland J. Sermons Jr. in Superior Court, Beaufort County. Heard in the Supreme Court on 10 December 2019.

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

The Robinson Law Firm, P.A., by Leslie S. Robinson, for defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
NEIL WAYNE HOYLE

No. 239A18

Filed 28 February 2020

1. Indecent Exposure—jury instructions—interpretation of element—"in the presence of"

In a prosecution for indecent exposure, the trial court correctly instructed the jury on the presence element where the facts showed defendant was inside his car when he called a mother to his car window and her child was about twenty feet away. In light of the plain language of N.C.G.S. § 14-190.9, as interpreted by *State v. Fly*, 348 N.C. 556 (1998), the requirement that the exposure be in the presence of the victim does not mean that the victim could have seen the exposed private parts had the victim looked. The focus is on where the defendants place themselves and on what the defendants do, not on what the victims do.

2. Indecent Exposure—sufficiency of evidence—presence

There was sufficient evidence of the presence element of indecent exposure where defendant exposed himself while sitting in his car to a mother standing at his passenger side window while her child was about twenty feet away. The proximity to the child was sufficiently close that the jury could find defendant's act was in the child's presence.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 818 S.E.2d 149 (N.C. Ct. App. 2018), vacating a judgment entered on 1 June 2017 by Judge Jeffrey P. Hunt in Superior Court, Catawba County, and remanding for a new trial. On 5 December 2018, the Supreme Court allowed the parties' petitions for discretionary review of additional issues. Heard in the Supreme Court on 5 November 2019.

Joshua H. Stein, Attorney General, by Tiffany Y. Lucas, Special Deputy Attorney General, for the State-appellant.

Anne Bleyman for defendant-appellee.

NEWBY, Justice.

In this case we decide whether a defendant charged with felony indecent exposure is entitled to an instruction requiring the jury to find that the victim could have seen the exposed private part had the victim looked. We hold that a defendant is not entitled to such an instruction. It is sufficient for the instruction to explain that the jury must find beyond a reasonable doubt that the exposure was in the presence of another person. We also conclude that the evidence at trial was sufficient for the jury to find that defendant exposed himself in the presence of the child victim. Finding no error in defendant's conviction, we therefore reverse the decision of the Court of Appeals in part.

The child victim was four years old at the time of the incident. His mother drove home from the grocery store with him in the car. After the mother parked, she began removing grocery bags from the car while the child played in the yard. As she was removing the bags, defendant came to her home in his car. Defendant parked along the street at the edge of the yard and called out to her to ask for directions. She explained to defendant that she could not help him; defendant then offered to do some work on her house. She declined, but defendant persisted. Finally, at defendant's request, the mother walked over to defendant's car to take his business card. When she arrived at the passenger side window and reached in to take the card, she saw defendant's exposed genitals. She quickly pulled her hand back, stumbled, dropped the groceries, and ran to grab her child and go inside the house. As she ran from defendant's car, she heard him laugh. During this encounter, the child was playing by a tree in the yard about twenty feet from defendant's car. Law enforcement identified defendant by the business card he had given the mother.

Defendant was tried in Superior Court, Catawba County, for one count of felony indecent exposure, the child being the victim, and one count of misdemeanor indecent exposure, the mother being the victim, both under N.C.G.S. § 14-190.9 (2017). After the State presented its evidence, and again after all evidence was presented, defendant moved to dismiss the felony indecent exposure charge for insufficient evidence. The trial court denied the motion. Defendant also asked the court to instruct the jury that, to find that defendant's exposure was in the presence of someone under the age of sixteen as required by the statute, it must find beyond a reasonable doubt that the child "could have seen [the exposure] had [he] looked." The court declined and, instead, followed the pattern jury instruction. It instructed the jury that to satisfy the "presence" element, the State must prove beyond a reasonable doubt that the exposure "was in the presence of at least one other person." It also explained that "[i]t is not necessary that [the exposure] be directed

at or even seen by another person." The jury found defendant guilty of both felony and misdemeanor indecent exposure, and the trial court arrested judgment on the misdemeanor charge. Defendant was sentenced to ten to twenty-one months in custody and was ordered to register as a sex offender and enroll in lifetime satellite-based monitoring.

[1] Defendant appealed to the Court of Appeals, arguing that the trial court committed prejudicial error by refusing to give the instruction he requested. He also argued that the Court of Appeals should vacate his conviction for felony indecent exposure because the evidence was insufficient to show that he exposed himself "in the presence of" the child. The Court of Appeals held that the trial court should have instructed the jury that to satisfy the "presence" element the State must show that the victim could have seen the exposure had he looked, and that failure to give the instruction was reversible error. The Court of Appeals, however, agreed with the trial court that the evidence was sufficient to allow the jury to consider whether the presence element was satisfied. It thus ordered a new trial requiring defendant's requested jury instruction. The dissent thought the trial court properly instructed the jury. The State appealed to this Court based on the dissent. This Court also allowed the parties' petitions for discretionary review, including defendant's request that the Court review the sufficiency of the evidence issue.

The State argues that the Court of Appeals wrongly held that the "presence" requirement under subsection 14-190.9(a1) means the child must have been able to see defendant's exposed private part had he looked. Defendant claims the Court of Appeals was correct about the jury instruction and also argues that the evidence was insufficient to satisfy the presence element of felony indecent exposure.

Subsection 14-190.9(a1) provides that

> any person at least 18 years of age who shall willfully expose the private parts of his or her person in any public place in the presence of any other person less than 16 years of age for the purpose of arousing or gratifying sexual desire shall be guilty of a Class H felony.

The elements of felony indecent exposure under this statute are that the defendant was at least eighteen years old at the time of the exposure, that he willfully exposed his private parts, that the exposure was in a public place, that the exposure was in the "presence" of someone under the age of sixteen, and that the exposure was committed to arouse or gratify sexual desire. *See State v. Fly*, 348 N.C. 556, 559, 501 S.E.2d 656,

658 (1998) (interpreting a similarly worded prior version of section 14-190.9). The presence element is the only element defendant contests before this Court, so we do not address the others.

This Court previously considered the presence element of indecent exposure in *State v. Fly*. In that case, the victim walked up the steps of her condominium building, and, upon rounding a section of stairs, looked up and saw the defendant "mooning" her. *Id.* at 557, 501 S.E.2d at 657. The defendant's pants were pulled down to his ankles and the victim could see the "crack of his [exposed] buttocks." *Id.* When the victim saw the defendant, she yelled, and the defendant quickly pulled up his pants and ran away. *Id.* One issue in *Fly* was whether the defendant could be convicted when the victim saw the "crack of his buttocks," but could not see his genitals. *Id.* at 559, 501 S.E.2d at 658. The Court first held that though the buttocks is not a "private part" under the indecent exposure statute, "the external organs of sex and excretion" are. *Id.* at 560, 501 S.E.2d at 659. It then held that a jury could reasonably find that the defendant had exposed "either his anus, his genitals, or both." *Id.* at 561, 501 S.E.2d at 659. The Court explained that the statute does not require the victim to have seen the exposure; instead, it only requires that the exposure was willfully made in a public place and in the presence of another. *Id.* The exposure need not have been to another, as long as it occurred in the *presence* of another. *Id.* Indecent exposure, the Court said, "does not go to what the victim saw but to what defendant exposed in her presence without her consent." *Id.* Therefore, the Court held that a jury could have found that the defendant exposed his genitals in the presence of the victim, even though the victim did not see them and could not have seen them without being positioned differently. *Id.*

In light of the plain language of N.C.G.S. § 14-190.9 as interpreted in *Fly*, we hold that the requirement that the exposure be "in the presence of" the victim does not require a jury to find that the victim could have seen the exposed private parts had he or she looked. The statutory requirement that the exposure be in the presence of another focuses on where a defendant places himself relative to others; it concerns what the defendant does, not what the victim does or could do. *See, e.g.*, *Fly*, 348 N.C. at 561, 501 S.E.2d at 659 ("The statute does not go to what the victim saw but to what defendant exposed in her presence without her consent."). If a defendant exposes himself in public and has positioned himself so he is sufficiently close to someone under the age of sixteen, the presence element of subsection 14-190.9(a1) is satisfied.[1]

1. To hold otherwise would lead to absurd results. If the offense of indecent exposure is not committed unless the victim could have seen the exposure had he or she

The jury instruction in this case drew directly from the statutory language and the *Fly* opinion. The trial court instructed the jury that to return a guilty verdict it must find beyond a reasonable doubt "that the exposure was in the presence of at least one other person" and that "[i]t is not necessary that [the exposure] be directed at or even seen by another person." This instruction was correct.

[2] Finally, the evidence at trial was sufficient to satisfy the presence element of the felony indecent exposure statute. When we consider a defendant's motion to dismiss, the question is "whether there is substantial evidence . . . of each essential element of the offense charged." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980) (citation omitted). The trial court must consider the evidence in the light most favorable to the State. *State v. Rose*, 339 N.C. 172, 192–93, 451 S.E.2d 211, 223 (1994). Because defendant has only contested the sufficiency of the evidence as to the "presence" element of the offense, that is the only element we consider.

At the time of the exposure, defendant was in his car along a road in front of the victim's house. He exposed himself while the child was about twenty feet away. Viewing the evidence in the light most favorable to the State, the proximity of the exposure to the victim was sufficiently close that a jury could find it was in the child's presence. The properly instructed jury, by returning a guilty verdict, apparently concluded it was. The conviction was thus appropriate. We therefore agree with the Court of Appeals that the evidence was sufficient to support defendant's felony indecent exposure conviction. That portion of the Court of Appeals' decision is affirmed.

But because the Court of Appeals erroneously held that defendant was entitled to an instruction requiring the jury to find that the child could have seen the exposure had he looked, and that the failure to give the instruction was prejudicial to defendant, we reverse that portion of

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looked, then a conviction could hinge on considerations like the quality of the victim's vision. We see nothing in the statute's language indicating that the General Assembly intended a defendant to be culpable for indecent exposure by exposing himself near a child with 20/20 vision, but not for exposing himself near a visually impaired child who left her glasses at home that day. In the same way, we do not think the General Assembly would have intended defendant's culpability to be contingent on whether the victim child happened to climb a tree or otherwise move to a position where he could more easily see the exposure.

the decision of the Court of Appeals that awarded defendant a new trial and find no error in defendant's conviction for felony indecent exposure.

AFFIRMED IN PART; REVERSED IN PART.

STATE OF NORTH CAROLINA
v.
SYDNEY SHAKUR MERCER

No. 257PA18

Filed 28 February 2020

1. Firearms and Other Weapons—possession of a firearm by a felon—affirmative defense—justification

In a case of first impression, the Supreme Court recognized the common law defense of justification as an affirmative defense for possession of a firearm by a felon (N.C.G.S. § 14-415.1) in narrow and extraordinary circumstances. The Court adopted the four-factor test outlined in *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000).

2. Criminal Law—jury instructions—possession of a firearm by a felon—requested instruction—justification defense

Defendant was entitled to his requested jury instructions on the defense of justification for possession of a firearm by a felon where each required factor was satisfied by the evidence when viewed in the light most favorable to defendant: Defendant arrived home from a job interview and found that another family had approached his family's home seeking a fight with him; defendant grabbed his cousin's gun only after he heard the other family's guns cocking and witnessed his cousin struggling with his own gun; and defendant relinquished possession of the gun when it jammed and he was able to flee. The trial court's error in failing to instruct on the justification defense was prejudicial where the jury sent a note to the trial court asking about the availability of the defense.

Justice MORGAN dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 818 S.E.2d 375 (N.C. Ct. App. 2018), vacating a judgment entered on 8 May 2017 by Judge Jesse B.

Caldwell III in Superior Court, Mecklenburg County, and remanding for a new trial. Heard in the Supreme Court on 22 November 2019 in session in the Johnston County Courthouse in the City of Smithfield pursuant to section 18B.8 of chapter 57 of the 2017 North Carolina Session Laws.

Joshua H. Stein, Attorney General, by Mary C. Babb, Assistant Attorney General, for the State-appellant.

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

HUDSON, Justice.

Here, we must determine whether the Court of Appeals erred by concluding that the trial court committed prejudicial error when it failed to instruct the jury on justification as a defense for the charge of possession of a firearm by a felon. Because we conclude that the Court of Appeals did not err, we affirm.

I. Factual and Procedural Background

On 30 March 2016 an altercation occurred outside defendant's home. The State and defendant presented different versions of that event at trial. Due to our standard of review in this case, we present the facts primarily from defendant's version of events.

Dazoveen Mingo and a group of approximately fifteen family members (hereinafter, the Mingo group) walked to defendant's home to fight two of defendant's friends, J and Wardell. When defendant arrived at his house with J and Wardell after a job interview, the Mingo group was there urging defendant and his friends to fight them and blocking defendant from going into his house. Defendant asked the Mingo group what was going on and they accused him of jumping a member of their group. Defendant denied having anything to do with a jumping, but the Mingo group continued to approach him saying they were "done talking."

Defendant's mother heard a commotion outside her house and went outside to find the Mingo group "ambushing" defendant and preventing him from coming into the house. She tried to calm everyone down but the Mingo group continued to try to fight, walking toward defendant and his friends, who backed away. Both defendant and his mother observed that members of the Mingo group were armed.

Defendant heard the sound of guns cocking. Wardell had a gun but he did not seem to know what he was doing with it. Defendant took

the gun from Wardell, but continued to talk to the Mingo group and deny involvement in the jumping. Defendant knew he was not allowed to possess a firearm, but he saw Wardell was struggling with the gun and defendant wanted to make sure they survived. Defendant pointed Wardell's gun at the Mingo group and told them to "back up." He heard shots fired by someone else.

When defendant's mother heard the shot, she urged defendant to run away because she believed the Mingo group was trying to kill him. She heard one member of the group, Ms. Mingo, tell her son to shoot defendant and saw Ms. Mingo chasing defendant and shooting at him.

Defendant dashed to the side of the street. When he observed that someone was still shooting at him, defendant shot back once and then the gun jammed. Defendant threw the gun back to Wardell to fix it and defendant ran away. Early the next morning defendant turned himself in to the police.

The State's witnesses provided a slightly different version of events:

Dazoveen Mingo and a group of family members walked to defendant's home to fight two of defendant's friends, J and Wardell. None of the Mingo group was armed. Defendant, J, and Wardell arrived at defendant's house about the same time as the Mingo group and Dazoveen noticed that defendant had a handgun in his belt.

The Mingo group began urging defendant and his friends to fight them, walking toward defendant and his friends, who backed away. Defendant removed the gun from his pants and pointed it while telling the group to "back up." Defendant then fired a shot into the air.

After defendant fired the shot, Dazoveen's aunt arrived with a gun. Dazoveen's mother grabbed the gun from the aunt and shot it into the air. Both defendant and a member of the Mingo group fired shots into the air three to four times each. After these shots, the Mingo group went home and called the police.

Defendant was indicted on 11 April 2016 for possession of a firearm by a felon under N.C.G.S. § 14-415.1 and tried before a jury beginning in March 2017. At the conclusion of all the evidence, defendant requested a jury instruction on justification as a defense to the charge of possession of a firearm by a felon. The trial court denied the request, and defendant objected. During deliberations, the jury sent a note asking the trial court for "clarification on whether or not [defendant] could be justified in possession of a firearm even with the stipulation [that he was] a convicted

felon." In response, the trial court reread its original instruction on possession of a firearm by a felon to the jury.

The jury returned a verdict of guilty on the charge of possession of a firearm by a felon. Defendant appealed his conviction to the Court of Appeals, arguing that the trial court erred by denying his requested jury instruction on justification as a defense to possession of a firearm by a felon. The Court of Appeals concluded that defendant was entitled to a justification defense instruction. We affirm.

II. Standard of Review

We review a decision of the Court of Appeals' to determine whether it contains any error of law. N.C.R. App. P. 16(a); *State v. Malone*, 833 S.E.2d 779, 787 (N.C. 2019) (citing *State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994)). A trial court must give the substance of a requested jury instruction if it is "correct in itself and supported by the evidence . . . ." *State v. Locklear*, 363 N.C. 438, 464, 681 S.E.2d 293, 312 (2009) (citing *State v. Harvell*, 334 N.C. 356, 364, 432 S.E.2d 125, 129 (1993)); *see also*, *e.g.*, *State v. Montague*, 298 N.C. 752, 755, 259 S.E.2d 899, 902 (1979) (holding that if, there is sufficient evidence in the light most favorable to the defendant to support a self-defense instruction, "the instruction must be given even though the State's evidence is contradictory."). To resolve whether a defendant is entitled to a requested instruction, we review de novo whether each element of the defense is supported by the evidence, when taken in the light most favorable to defendant. *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988) ("When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to defendant.").

III. Analysis

A. Justification as a Defense to N.C.G.S. § 14-415.1

[1] In North Carolina, "[i]t shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction as defined in [G.S. § 14-288.8(c)]." N.C.G.S. § 14-415.1(a) (2017). "The offense of possession of a firearm by a convicted felon has two essential elements: (1) the defendant has been convicted of a felony, and (2) the defendant subsequently possessed a firearm." *State v. Floyd*, 369 N.C. 329, 333, 794 S.E.2d 460, 463 (2016) (citation omitted).

Whether justification is a common-law defense to a charge of possession of a firearm by a felon under N.C.G.S. § 14-415.1 is a question of

first impression in our Court. Previous cases addressing this issue at the Court of Appeals have assumed arguendo that justification is available as a defense to a charge of possession of a firearm by a felon, but the defense has never been recognized by this Court because none of the previous cases presented a situation in which a defendant would have been entitled to the instruction under the analysis the defendant proposed to the Court of Appeals. *See State v. Monroe*, 233 N.C. App. 563, 568–69, 756 S.E.2d 376, 379–80 (2014), *aff'd per curiam*, 367 N.C. 771, 768 S.E.2d 292 (2015) (surveying prior Court of Appeals cases).

We now hold that in narrow and extraordinary circumstances, justification may be available as a defense to a charge under N.C.G.S. § 14-415.1.[1]

We note that justification is an affirmative defense and does not negate any element of N.C.G.S. § 14-415.1. The justification defense "serves only as a legal excuse for the criminal act and is based on additional facts and circumstances that are distinct from the conduct constituting the underlying offense." *State v. Holshouser*, 833 S.E.2d 193, 197 (N.C. Ct. App. 2019) (citing *United States v. Deleveaux*, 205 F.3d 1292, 1297–98 (11th Cir. 2000)). Thus, like other affirmative defenses, a defendant has the burden to prove his or her justification defense to the satisfaction of the jury. *See State v. Sanders*, 280 N.C. 81, 85, 185 S.E.2d 158, 161 (1971) ("When defendant relies upon some independent, distinct, substantive matter of exemption, immunity or defense, beyond the essentials of the legal definition of the offense itself, the onus of proof as to such matter is upon the defendant." (quoting *State v. Johnson*, 229 N.C. 701, 706, 51 S.E.2d 186, 190 (1949))). *See also*, *e.g.*, *State v. Caldwell*, 293 N.C. 336, 339, 237 S.E.2d 742, 744 (1977) ("[I]nsanity is an affirmative defense which must be proved to the satisfaction of the jury by every accused who pleads it."); *State v. Caddell*, 287 N.C. 266, 290, 215 S.E.2d 348, 363 (1975) ("[Unconsciousness] is an affirmative defense; . . . the burden rests upon the defendant to establish this defense, unless it arises out of the State's own evidence, to the satisfaction of the jury.").

The Court of Appeals looked to the *Deleveaux* case for guidance as to how a defendant could invoke the defense of justification. We view

1. Some form of the defense of justification has been widely recognized by other jurisdictions as a defense to possession of a firearm by a felon. *See*, *e.g.*, *United States v. Gomez*, 92 F.3d 770, 774–75 (9th Cir. 1996); *United States v. Paolello*, 951 F.2d 537, 541 (3d Cir. 1991); *United States v. Singleton*, 902 F.2d 471, 472 (6th Cir. 1990); *United States v. Gant*, 691 F.2d 1159, 1161–62 (5th Cir. 1982); *Smith v. State*, 290 Ga. 768, 770, 723 S.E.2d 915, 918 (2012); *People v. Dupree*, 486 Mich. 693, 696, 788 N.W.2d 399, 401 (2010); *Humphrey v. Commonwealth*, 37 Va. App. 36, 44–48, 553 S.E.2d 546, 550–52 (2001).

the *Deleveaux* factors as appropriate and adopt them here.[2] Accordingly, we hold that to establish justification as a defense to a charge under N.C.G.S. § 14-415.1, the defendant must show:

> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Deleveaux, 205 F.3d at 1297. Having determined that justification may be a defense to N.C.G.S. § 14-415.1 and that a justification instruction must be given when each *Deleveaux* factor is supported by evidence taken in the light most favorable to defendant, we now turn to the specific facts of the case at hand.

B. Application of the Defense

[2] "When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to defendant." *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988) (citations omitted). Thus, we examine whether evidence, considered in the light most favorable to defendant, tends to show each element of justification such that the trial court should have instructed the jury on justification as a defense.

First, defendant presented evidence that he was under unlawful and present, imminent and impending threat of death or serious bodily injury. When defendant arrived at his own house, there was a group of people ready to fight him, and those people were blocking him from going inside. The group accused defendant of jumping one of them and Ms. Mingo was shouting at her son to shoot defendant. While trying to

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2. We recognize that the court in *Deleveaux* analyzed 18 U.S.C. § 922(g)(1), the federal equivalent of N.C.G.S. §14-415.1. The two statutes share similar language and restrict similar behavior. The federal statute makes it unlawful for a convicted felon "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(g)(1). The North Carolina statute makes it unlawful for a convicted felon "to purchase, own, possess, or have in his custody, care, or control any firearm." Thus, we find the *Deleveaux* factors helpful and appropriate as a rubric for defendants to establish that they are entitled to an instruction on justification as a defense to a charge under N.C.G.S. §14-415.1.

explain that he had nothing to do with the underlying conflict and backing away from the group, defendant heard the sound of guns cocking and heard someone in the group say they were "done talking." Defendant testified that he saw his cousin struggling with his gun, and only then took the gun himself. While there is some evidence from the State that defendant was armed before the threat arose, we must view the evidence in the light most favorable to defendant, and defendant's evidence tends to show that he was under unlawful and present, imminent and impending threat of death or serious bodily injury.

Second, the evidence suggests that defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct. Defendant testified that when he arrived home after a job interview, a large group of people were there looking for a fight. Defendant's mother testified that the group was blocking defendant from going into his house and that from the moment he exited his car they were challenging him to fight. Although defendant tried to explain that he was not involved in the underlying conflict from earlier that day and physically backed away from the group, the situation escalated rapidly. Considering the evidence in the light most favorable to defendant, we conclude that a jury could find that he did not negligently or recklessly place himself in a situation where he would be forced to arm himself simply by arriving at his home and trying to explain himself to the group who were blocking him from entering his home.

Third, some evidence supports defendant's claim that he had no reasonable legal alternative to violating the law. Defendant was unable to go into his home when he arrived because the group blocked his path, and he was already out of the car and unable to drive away when the group said they were "done talking." Defendant testified that after he heard guns being cocked, he looked over to see his cousin struggling with the gun. Again, considering the evidence in the light most favorable to defendant, a reasonable jury could conclude that it was too late to call 911 and that running away would have put him at greater risk of being shot. A jury could have concluded that defendant had no reasonable legal alternative to violating the law.

Fourth and finally, there was evidence tending to show a direct causal relationship between the criminal action and the avoidance of the threatened harm. According to defendant, he only took possession of the gun when he heard other guns being cocked, and he gave the gun back to his cousin when it jammed and he was able to run away. Defendant argued that having the gun allowed him to create space enough to retreat and avoid being jumped or shot by the group. The

State presented evidence to the contrary, but when considering the evidence in the light most favorable to defendant, a jury could find that his gun possession was directly caused by his attempt to avoid a threatened harm.

Thus, viewed in the light most favorable to defendant, we conclude that he presented sufficient evidence of each *Deleveaux* factor to require the court to instruct the jury on justification as a defense to the charge of possession of a firearm by a felon. We emphasize that we are not determining whether defendant here was actually justified in his possession of the firearm, as the State did present relevant conflicting evidence on several points. We hold only that he was entitled to have the justification defense presented to the jury.

Having determined that defendant was entitled to a jury instruction on justification as a defense, we must now evaluate whether the trial court's failure to give this instruction was prejudicial to defendant. "[A] defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial. . . ." N.C. Gen. Stat. § 15A-1443(a) (2017).

The jury was not instructed on justification as a defense to the possession of a firearm by a felon and it ultimately convicted defendant on that charge. But, during deliberations, the jury sent a note to the trial court explicitly asking about the availability of a justification defense for the charge of possession of a firearm by a felon. This question indicates, at a minimum, that the jury was concerned about this legal issue. We conclude that the trial court's failure to give a justification instruction created a reasonable possibility that the jury would have reached a different result.

IV. Conclusion

We hold that the Court of Appeals did not err by recognizing the availability of a common law justification defense for a possession of a firearm by a felon charge under N.C.G.S. § 14-415.1 nor by prescribing the *Deleveaux* factors as the framework within which to determine whether the defense should have been presented to the jury. Having considered the evidence in the light most favorable to defendant, we hold that there is sufficient evidence of each *Deleveaux* factor to require a justification instruction be given to the jury. Because the failure to give that instruction was prejudicial, defendant is entitled to a new trial, and we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice MORGAN dissenting.

While I agree with my distinguished colleagues of the majority that our Court should avail itself of the opportunity that this case presents to expressly recognize and establish a defense of justification as an affirmative defense which is available to a criminal defendant who is accused of the offense of possession of a firearm by a felon, I respectfully dissent on the ground that the majority has formalized a threshold which is perilously low for the requirements of this affirmative defense to be met. In this case of first impression in this Court, while the majority states that this affirmative defense is now available "in narrow and extraordinary circumstances," in my view defendant here did not present evidence of circumstances at trial which were sufficient to qualify him for the affirmative defense at issue. Therefore, while I agree with the decision of the majority to establish a defense of justification which is available as an affirmative defense to a criminal defendant who is charged with the offense of possession of a firearm by a felon, I must dissent from the majority's decision due to my belief that defendant in the instant case did not present evidence sufficient to show each necessary element to warrant a jury instruction on justification as a defense.

In welcoming the establishment of the justification defense for a criminal defendant in the state courts of North Carolina who is charged under Section 14-415.1 of the General Statutes of North Carolina, I agree with the majority's premise that our courts should implement the four factors enunciated in *United States v. Deleveaux*, which a defendant must satisfy in order to establish justification as a defense:

> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

205 F.3d 1292, 1297 (11th Cir. 2000). I also concur with the majority's recognition of the well-established principle, as cited in its opinion, that an appellate court reviews de novo whether or not a defendant is entitled to a requested jury instruction on an affirmative defense upon examining the evidence in the light most favorable to the defendant so as to

determine whether each element of the affirmative defense is supported by the evidence.

Within the Felony Firearms Act, codified in Article 54A of the North Carolina General Statutes, is N.C.G.S. § 14-415.1. Defendant was convicted in the present case of possession of a firearm by a felon, in violation of N.C.G.S. § 14-415.1. The offense is established in § 14-415.1(a), which states in pertinent part: "It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm." In according the word "any"—which is used twice in the excerpted passage of the statute—its plain and simple meaning, no person convicted of a felony is exempted from the statutory reach of this offense. Likewise, no firearm is excluded from the application of this criminal law. Inherent in the usage of such unequivocal and unambiguous language, and reinforced by the dearth of any terminology to compromise or to weaken its directness, is the clarity of the legislative intent undergirding N.C.G.S. § 14-415.1(a) that there are no exceptions to the operation of the statute. Therefore, while I agree with the majority's presumption that this Court has the authority to judicially carve out an affirmative defense to the criminal statutory provision,[1] nonetheless I am compelled to tailor this newly formalized affirmative defense of justification as a defense to N.C.G.S. § 14-415.1 in such a way that it is appropriately only available to criminal defendants in the type of narrow and extraordinary circumstances which most closely retain the original concept of the statute's lack of any exceptions.

In this case of first impression, as this Court adopts the standards of the federal court case *United States v. Deleveaux* to establish the affirmative defense of justification in North Carolina state court cases involving the criminal charge of possession of a firearm by a felon, it would be prudent to examine the federal courts' approach to the utilization of the defense in circumstances where, as in the instant case, the legislative enactment comprehensively bars a convicted felon from acquiring a firearm by any means. "To ensure that this strict prohibition is effectuated, we should require that the defendant meet a high level of proof to establish the defense of justification." *United States v. Paolello*, 951 F.2d 537, 541 (3rd Cir. 1991). The Seventh Circuit in *United States v. Perez* emphasized that, other than when a felon who is not engaged in criminal activity grabs a gun which is actively threatening harm, a justification defense "will rarely lie in a felon-in-possession case" and

1. "[S]tatutes rarely enumerate the defenses to the crimes they describe." *United States v. Panter*, 688 F.2d 268, 270 (5th Cir. 1982) (footnote omitted).

is available "*only in the most extraordinary circumstances*." 86 F.3d 735, 737 (7th Cir. 1996) (emphasis added). "A 'mere scintilla' of evidence supporting a defendant's theory . . . is not sufficient to warrant a [justification] defense instruction." *United States v. Morton*, 999 F.2d 435, 437 (9th Cir. 1993). Other federal courts have reached similar conclusions which require strict standards for this affirmative defense. *See, e.g.*, *United States v. Singleton*, 902 F.2d 471–72 (6th Cir. 1990) (holding "that a defense of justification may arise *in rare situations*") (citation omitted) (emphasis added); *United States v. Rice*, 214 F.3d 1295, 1297 (11th Cir. 2000) (finding that the justification defense "*is reserved for 'extraordinary circumstances*' ") (citation omitted) (emphasis added).

In examining the trial evidence when taken in the light most favorable to defendant in order to determine whether or not the evidence was sufficient to entitle him to a jury instruction on justification as a defense to the criminal offense of possession of a firearm by a felon as established by N.C.G.S. § 14-415.1(a), in my view the first factor—"the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury"—and the third factor—"the defendant had no reasonable legal alternative to violating the law"—were insufficiently shown by defendant to establish the affirmative defense and to require an instruction to the jury on it. Stated another way, because the defendant did not show sufficient evidence of all four of the *Deleveaux* factors, the circumstances presented at trial were not sufficiently narrow and extraordinary to support a defense of justification.

While the circumstances described in the testimony presented at trial concerning the two antagonistic groups of people confronting each other in an outdoor environment is a disturbing situation, they do not rise to a level which constitutes sufficient evidence to satisfy all of the required *Deleveaux* factors. Even taking the evidence in the light most favorable to defendant, such evidence falls short of the high standards articulated in the cited case law. The evidence at trial showed that defendant was engaged in discussion with the members of the "Mingo group" during the entirety of the confrontation. While there were angry responses to defendant's statements from the "Mingo group" members and gunshots fired by unknown individuals within the two groups, defendant extricated himself from the unpleasant situation simply by running away from it. As defendant put it, "I just run home. Not run home, but run away." Hence, I am not persuaded that it was necessary for defendant to possess a firearm in order to escape from the unlawful and present, imminent, and impending threat of death or serious bodily injury. Also, the trial evidence offered by defendant himself

demonstrated that there was no need for him to possess a firearm during this altercation: defendant's cousin Wardell Sherill had a firearm which he displayed, defendant "hurried up and snatched it out of his hand" after hearing "people cock their guns back" because "Wardell Sherill is my little cousin," and defendant subsequently returned the gun to its owner as he "threw it to Mr. Sherill." Through this testimony of defendant, it is apparent that he was not in a position in which he had no reasonable legal alternative to violating the law, because after he unilaterally and voluntarily took possession of the firearm from its owner, defendant unilaterally and voluntarily returned the firearm to its owner when defendant was finished with it. "Generalized fears will not support the defense of justification." *United States v. Crittendon*, 883 F.2d 326, 330 (4th Cir. 1989). As stated in *United States v. Lewis*:

> [a justification defense] does not arise from a "choice" of several sources of action; it is instead based on a *real emergency*. It may be asserted only by a defendant who was confronted with a crisis as a personal danger, a crisis that did not permit a selection *from among several solutions*, some of which would not have involved criminal acts.

628 F.2d 1276, 1279 (10th Cir. 1980) (emphasis added), *cert. denied*, 450 U.S. 924 (1981).

It is needless for me to address whether any of the other *Deleveaux* factors exist, since pursuant to my analysis regarding the sufficiency of the evidence to invoke the affirmative defense of justification, the first and third factors fail to exist, and all of them must be present for the jury instruction to be given.

I would readily join the majority in the conclusion that the defense of justification as an affirmative defense to a charge of possession of a firearm by a felon under N.C.G.S. § 14-415.1 should be deemed to be formally established by virtue of the present case. However, the "rare" and "most extraordinary" circumstances which courts routinely require to be shown through a "high level of proof to establish the defense of justification" have not been satisfied by defendant in this case in light of the clear intent of the legislature to create a pervasive denial of the possession of firearms by persons convicted of felony offenses and the resulting judicial responsibility "to ensure that this strict prohibition is effectuated." Through the majority's determination that defendant here merited a jury instruction at trial on the affirmative defense of justification on the basis of the evidence presented in this case, it has set a standard in this case of first impression which is far too low

to represent the appropriate evidentiary threshold. While the majority purports to have copiously constrained the availability of the affirmative defense of justification in cases involving N.C.G.S. § 14-415.1 to "narrow and extraordinary circumstances," I disagree. Accordingly, I would reverse the decision of the Court of Appeals on the basis that there was not sufficient evidence to entitle defendant to a jury instruction on justification as a defense to the charged offense under N.C.G.S. § 14-415.1 of possession of a firearm by a felon.

STATE OF NORTH CAROLINA
v.
GEORGE LEE NOBLES

No. 34PA14-2

Filed 28 February 2020

1. Native Americans—status as Indian—tribal or federal recognition—four-factor balancing test—factors not exhaustive

To establish whether a criminal defendant met the definition of "Indian" and therefore was subject to the federal Indian Major Crimes Act for a murder that occurred on land belonging to the Eastern Band of Cherokee Indians, the Supreme Court adopted a non-exhaustive balancing test for determining the second prong of a two-pronged test under *United States v. Rogers*, 45 U.S. 567 (1846), which is recognition as an Indian by a tribe or the federal government. The test utilized the four factors set forth in *St. Cloud v. United States*, 702 F. Supp. 1456 (D.S.D. 1988), as well as other relevant factors.

2. Native Americans—status as Indian—tribal recognition—first descendant status

In a case involving a murder on land belonging to the Eastern Band of Cherokee Indians (EBCI), the Supreme Court rejected arguments by the defendant that his status as a first descendant of the EBCI conclusively demonstrated his tribal or federal recognition as an Indian under the second prong of the two-pronged test in *United States v. Rogers*, 45 U.S. 567 (1846), precluding the need to consider factors set forth in *St. Cloud v. United States*, 702 F. Supp. (D.S.D. 1988), regarding such recognition. Classification as an Indian solely on the basis of percentage of Indian blood (the first *Rogers* prong)

and status as a first descendant would reduce the *Rogers* test to one of genetics, and ignore a person's social, societal, and spiritual ties to a tribe.

3. Native Americans—status as Indian—tribal or federal recognition—application of balancing test

In a case involving a murder on land belonging to the Eastern Band of Cherokee Indians (EBCI), defendant did not qualify as an "Indian" for purposes of the federal Indian Major Crimes Act based on multiple factors, including those found in *St. Cloud v. United States*, 702 F. Supp. 1456 (D.S.D. 1988). Defendant was not enrolled in the EBCI, received limited tribal medical benefits as a minor, did not enjoy benefits of tribal affiliation, did not participate in Indian social life, had never previously been subjected to tribal jurisdiction, and did not hold himself out as an Indian.

4. Native Americans—jurisdiction—special jury instruction—legal versus factual issue

In a case involving a murder on land belonging to the Eastern Band of Cherokee Indians, defendant was not entitled to a special jury verdict on the jurisdictional issue underlying his motion to dismiss the charges against him where the issue hinged on a legal determination of whether the Indian Major Crimes Act applied and not the resolution of a factual dispute.

Justice EARLS dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 818 S.E.2d 129 (N.C. Ct. App. 2018), determining no error in part and remanding in part a judgment entered on 15 April 2016 by Judge Bradley B. Letts in Superior Court, Jackson County. Heard in the Supreme Court on 4 November 2019.

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

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

DAVIS, Justice.

In this case, we must determine whether defendant has sufficiently demonstrated that he qualifies as an "Indian"[1] under the federal Indian Major Crimes Act (IMCA) such that he was not subject to the jurisdiction of North Carolina's courts. Because we conclude that defendant failed to demonstrate that he is an Indian for purposes of the IMCA, we affirm the decision of the Court of Appeals.

Factual and Procedural Background

On 30 September 2012, Barbara Preidt was robbed at gunpoint and fatally shot outside of a Fairfield Inn in Jackson County. The crime took place within the Qualla Boundary—land that is held in trust by the United States for the Eastern Band of Cherokee Indians (EBCI).

After an investigation by the Cherokee Indian Police Department, defendant, Dwayne Edward Swayney, and Ashlyn Carothers were arrested for the robbery and murder on 30 November 2012. Because Swayney and Carothers were enrolled members of the EBCI and of the Cherokee Nation of Oklahoma, respectively, they were brought before an EBCI tribal magistrate for indictment proceedings. Tribal, state, and federal authorities, however, agreed that defendant should be prosecuted by the State of North Carolina given that he was not present in the EBCI enrollment records. Accordingly, defendant was brought before a Jackson County magistrate and then charged in Jackson County with first-degree murder, robbery with a dangerous weapon, and two counts of possession of a firearm by a felon.

On 15 April 2013, defendant moved to dismiss the charges against him for lack of subject matter jurisdiction, arguing that because he was an Indian he could only be tried in federal court pursuant to the IMCA. The IMCA provides, in pertinent part, that "[a]ny Indian" who commits an enumerated major crime in "Indian country" is subject to "the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a) (2012).

The trial court held a pre-trial hearing on defendant's motion to dismiss on 9 August 2013. The parties stipulated that defendant was born in 1976 in Florida to Donna Lorraine Smith Crowe, an enrolled member of the EBCI. The parties also stipulated that although defendant himself is not an enrolled member of the EBCI, he "would be [classified as] a first descendant" due to his mother's status.

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1. Throughout this opinion, we use the term "Indian" to comport with the terminology contained in the Indian Major Crimes Act.

At the hearing, the trial court received testimony from Kathie McCoy, an employee at the EBCI Office of Tribal Enrollment. McCoy testified that while defendant is neither currently enrolled nor classified as a first descendant in the EBCI database, he was nevertheless "eligible to be designated as a [f]irst [d]escendant" because his mother was an enrolled member of the EBCI.

Annette Tarnawsky, the Attorney General for the EBCI, also provided testimony explaining that while first descendants are not entitled to the full range of tribal affiliation benefits that enrolled members enjoy, first descendants are eligible for some special benefits not available to persons lacking any affiliation with the tribe. These benefits include certain property rights (such as the right to inherit land from enrolled members by valid will and to rent dwellings on tribal land), health care benefits (eligibility to receive free care at the Cherokee Indian Hospital), employment benefits (a limited hiring preference for EBCI employment), and education benefits (access to financial assistance for higher education and adult education services). Tarnawsky also testified that the list of benefits available only to enrolled EBCI members includes the right to hunt and fish on tribal lands, the ability to vote in tribal elections, and the right to hold tribal office.

The State also presented evidence that defendant had been incarcerated in Florida from 1993 until 2011 and that his pre-sentence report in Florida listed his race and sex as "W/M." When defendant was released from Florida's custody in 2011, he requested that his probation be transferred to North Carolina and listed his race as "white" on his Application for Interstate Compact Transfer.

Defendant's probation officers, Christian Clemmer and Olivia Ammons, testified that in 2011, defendant began living with family members at an address near the Qualla Boundary and working at a fast food restaurant that was also located within the Boundary. For the next fourteen months, defendant lived at various addresses on or near the Qualla Boundary until his arrest on 30 November 2012. Defendant never represented to either of his probation officers that he was an Indian. On a mandatory substance abuse screening form completed by Ammons on 7 May 2012, defendant's race was listed as "white."

Defendant's mother also testified at the hearing, stating that she is an enrolled EBCI member but that defendant's father was white and not affiliated with any tribe. She testified that defendant lived on or near the Qualla Boundary for much of his childhood and that she had

enrolled defendant in both the Cherokee tribal school system and the Swain County school system. On one Bureau of Indian Affairs (BIA) student enrollment application, she listed defendant's "Degree Indian" as "none." On two other BIA student enrollment applications, however, she listed defendant's "Tribal Affiliation" as "Cherokee."

As a child, defendant received treatment at the Swain County Hospital for injuries suffered in a car accident, and the EBCI paid for the portion of his medical expenses not covered by health insurance. An employee of Cherokee Indian Hospital, Vickie Jenkins, testified that defendant received care at the hospital on five occasions between 1985 and 1990. The hospital serves only enrolled members of the EBCI and first descendants, both of whom receive medical services at no cost. Defendant's hospital records indicated that he was of EBCI descent and identified him as an "Indian nontribal member."

After hearing all the evidence, the trial court entered an order on 26 November 2013 denying defendant's motion to dismiss based on its determination that defendant was not an Indian within the meaning of the IMCA. The trial court's order contained hundreds of detailed findings of fact. On 31 January 2014, defendant filed a petition for writ of certiorari with this Court seeking review of the trial court's order. The petition was denied on 11 June 2014.

On 14 March 2016, defendant renewed his motion to dismiss the charges against him in the trial court for lack of jurisdiction, and, in the alternative, moved that the jurisdictional issue relating to his Indian status be submitted to the jury by means of a special verdict. The trial court denied both motions on 25 March 2016.

Defendant was subsequently tried in Superior Court, Jackson County, beginning on 28 March 2016, and was ultimately convicted of armed robbery, first-degree murder under the felony murder doctrine, and possession of a firearm by a felon. He was sentenced to life imprisonment without parole.

Defendant appealed his convictions to the Court of Appeals. His principal argument on appeal was that the trial court had erred in denying his motion to dismiss on jurisdictional grounds. In a unanimous opinion, the Court of Appeals rejected his argument, based on its determination that defendant did not qualify as an Indian under the IMCA and that a special verdict was not required. *State v. Nobles*, 818 S.E.2d 129

(N.C. Ct. App. 2018).[2] Defendant filed a petition for discretionary review with this Court on 7 August 2018, which we allowed.

Analysis

The two issues before us in this appeal are whether the Court of Appeals erred in affirming the trial court's order denying defendant's motion to dismiss and in ruling that the jurisdictional issue was not required to be submitted to the jury by means of a special verdict. We address each issue in turn.

I. Denial of Motion to Dismiss

[1] The IMCA provides that "[a]ny Indian who commits [an enumerated major crime] against the person or property of another . . . within the Indian country[ ] shall be subject to . . . the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a); *see United States v. Juvenile Male*, 666 F.3d 1212, 1214 (9th Cir. 2012) ("[The IMCA] provides federal criminal jurisdiction for certain crimes committed by Indians in Indian country."); *United States v. Sands*, 968 F.2d 1058, 1061 (10th Cir. 1992) ("[The IMCA] provides that federal criminal law applies to various offenses committed by Indians . . . 'within the Indian Country.' ").

Here, there is no dispute that the shooting took place in "Indian country" as it occurred within the Qualla Boundary. Nor is there any dispute that the charges against defendant constituted major crimes for purposes of the IMCA. The question before us is whether defendant qualifies as an Indian under that statute.

The IMCA does not provide a definition of the term "Indian." The Supreme Court of the United States, however, suggested a two-pronged test for analyzing this issue in *United States v. Rogers*, 45 U.S. 567, 572–73, 11 L. Ed. 1105, 1107–08 (1846). To qualify as an Indian under the *Rogers* test, a defendant must (1) have "some Indian blood," and (2) be "recognized as an Indian by a tribe or the federal government or both." *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009) (citing *Rogers*, 45 U.S. at 572–73, 11 L. Ed. at 1105); *see also United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015) (en banc) ("We hold that proof of Indian status under the IMCA requires only two things: (1) proof of some quantum of Indian blood, . . . and (2) proof of membership in, or affiliation with, a federally recognized tribe.").

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2. The Court of Appeals remanded the case to the trial court for the sole purpose of correcting a clerical error. *Nobles*, 818 S.E.2d at 144. This portion of the Court of Appeals' decision is not before us in this appeal.

In the present case, the parties agree that the first prong of the *Rogers* test has been satisfied because defendant possesses an Indian blood quantum of 11/256 (4.29%). Thus, only the second prong of *Rogers* is at issue—that is, whether defendant has received tribal or federal recognition as an Indian. This Court has not previously had an opportunity to apply the *Rogers* test. It is therefore instructive to examine how other courts have done so.

In applying the second prong of *Rogers*, both federal and state courts around the country have frequently utilized—in some fashion—the four-factor balancing test first enunciated in *St. Cloud v. United States*, 702 F. Supp. 1456 (D.S.D. 1988). Under the *St. Cloud* test, a court considers the following factors:

> 1) enrollment in a tribe; 2) government recognition formally and informally through providing the person assistance reserved only to Indians; 3) enjoying benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation and participating in Indian social life.

Id. at 1461; *see, e.g.*, *United States v. Nowlin*, 555 F. App'x 820, 823 (10th Cir. 2014) (using the *St. Cloud* factors to determine whether the defendant was an Indian); *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005) (applying the *Rogers* test as the "generally accepted test for Indian status" as well as the *St. Cloud* factors); *United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir. 1995) (court's analysis of the second *Rogers* prong was "guided by consideration of four factors . . . first enunciated in *St. Cloud*"); *State v. Sebastian*, 243 Conn. 115, 132, 701 A.2d 13, 24 (1997) ("The four factors enumerated in *St. Cloud* have emerged as a widely accepted test for Indian status in the federal courts."); *State v. George*, 163 Idaho 936, 939–40, 422 P.3d 1142, 1145–46 (2018) (relying on the *St. Cloud* factors to determine the defendant's Indian status); *State v. LaPier*, 242 Mont. 335, 341, 790 P.2d 983, 986 (1990) ("We expressly adopt the foregoing [*St. Cloud*] test."); *State v. Perank*, 858 P.2d 927, 933 (Utah 1992) (relying on *St. Cloud* to determine whether the defendant met the definition of an Indian); *State v. Daniels*, 104 Wash. App. 271, 281–82, 16 P.3d 650, 654–55 (2001) (considering the *St. Cloud* factors in deciding whether the defendant qualified as an Indian).

Courts have varied, however, in their precise application of the *St. Cloud* factors. *See, e.g.*, *State v. Salazar*, No. A-1-CA-36206, 2020 WL 239879, at *3 n.4 (N.M. Ct. App. Jan. 15, 2020) ("[A] circuit split has emerged about whether certain factors carry more weight than others.").

Some courts deem the four factors set out in *St. Cloud* to be exclusive and consider them "in declining order of importance." *Bruce*, 394 F.3d at 1224; *accord Sebastian*, 243 Conn. at 132, 701 A.2d at 24 (applying the four *St. Cloud* factors "in declining order of importance"); *LaPier*, 242 Mont. at 341, 790 P.2d at 986 (analyzing the *St. Cloud* factors "[i]n declining order of importance"); *Lewis v. State*, 137 Idaho 882, 885, 55 P.3d 875, 878 (Idaho Ct. App. 2002) ("[Of the *St. Cloud*] factors tribal enrollment is the most important."); *Daniels*, 104 Wash. App. at 279, 16 P.3d at 654 (using the four factors identified in *St. Cloud* "[i]n declining order of importance").

Other courts have utilized the *St. Cloud* factors differently. The Eighth Circuit has held that the four *St. Cloud* factors "should not be considered exhaustive . . . [n]or should they be tied to an order of importance." *Stymiest*, 581 F.3d at 764. The Tenth Circuit has likewise determined that the *St. Cloud* factors "are not exclusive." *Nowlin*, 555 F. App'x at 823 ("These factors are not exclusive and only the first factor is dispositive if the defendant is an enrolled tribe member.").

After thoroughly reviewing the decisions from other jurisdictions addressing this issue, we adopt the application of the *St. Cloud* factors utilized by the Eighth Circuit and the Tenth Circuit. We do so based on our belief that this formulation of the test provides needed flexibility for courts in determining the inherently imprecise issue of whether an individual should be considered to be an Indian under the second prong of the *Rogers* test. We likewise recognize that, depending upon the circumstances in a given case, relevant factors may exist beyond the four *St. Cloud* factors that bear on this issue. *See, e.g.*, *Stymiest*, 581 F.3d at 764 (holding that the trial court "properly identified two other factors relevant on the facts of this case" in addition to the *St. Cloud* factors—namely, that the defendant's tribe had previously "exercised criminal jurisdiction over" him and that the defendant "held himself out to be an Indian").

[2] Before applying this test in the present case, however, we must first address defendant's threshold arguments. Initially, he contends that consideration of the *St. Cloud* factors is unnecessary because his status as a first descendant conclusively demonstrates—as a matter of law—his "tribal or federal recognition" under the second *Rogers* prong. We reject this argument, however, based on our concern that such an approach would reduce the *Rogers* test into a purely blood-based inquiry, thereby conflating the two prongs of the *Rogers* test into one. Were we to hold that defendant may be classified as an Indian solely on the basis of (1) his percentage of Cherokee blood; and (2) his status as the son

of an enrolled member of the Cherokee tribe, this would transform the *Rogers* test into one based wholly upon genetics. Such an approach would defeat the purpose of the test, which is to ascertain not just a defendant's blood quotient, but also his social, societal, and spiritual ties to a tribe.

Indeed, the Ninth Circuit rejected this exact argument in *United States v. Cruz*, 554 F.3d 840 (9th Cir. 2009), explaining that the four-factor test articulated in *St. Cloud* is designed to probe

> "whether the Native American has a sufficient non-racial link to a formerly sovereign people" . . . . Given that many descendants of Indians are eligible for tribal benefits based exclusively on their blood heritage, the government's argument [that the defendant's descendant status alone could satisfy this prong] would effectively render the second [*Rogers* prong] a de facto nullity, and in most, if not all, cases would transform the entire [*Rogers*] analysis into a "blood test."

Cruz, 554 F.3d at 849 (citations and emphasis omitted).

We are likewise unpersuaded by defendant's assertion that we should follow the decision of the Cherokee Court in *E. Band of Cherokee Indians v. Lambert*, 3 Cher. Rep. 62 (N.C. Cherokee Ct. 2003), on this issue. At issue in *Lambert* was whether the defendant in that case qualified as an Indian for purposes of EBCI tribal criminal jurisdiction. *Id.* at 62. The defendant filed a motion to dismiss, contending that the EBCI lacked jurisdiction over her because she was not an enrolled member of the tribe. *Id.* Both parties stipulated that the defendant was recognized by the tribe as a first descendant. *Id.*

After holding a hearing to gather additional evidence, the court ruled that the defendant was "an Indian for the purposes of [tribal criminal] jurisdiction." *Id.* at 64. The court rejected the defendant's argument that her lack of enrollment in a tribe was dispositive of her status, explaining that "membership in a Tribe is not an 'essential factor' in the test of whether the person is an 'Indian' for the purposes of this Court's exercise of criminal jurisdiction." *Id.* Instead, the court relied on *Rogers* and the *St. Cloud* factors to conclude that "the inquiry includes whether the person has some Indian blood and is recognized as an Indian." *Id.*

The Cherokee Court ruled that "[a]pplying this test in this case, the [c]ourt can only conclude that the [d]efendant meets the definition of an Indian." *Id.* at 65. The court detailed the benefits and privileges available

to EBCI first descendants, including "some privileges that only Indians have, [as well as] some privileges that members of other Tribes do not possess." *Id.* at 64. The court also took judicial notice of the fact that the defendant had "availed herself of the [c]ourt's civil jurisdiction" to file a pending lawsuit against another tribal member. *Id.* at 63. Finally, the court noted that "[f]irst [d]escend[a]nts are participating members of [the] community and treated by the [t]ribe as such." *Id.* at 64.

In the present case, we believe that defendant's reliance on *Lambert* is misplaced for several reasons. First, it is far from clear that the *Lambert* court intended to announce a categorical rule that all first descendants must be classified as Indians. There, despite the parties' stipulation that the defendant was, in fact, an EBCI first descendant, the court nevertheless determined that "additional evidence was required to decide the matter" and proceeded to hold an evidentiary hearing. *Id.* at 62. The logical inference from the court's opinion is that if first descendant status alone was sufficient to decide the issue, the court would have had no need to seek additional evidence in order to determine whether the defendant was subject to tribal jurisdiction. Indeed, we note that the court in *Lambert* expressly made a finding of fact that the defendant had previously "availed herself of the [tribal] [c]ourt's civil jurisdiction" to file a lawsuit against another tribal member. *Id.* at 63. Such a finding would have been unnecessary had the defendant's first descendant status been enough by itself to resolve the issue.

Moreover, even if the Cherokee Court in *Lambert* did intend to articulate such a categorical rule, we would not be bound by it. The court that decided *Lambert* is a trial court within the EBCI judicial system. *See* Cherokee Code § 7-1(a) ("[T]he Trial Court shall be known as the 'Cherokee Court.' "). Defendant has failed to offer any persuasive argument as to why this Court should be bound by the decision of an EBCI trial court on this issue. We note that the Supreme Court of the EBCI has made clear that it "do[es] not consider the Cherokee Court opinions as having any precedential value since the Cherokee Court is the trial court for this appellate court." *Teesateskie v. E. Band of Cherokee Indians Minors Fund*, 13 Am. Tribal Law 180, 188 (E. Cher. Sup. Ct. 2015). Thus, the decision in *Lambert* does not have binding effect even within the EBCI courts.

Furthermore, as the Idaho Supreme Court has noted, the fact that a tribal court may have exercised its jurisdiction over certain defendants is not dispositive on the issue of whether a state court possesses jurisdiction over such defendants in a particular case. *See George*, 163 Idaho at 940, 422 P.3d at 1146 ("[T]his [c]ourt either has jurisdiction or

it does not, and it is not determined by whether other agencies have or do not have jurisdiction or exercise discretion in determining whether to prosecute."). Accordingly, we hold that defendant's status as a first descendant does not—without more—satisfy the second prong of the *Rogers* test.

[3] Having rejected defendant's initial arguments, we now proceed to apply the four *St. Cloud* factors along with any additional factors relevant to the analysis. Before doing so, it is important to emphasize that defendant has not specifically challenged any of the hundreds of findings of fact contained in the trial court's order denying his motion to dismiss. Accordingly, those findings are binding upon us in this appeal. *See State v. Sparks*, 362 N.C. 181, 185, 657 S.E.2d 655, 658 (2008) ("It is well established that if a party fails to object to the [trial court's] findings of fact and bring[s] them forward on appeal, they are binding on the appellate court.").

A. Enrollment in a Tribe

We first consider whether defendant is enrolled in any "federally recognized tribe." *Zepeda*, 792 F.3d at 1114. Here, the inquiry is a simple one. It is undisputed that defendant is not enrolled in any such tribe.

B. Government Recognition Through Provision of Assistance

The second *St. Cloud* factor requires us to determine whether defendant was the recipient of "government recognition formally and informally through receipt of assistance reserved only to Indians." *Cruz*, 554 F.3d at 846. In arguing that this factor supports his argument, defendant lists the types of benefits for which first descendants are eligible. However, this factor is concerned with those tribal benefits a defendant has actually *received* as opposed to those benefits for which he is merely *eligible*. *See Cruz*, 554 F.3d at 848 (holding that defendant failed to satisfy this prong of the *St. Cloud* test because he "never 'received . . . any benefits from the Blackfeet Tribe' "); *accord United States v. LaBuff*, 658 F.3d 873, 878 (9th Cir. 2011) (rejecting the argument that this factor "could be established by demonstrating eligibility rather than actual receipt of benefits").

Here, based on the trial court's findings of fact, the only evidence of governmental assistance to defendant consisted of five incidents of free medical treatment that he received as a minor at the Cherokee Indian Hospital, a hospital that serves only enrolled EBCI members and first descendants. Defendant's hospital records indicated that he was of EBCI descent and identified him as an "Indian nontribal member." The

trial court made no findings as to any tribal assistance that defendant has received since reaching adulthood.

C. Enjoyment of Benefits of Tribal Affiliation

The third factor under *St. Cloud* addresses defendant's "enjoyment of the benefits of tribal affiliation." *Bruce*, 394 F.3d at 1224. In assessing this factor, we must examine whether defendant has received any broader benefits from his affiliation with a tribe—apart from the receipt of government assistance. *See, e.g.*, *Cruz*, 554 F.3d at 848 (holding that the defendant failed to demonstrate that he "enjoy[ed] any benefits of tribal affiliation" when there was "no evidence that he hunted or fished on the reservation, nor . . . that his employment with the BIA was related to or contingent upon his tribal heritage").

Here, defendant was born in Florida and the trial court made no finding that he was born on tribal land. He did attend a school in the Cherokee tribal school system as a child after he and his mother moved back to North Carolina in the early 1980's, but the school was open to both Indian and non-Indian students. As an adult, defendant lived and worked on or near the Qualla Boundary for approximately fourteen months prior to the murder of Preidt in 2012. The trial court made no findings, however, suggesting that his employment at the restaurant was in any way connected to his first descendant status. Nor does the trial court's order show that he enjoyed any other benefits of tribal affiliation.

D. Social Recognition as an Indian

Under the fourth *St. Cloud* factor, we consider whether defendant received "social recognition as an Indian through residence on a reservation and participation in Indian social life." *Bruce*, 394 F.3d at 1224. Courts applying this factor have deemed relevant various types of conduct showing a defendant's connection with a particular tribe. *See, e.g.*, *United States v. Reza-Ramos*, 816 F.3d 1110, 1122 (9th Cir. 2016) (defendant "spoke the tribal language" and "had lived and worked on the reservation for some time"); *LaBuff*, 658 F.3d at 878 ("[Defendant] lived, grew up, and attended school on the Blackfeet Reservation."); *Stymiest*, 581 F.3d at 765–66 (defendant "lived and worked on the Rosebud reservation," told others he was an Indian, and spent significant time "socializing with other Indians"); *Bruce*, 394 F.3d at 1226 (defendant "was born on an Indian reservation and currently lives on one," she "participated in sacred tribal rituals," and her mother and children were enrolled members of a tribe).

Conversely, courts have determined that this factor weighs against a finding of Indian status under the IMCA as to defendants who have never

been involved in Indian cultural, community, or religious events; never participated in tribal politics; and have not placed any emphasis on their Indian heritage. *See*, *e.g.*, *Cruz*, 554 F.3d at 847 (defendant "never participated in Indian religious ceremonies or dance festivals, has never voted in a Blackfeet tribal election, and does not have a tribal identification card"); *Lawrence*, 51 F.3d at 154 (victim was not "recognized socially as an Indian" when she had only lived on the reservation for seven months and "did not attend pow-wows, Indian dances or other Indian cultural events; and . . . she and her family lived without focusing on their Indian heritage").

In the present case—as noted above—defendant lived and worked on or near the Qualla Boundary for approximately fourteen months prior to the murder of Preidt. During this time, he had a girlfriend, Ashlyn Carothers, who was an enrolled tribal member. Defendant also emphasizes that his two tattoos—which depict an eagle and a headdress—demonstrate his celebration of his cultural heritage.

However, the trial court's findings are devoid of any indication that defendant ever attended any EBCI cultural, community, or religious activities; that he spoke the Cherokee language; that he possessed a tribal identification card; or that he participated in tribal politics. Indeed, we note that Myrtle Driver Johnson, an active elder and member of the EBCI community, testified that she had never seen defendant at EBCI events. Moreover, on several different official documents, defendant self-identified as being "white."

E. Other Relevant Factors

Finally, we consider whether any additional pertinent factors exist. For example, whether a defendant has been subjected to tribal jurisdiction in the past—in either a criminal or civil context—has been considered by several courts to be relevant. *See*, *e.g.*, *LaBuff*, 658 F.3d at 879 (noting "that on multiple occasions, [the defendant] was arrested, prosecuted, and convicted under the jurisdiction of the tribal courts" and that "the assumption and exercise of tribal jurisdiction over criminal charges[ ] demonstrates tribal recognition"); *Stymiest*, 581 F.3d at 766 (observing that the defendant had "repeatedly submitt[ed] [himself] to tribal arrests and prosecutions"); *Bruce*, 394 F.3d at 1226–27 (deeming instructive the fact that the defendant had been "arrested tribal all her life" because "the tribe has no jurisdiction to punish anyone but an Indian").

Here, the trial court's findings do not show that defendant was ever subjected to the jurisdiction of the EBCI tribal court or, for that matter,

any other tribal court. Nor has defendant directed us to any additional facts found by the trial court that would otherwise be relevant under the second prong of the *Rogers* test.

* * *

After carefully considering the trial court's extensive findings of fact in light of the factors relevant to the second prong of the *Rogers* test, we conclude that defendant has failed to demonstrate that the trial court erred in denying his motion to dismiss. In essence, the trial court's findings show that (1) defendant is not enrolled in any tribe; (2) he received limited government assistance from the EBCI in the form of free healthcare services on several occasions as a minor; (3) as a child, he attended a Cherokee school that accepted both Indian and non-Indian students; (4) he lived and worked on the Qualla Boundary for approximately fourteen months as an adult; (5) his participation in Indian social life was virtually nonexistent and his demonstrated celebration of his cultural heritage was at best minimal; (6) he has never previously been subjected to tribal jurisdiction; and (7) he did not hold himself out as an Indian. The trial court therefore properly concluded that defendant was not an Indian for purposes of the IMCA. Accordingly, we affirm the court's denial of his motion to dismiss.

II. Special Jury Verdict

[4] The only remaining issue before us concerns defendant's contention that he was entitled to a special jury verdict on the jurisdictional issue underlying his motion to dismiss. Defendant asserts that because this issue required resolution by a jury the trial court erred in ruling on the motion as a matter of law. In support of this contention, he cites our decisions in *State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 497 (1977) and *State v. Rick*, 342 N.C. 91, 463 S.E.2d 182 (1995).

In *Batdorf*, the defendant challenged the trial court's territorial jurisdiction, contending that there was insufficient evidence that his crime was committed in North Carolina—as opposed to Ohio—"so as to confer jurisdiction on the courts of this State." *Batdorf*, 293 N.C. at 492, 238 S.E.2d at 502. We agreed with the defendant that the State bears the "burden of proving beyond a reasonable doubt that the crime with which an accused is charged was committed in North Carolina." *Id.* at 494, 238 S.E.2d at 502. We held that the trial court should have instructed the jury to "return a special verdict indicating lack of jurisdiction" if the jury was not satisfied that the crime occurred in North Carolina. *Id.* at 494, 238 S.E.2d at 503.

Rick likewise involved a challenge to the trial court's territorial jurisdiction in which the defendant contended that the State had not sufficiently proven whether the crime occurred in North Carolina or South Carolina. *Rick*, 342 N.C. at 98, 463 S.E.2d at 186. Citing the rule established in *Batdorf*, we determined that a remand was necessary because "the record reveals that although the defendant challenged the facts of jurisdiction, the trial court did not instruct the jury as to which party bore the burden of proving jurisdiction and that if the jury was unconvinced beyond a reasonable doubt that the murder . . . occurred in North Carolina, it should return a special verdict so indicating." *Id.* at 101, 463 S.E.2d at 187.

Thus, *Batdorf* and *Rick* each involved a challenge to the court's *territorial* jurisdiction—that is, whether the crime occurred in North Carolina as opposed to another state. Here, conversely, defendant is making the entirely separate argument that he was required to be prosecuted in federal court pursuant to the IMCA. As a result, our decisions in *Batdorf* and *Rick* have no application here.

The dissent appears to be arguing that *any* challenge to the trial court's jurisdiction in a criminal case must always be resolved by a jury—regardless of the nature of the jurisdictional challenge or whether any factual disputes exist regarding the jurisdictional issue. Such an argument finds no support in our caselaw and would extend the rulings in *Batdorf* and *Rick* well beyond the limited principle of law for which those cases stand.

The dissent fails to point to any factual dispute relevant to the IMCA analysis that exists in the record.[3] Given the absence of any such factual dispute, it would make little sense to hold that a jury was required to decide the purely legal jurisdictional issue presented here.

This principle is illustrated by our decision in *State v. Darroch*, 305 N.C. 196, 287 S.E.2d 856 (1982). There, the defendant was convicted of accessory before the fact to murder. *Id.* at 197, 287 S.E.2d at 857. The evidence showed that the defendant, a Virginia resident, had—while in Virginia—hired two persons to kill her husband and that the husband was subsequently killed in North Carolina by the individuals she had hired. *Id.* On appeal, the defendant argued that the trial court lacked jurisdiction over her based on the specific crime for which she had been charged given that the murder had been committed in North Carolina

3. The dissent similarly does not acknowledge the effect of defendant's failure to challenge on appeal any of the trial court's findings of fact.

but arranged in another state. *Id.* at 200–01, 287 S.E.2d at 859–60. Relying on *Batdorf*, she contended that because she had raised a jurisdictional issue "the jury should have been allowed to return a special verdict" as to whether jurisdiction existed in the trial court. *Id.* at 212, 287 S.E.2d at 866. In rejecting her argument, we explained as follows:

> While *Batdorf* still represents the law in this state on the burden of proof on jurisdiction, it is applicable only when the facts on which the State seeks to base jurisdiction are challenged. In this case, defendant challenged not the *facts* which the State contended supported jurisdiction, but the *theory* of jurisdiction relied upon by the State. Whether the theory supports jurisdiction is a legal question; whether certain facts exist which would support jurisdiction is a jury question.

Id.

As in in *Darroch*, defendant here is not challenging the underlying "facts on which the State seeks to base jurisdiction." *Id.* Instead, defendant contests the trial court's determination that the IMCA is not applicable in this case—an inherently legal question properly decided by the trial court rather than by the jury.[4]

Finally, the dissent notes that some federal courts have concluded that a defendant's Indian status under the IMCA "is an element of the crime that must be submitted to and decided by the jury" because it is "essential to federal subject matter jurisdiction." *Stymiest*, 581 F.3d at 763. Such a requirement is not illogical given that "federal courts are courts of limited jurisdiction." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374, 57 L. Ed. 2d 274, 282 (1978). The dissent, however, has failed to cite any authority for the converse proposition that in state court proceedings the *inapplicability* of the IMCA is an element of the crime that must be submitted for resolution by the jury. Accordingly, we conclude that the trial court did not err by denying defendant's request for a special jury verdict.

Conclusion

For the reasons stated above, we affirm the decision of the Court of Appeals.

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4. Therefore, this case does not require us to decide the question of whether a defendant's challenge to a trial court's jurisdiction based on the IMCA could ever require a special jury verdict on that issue in a case where—unlike here—a factual dispute exists that is relevant to the IMCA analysis.

AFFIRMED.

Justice EARLS dissenting.

I disagree with the majority's conclusion that defendant was not entitled to a special jury verdict on the question of whether he is an "Indian" under the Indian Major Crimes Act (the IMCA).[1] Further, assuming that the majority is correct that this question was not required to be submitted to the jury, I disagree with the majority's conclusion that defendant is not an Indian under the IMCA. Accordingly, I respectfully dissent.

As the majority notes, the fatal shooting of Barbara Preidt on 30 September 2012 occurred in Jackson County within the Qualla Boundary, which is land that is held in trust by the United States for the Eastern Band of Cherokee Indians (the EBCI), a federally-recognized tribe. Following an investigation by the Cherokee Indian Police Department (the CIPD), defendant was arrested within the Qualla Boundary in connection with the shooting.

The Cherokee Rules of Criminal Procedure mandated that individuals arrested on tribal land must be brought before a tribal magistrate to "conduct the '*St. Cloud*' test" to determine whether the arrestee is an Indian, and further that if the arrestee is an enrolled member of any federally-recognized tribe or an EBCI First Descendant, jurisdiction lies with the tribal court. Despite these Rules of Criminal Procedure, CIPD Detective Sean Birchfield did not bring defendant before a tribal magistrate nor ask whether defendant was a First Descendant. Rather, after checking an EBCI enrollment book, which does not include First Descendants, and determining that defendant was not an enrolled member, and after discussing the situation with a Jackson County Assistant District Attorney and a Special Assistant United States Attorney, Detective Birchfield transported defendant to Jackson County, where he was charged in State court with first-degree murder, robbery with a dangerous weapon,. and two counts of possession of a firearm by a felon.

On 15 April 2013, defendant filed a motion to dismiss in superior court, arguing that because he was an Indian under the IMCA, jurisdiction over his case lies exclusively in federal court. After a hearing, the trial court denied defendant's motion on 26 November 2013. Defendant later renewed his motion to dismiss and requested in the alternative that

1. Like the majority, I use the term "Indian" to comport with the terminology contained in the IMCA.

the question of whether he is an Indian be submitted to the jury for a special verdict. The trial court denied these motions on 25 March 2016. On appeal, the Court of Appeals upheld the trial court's rulings, concluding that defendant received a fair trial free from error. *State v. Nobles*, 818 S.E.2d 129 (N.C. Ct. App. 2018).

Special Jury Verdict

Defendant argues that the trial court erred in denying his request for a special jury verdict because he has a constitutional right to a jury trial, with the burden on the State to prove every factual matter necessary for his conviction and sentence beyond a reasonable doubt. In support of his contention, defendant relies, in part, upon two cases from this Court, *State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 496 (1977), and *State v. Rick*, 342 N.C. 91, 463 S.E.2d 182 (1995).

In *Batdorf*, the defendant argued that there was insufficient evidence that the murder at issue was committed in North Carolina "so as to confer jurisdiction on the courts of this State." 293 N.C. at 492, 238 S.E.2d at 502. The Court stated:

> A defendant's contention that this State lacks jurisdiction may be an affirmative defense in that it presents . . . a matter "beyond the essentials of the legal definition of the offense itself." Jurisdictional issues, however, relate to the authority of a tribunal to adjudicate the questions it is called upon to decide. When jurisdiction is challenged, the defendant is contesting the very power of this State to try him. We are of the view that a question as basic as jurisdiction is not an "independent, distinct, substantive matter of exemption, immunity or defense" and ought not to be regarded as an affirmative defense on which the defendant must bear the burden of proof. Rather, jurisdiction is a matter which, *when contested*, should be proven by the prosecution as a prerequisite to the authority of the court to enter judgment.

Id. at 493, 238 S.E.2d at 502 (citations omitted). Thus, the Court held that "when jurisdiction is challenged, as here, the State must carry the burden and show beyond a reasonable doubt that North Carolina has jurisdiction to try the accused." *Id.* at 494, 238 S.E.2d at 502–03.[2]

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2. The Court concluded that while the trial court there should have instructed the jury "to return a special verdict indicating lack of jurisdiction" if the jury did not find the killing occurred in North Carolina, the instruction given "afford[ed] [defendant] no just

Similarly, in *Rick*, the defendant filed a motion to dismiss for lack of jurisdiction on the basis that there was insufficient evidence that the murder with which he was charged occurred in North Carolina. 342 N.C. at 98, 463 S.E.2d at 186. The Court determined that there was sufficient evidence that the crime occurred in North Carolina, but that in light of *Batdorf* the trial court erred because it "did not instruct the jury as to which party bore the burden of proving jurisdiction and that if the jury was unconvinced beyond a reasonable doubt that the murder, or the essential elements of murder, occurred in North Carolina, it should return a special verdict so indicating." *Id.* at 99–101, 463 S.E.2d at 186–87.

In addressing defendant's argument, the majority suggests that unlike a challenge to a court's "territorial jurisdiction," "defendant is making the *entirely separate* argument that he was required to be prosecuted in federal court pursuant to the IMCA. *As a result*, our decisions in *Batdorf* and *Rick* have no application here." (Emphases added.) Yet, the majority does not explain why the characterization of *Batdorf* and *Rick* as cases involving challenges to "territorial jurisdiction" renders them "entirely separate" and inapplicable to a jurisdictional challenge in the context of the IMCA.[3] It is undisputed that defendant's Indian status has jurisdictional consequences here—that is, if defendant is an Indian under the IMCA, the trial court had no jurisdiction over the case. *See* 18 U.S.C. § 1153(a) (2012); *see also Negonsott v. Samuels*, 507 U.S. 99, 102–03 (1993) ("As the text of § 1153 and our prior cases make clear, federal jurisdiction over the offenses covered by the [IMCA] is 'exclusive' of state jurisdiction." (citations omitted)); *United States v. John*, 437 U.S. 634, 651 (1978) (stating that "the assumption that § 1153 ordinarily is pre-emptive of state jurisdiction when it applies, seems to us to be correct"). Thus, defendant, like the defendants in *Batdorf* and *Rick*, "is contesting the very power of this State to try him." *Batdorf*, 293 N.C. at 493, 238 S.E.2d at 502.

Rather than elaborate on any differences between challenges to "territorial jurisdiction" and challenges to jurisdiction under the IMCA, the majority, shifting gears, alleges that the issue of defendant's Indian

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grounds for complaint" because the instruction "properly placed the burden of proof and instructed the jury that unless the State had satisfied it beyond a reasonable doubt that the killing . . . occurred in North Carolina, a verdict of not guilty should be returned." *Batdorf*, 293 N.C. at 494, 238 S.E.2d at 503.

3. If the issue was whether the crime occurred "within the Indian country" under the IMCA, I suspect the majority would hesitate to characterize the argument that the state court lacked jurisdiction as "entirely separate," such that, "*[a]s a result*, our decisions in *Batdorf* and *Rick* have no application here." (Emphasis added.)

status here is a "purely legal" issue and therefore need not be decided by a jury.[4] According to the majority, there is no "factual dispute relevant to the IMCA analysis."[5] Yet, the majority ignores that under the federal law it purports to follow, a determination of Indian status involves fundamental questions of fact such that a defendant's Indian status itself is a "factual dispute." *See*, *e.g.*, *United States v. Bruce*, 394 F.3d 1215, 1218 (9th Cir. 2005) (stating that a determination of Indian status is "a mixed question of law and fact"); *see also United States v. Gaudin*, 515 U.S. 506, 511–12 (1995) (rejecting the government's argument that in a prosecution for making material false statements in a matter within the jurisdiction of a federal agency the question of "materiality" is a "legal" question that need not be decided by a jury and stating that the ultimate question of "whether the statement was material to the decision" is an "application-of-legal-standard-to-fact sort of question . . . commonly called a 'mixed question of law and fact,' " which "has typically been resolved by juries"). For example, the majority here expressly adopts the test used by the Eighth Circuit and Tenth Circuit to determine an individual's Indian status for the purposes of the IMCA. *See United States v. Stymiest*, 581 F.3d 759 (8th Cir. 2009); *United States v. Nowlin*, 555 F. App'x 820 (10th Cir. 2014). In these circuits, the courts submit this test—the same one the majority purports to apply here—to the jury to determine whether a defendant is an Indian. *See Stymiest*, 581 F.3d at

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4. As defendant is not contending that *Batdorf* and *Rick* require "purely legal" issues to be submitted to the jury, this determination essentially renders the majority's previous paragraph *dicta*. That is—assuming that defendant's challenge here involved only a "purely legal" issue, there would be no need to suggest that *Batdorf* and *Rick* are "entirely separate" and, "[a]s a result," have no application in the context of a challenge to state court jurisdiction on the basis of the IMCA. The majority appears to concede this, stating later in its opinion that "this case does not require us to decide the question of whether defendant's challenge to a trial court's jurisdiction based on the IMCA could ever require a special jury verdict on that issue in a case where—unlike here—a factual dispute exists that is relevant to the IMCA analysis."

5. The majority also notes "defendant's failure to challenge on appeal any of the trial court's findings of fact." This characterization is not wholly accurate, as defendant challenged on appeal numerous findings of fact in the court below. It is true that before this Court defendant has not again raised those challenges to those findings. Yet, given that defendant's argument is that with respect to the question of his Indian status he was entitled to have all facts found, and all evidence weighed, by the jury, I can see little relevance to this issue in his failure to again raise those challenges before this court. For instance, were a trial judge in a prosecution for first degree murder to make findings on the issue of premeditation and deliberation, and refuse to submit that issue to the jury, it would make little difference that the defendant requested a jury instruction on the issue but failed to challenge any of those specific findings. The real dispute here appears to be the extent to which we view a determination of Indian status under the IMCA as inherently involving questions of fact.

763 (stating that "the district court properly denied the motion to dismiss and submitted the issue of Indian status to the jury as an element of the § 1153(a) offense."); *Nowlin*, 555 F. App'x at 823 ("Under the Major Crimes Act, 18 U.S.C. § 1153, the prosecution must prove to the jury that the defendant is an Indian." (citing *Stymiest*, 581 F.3d at 763)).

Briefly addressing this concept, the majority notes that federal courts addressing this issue, where a conviction rests on a determination that the defendant *is* an Indian, have treated the question as an element of the offense, but that here the conviction depends upon a showing that defendant is *not* an Indian, and no state court has considered the inapplicability of the IMCA to be an element of an offense. The fact that in our courts a defendant's Indian status, or lack thereof, may not be an element of the offense does not necessitate a conclusion that this jurisdictional issue need not be submitted to the jury. In fact, this is precisely the import of the Court's decision in *Batdorf*, to wit—that while "[a] defendant's contention that this State lacks jurisdiction presents . . . a matter 'beyond the essentials of the legal definition of the offense itself,' " "the defendant is contesting the very power of this State to try him" and "when jurisdiction is challenged, as here, the State must carry the burden and show beyond a reasonable doubt that North Carolina has jurisdiction to try the accused." *Batdorf*, 293 N.C. at 493–94, 238 S.E.2d at 502–03.[6]

More importantly, the fact that in our state courts, unlike in federal courts, a defendant's Indian status is not an element of the crime does not transform an otherwise factual inquiry into a question purely of law. The majority is misapprehending the relevance of these federal decisions in which the jury is asked to decide whether the defendant is an Indian—specifically, the majority is explicitly adopting a test that is inherently a mixed question of fact and law appropriate for resolution by a jury,[7] but then denying defendant the right to have the question decided by a jury on the basis that it is a "purely legal" issue.

Certainly, a determination of whether an individual is an Indian for the purposes of the IMCA is a complicated inquiry. As the trial court

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6. Under *Batdorf*, the fact that a defendant's Indian status is not an element of the crime in our state courts would be relevant in prosecutions in which the defendant did not challenge jurisdiction, in which case the State would be relieved of its burden to prove jurisdiction beyond a reasonable doubt.

7. After all, federal courts are not in the habit of submitting "purely legal" issues to the jury. As the majority itself notes, "it would make little sense" to submit questions strictly of law to the jury.

stated, "deciding who is an 'Indian' has proven to be a difficult question. In fact upon closer examination when one looks to legal precedent the question quickly devolves into a multifaceted inquiry requiring examination into factual areas not normally considered in our courts." This inquiry is particularly complex in that it involves difficult questions of race, including the extent to which a defendant self-identifies as an Indian, as well as credibility determinations regarding instances of self-identification.[8] Nonetheless, in view of the fact that the test employed by federal courts, and adopted today by the majority, requires an inherently factual inquiry, as well as the fact that our precedent requires jurisdiction, when contested, to be submitted to the jury and proven beyond a reasonable doubt, I must respectfully dissent from the majority's conclusion on this issue.

Denial of Motion to Dismiss

Assuming *arguendo* that defendant is not entitled to have the issue of his Indian status submitted to the jury, I disagree with the majority that the trial court correctly found that defendant was not an Indian under the IMCA. Applying the second prong of the *Rogers* test using the application of the *St. Cloud* factors utilized by the Eighth Circuit and Tenth Circuit, I would conclude that defendant is an Indian under the IMCA.

First, I disagree with the majority's reading of *Eastern Band of Cherokee Indians v. Lambert*, 3 Cher. Rep. 62 (N.C. Cherokee Ct. 2003), in which the Cherokee tribal court addressed whether the defendant was an Indian under the *Rogers* test such that the tribal court could exercise criminal jurisdiction over the defendant.[9] The majority states that because the parties stipulated that the defendant was an EBCI First Descendant, but nevertheless determined that additional evidence was necessary and therefore conducted an evidentiary hearing, "[t]he logical inference is that if first descendant status alone was sufficient to decide the issue, the court would have had no need to seek additional evidence in order to determine whether the defendant was subject to tribal jurisdiction." Given that the tribal court had not previously addressed this question, the

8. For example, the trial court found that while defendant claimed "at certain times to be white/Caucasian and then at other times to be Indian," the "variations," including the use on two occasions of different social security numbers "necessarily call[ ] into question the veracity of Defendant."

9. The tribal court's criminal jurisdiction over the defendant depended upon whether the defendant was an "Indian" under the Indian Civil Rights Act, which defines "Indian" by reference to the meaning of an Indian under the IMCA. 25 U.S.C. § 1301(4).

logical inference in my view is that the court needed additional evidence because this was an issue of first impression for the tribal court. This is particularly apparent given that essentially all of the tribal court's findings from that evidence address first descendants generally:

1. The Defendant, Sarella C. Lambert is not an enrolled member of any federally recognized Indian Tribe.

2. The Defendant, Sarella C. Lambert is recognized by the Eastern Band of Cherokee Indians as a "First Lineal Descendent" (First Descendent).

3. To be an enrolled member of the Eastern Band of Cherokee Indians, one must have at least one ancestor on the 1924 Baker roll of tribal members and possess at least one sixteenth blood quanta of Cherokee blood.

4. A First Descendent is a child of an enrolled member, but who does not possess the minimum blood quanta to remain on the roll.

5. A First Descendent may inherit Indian Trust property by testamentary devise and may occupy, own, sell or lease it to an enrolled member during her lifetime. C.C. § 28-2. However, she may not have mineral rights or decrease the value of the holding. C.C. § 28-2(b).

6. A First Descendent has access to the Indian Health Service for health and dental care.

7. A First Descendent has priority in hiring by the Tribe over non-Indians, on a par with enrolled members of another federally recognized Tribe as part of the Tribe's Indian preference in hiring.

8. A First Descendent has access to Tribal funds for educational purposes, provided that funds have not been exhausted by enrolled members.

9. A First Descendent may use the appeal process to appeal administrative decisions of Tribal entities.

10. A First Descendent may appear before the Tribal Council to air grievances and complaints and will be received by the Tribal Council in relatively the same manner that an enrolled member from another Indian Nation would be received.

11. Other than the Trust responsibility owed to a First Descendent who owns Indian Trust property pursuant to C.C. § 28-2, the United States Department of the Interior, Bureau of Indian Affairs has no administrative or regulatory responsibilities with regard to First Descendents.

12. A First Descendent may not hold Tribal elective office.

13. A First Descendent may not vote in Tribal elections.

14. A First Descendent may not purchase Tribal Trust land.

15. The Court takes judicial notice of its own records, and specifically of the fact that the Defendant has availed herself of the Court's civil jurisdiction in that she is the Plaintiff in the case of Sarella C. Lambert v. Calvin James, CV-99-566, a case currently pending on the Court's civil docket.

16. The Defendant was charged with a proper warrant and criminal complaint for Domestic Violence Assault pursuant to C.C. §§ 14-40.1(b)(6) and 14-40.10.

17. C.C. § 14-1.5 provides "The Cherokee Court system shall have the right to hear cases, impose fines and penalties on non members as well as members."

Lambert, 3 Cher. Rep. at 62–63. The majority holds up Finding of Fact 15 as proof that the tribal court was making its determination based on more than the defendant's mere status as a first descendant. Yet, the majority ignores the relevance of this finding to the court's analysis:

> The same concept is true here. By political definition First Descendents are the children of enrolled members of the EBCI. They have some privileges that only Indians have, but also some privileges that members of other Tribes do not possess, not the least of which is that they may own possessory land holdings during their lifetimes, if they obtain them by will. During this time, the Government will honor its trust obligations with respect to First Descendents who own Tribal Trust lands. Also, First Descendents have access to Tribal educational funds, with certain limitations, and may appeal the adverse administrative decisions of Tribal agencies. Like

> members of other tribes, First Descendents may apply for jobs with the EBCI and receive an Indian preference and they may also address the Tribal Council in a similar manner as members of other Tribes. *Of course, it almost goes without saying that First Descendents may, as this Defendant has, seek recourse in the Judicial Branch of Tribal Government.* Most importantly, according to the testimony of Councilwoman McCoy, First Descendents are participating members of this community and treated by the Tribe as such.

Id. at 64 (emphasis added). In *Lambert*, the tribal court plainly ruled that first descendants are Indians.

As the tribal court stated later that same year, "this Court . . . held [in *Lambert*] that first lineal descendants, children of enrolled members who do not possess sufficient blood quanta to qualify for enrolment [sic] themselves are nevertheless subject to the criminal jurisdiction of the Court." *In re Welch*, 3 Cher. Rep. 71, 75 (N.C. Cherokee Ct. 2003) (citation omitted); *see also E. Band of Cherokee Indians v. Prater*, 3 Cher. Rep. 111, 112–13 (N.C. Cherokee Ct. 2004) (citing *Lambert* as "[h]olding that First Lineal Descendants are Indians for the purposes of the exercise of [the tribal court's] jurisdiction"). The tribal court's position that first descendants are Indians is also reflected here in the trial court's findings regarding the Cherokee Rules of Criminal Procedure, which provided that when a tribal magistrate conducts the *St. Cloud* test, if a defendant is a First Descendant, "the inquiry ends there and the Court has jurisdiction over the defendant."

While I agree with the majority that the fact that a tribal court has exercised its jurisdiction over certain defendants is not dispositive of the issue, significant weight should be attributed to these tribal determinations that First Descendants are Indians, particularly in a test that is, at bottom, designed to determine whether an individual is "recognized as an Indian by [the] tribe." *Stymiest*, 581 F.3d at 762 (citing *United States v. Rogers*, 45 U.S. at 567, 572–73 (1846)). Yet, while the majority discusses *Lambert* in rejecting the notion that it alone satisfies the second prong of the *Rogers* test, the majority omits any mention of *Lambert*, the subsequent tribal court decisions, or the Cherokee Rules of Criminal Procedure, in its balancing of the *St. Cloud* factors.

Next, the trial court and the majority both, in my view, ignore the significance of the fact that defendant was incarcerated for nearly twenty years. The trial court's findings demonstrate that defendant was born in

Florida on 17 January 1976. When defendant was an infant, his father abandoned him with his maternal uncle, Mr. Furman Smith Crowe, an enrolled member of the EBCI. Defendant's mother returned from Florida in the early 1980's and lived with defendant until at least 1990, at which time they moved back to Florida. Defendant was convicted in Florida on 28 January 1993 at the age of seventeen years old and was imprisoned there until his release on 4 November 2011, at which time he returned to North Carolina and eventually began living on or around the Qualla Boundary. Defendant was arrested on 30 November 2012 and has been imprisoned since that time. In short, defendant—now forty-four years old—has lived only about eighteen years of his life outside of prison. During the large majority of that time defendant was a minor and lived on or near the Qualla Boundary.

Here, in addressing the extent to which defendant received government assistance reserved for Indians, the trial court made findings regarding the five separate instances that defendant, on the basis of his First Descendant status, received free medical treatment from Cherokee Indian Hospital ranging from when he was nine to fourteen years old, but then found that "there are no other records of accessing any other clinics or medical facilities overseen or related to the CIH for over 23 years." Similarly, in addressing how defendant enjoyed the benefits of tribal affiliation, the trial court found that "save however for use of medical services a quarter of a century ago Defendant has not demonstrated use of any of his rights as a First Descendant of the Eastern Band of Cherokee" and that "Defendant has never 'enjoyed' these opportunities [afforded to First Descendants] which were made available for individuals similarly situated." The majority stresses these findings, stating that "[t]he trial court made no findings as to any tribal assistance that defendant has received since reaching adulthood." While I recognize that defendant's incarceration was a result of his own conduct, the fact that during the vast majority of those previous twenty-three years defendant was wholly incapable of receiving further tribal assistance or enjoying benefits of tribal affiliation is salient, particularly in a test that is, again, geared towards determining whether an individual is "recognized as an Indian by [the] tribe." *Stymiest*, 581 F.3d at 62 (citing *Rogers*, 45 U.S. at 572–73). The extent to which defendant received tribal assistance and enjoyed the benefits of affiliation when he was actually at liberty to do so should, in my view, weigh more heavily in such an analysis.

The disregard for defendant's incarceration similarly pervades other portions of the majority's analysis. For example, the majority finds it significant that the trial court's findings are devoid of any indication that he

participated in tribal politics. Given that defendant has spent the majority of his life outside of prison living on the Qualla Boundary, but that he was over the age of eighteen for less than a year of that time, I can see little significance in his lack of participation in tribal politics in terms of measuring his "social recognition as an Indian." *St. Cloud v. United States*, 702 F. Supp. 1456, 1461 (D.S.D. 1988).

In sum, I would conclude that defendant has been "recognized by a tribe" and is an Indian for the purposes of the IMCA.[10] Of particular note, in my view, are the tribal court decisions and Cherokee Rules of Criminal Procedure providing that first descendants are subject to the tribal court's criminal jurisdiction on the basis that they are Indians under *Rogers* and the IMCA, as well as the findings that defendant has lived the large majority of his non-incarcerated life on or around the Qualla Boundary and during that time received free hospital care and attended Cherokee school.

Conclusion

For the reasons stated, I respectfully dissent from the majority's decision. I would reverse and remand for a new trial, at which defendant is entitled to have the question of his Indian status submitted to the jury. In the alternative, assuming that defendant is not entitled to have the question of his Indian status submitted to the jury, I would reverse the trial court and conclude that the trial court lacks jurisdiction on the basis that defendant is an Indian under the IMCA.

10. With respect to the findings regarding defendant's tattoos, the extent to which his claims of being an Indian are potentially contradicted by other instances of identifying as "white/Caucasian," including by signing his name to probation documents that listed him as "white," and his living on or around the Qualla Boundary and dating a woman who is an enrolled tribal member—to the extent that the majority relies upon these in determining that defendant did not demonstrate any legitimate celebration of his cultural heritage and did not genuinely hold himself out as an Indian, this reliance undercuts its determination that this inquiry is a purely legal, rather than factual, determination.

STATE OF NORTH CAROLINA
v.
DAVID MICHAEL REED

No. 365A16-2

Filed 28 February 2020

Search and Seizure—traffic stop—duration—reasonableness

The trial court's findings of fact did not support its denial of defendant's motion to suppress evidence obtained during a traffic stop where the law enforcement officer who made the initial stop for a speeding violation impermissibly extended the stop without a reasonable and articulable suspicion. Although the officer issued a traffic warning ticket to defendant and stated that the stop was concluded, defendant was still seated in the passenger side of the officer's patrol car when the officer asked if he would be willing to answer more questions. The officer gave contradictory statements during the suppression hearing regarding whether defendant was free to leave at that point.

Justice NEWBY dissenting.

Justice DAVIS dissenting.

Justices NEWBY and ERVIN join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 257 N.C. App. 524, 810 S.E.2d 245 (2018), on remand from this Court, 370 N.C. 267, 805 S.E.2d 670 (2017), reversing a judgment entered on 21 July 2015 by Judge Thomas H. Lock in Superior Court, Johnston County, following defendant's plea of guilty after the entry of an order by Judge Gale Adams on 14 July 2015 denying defendant's motion to suppress. Heard in the Supreme Court on 9 April 2019.

Joshua H. Stein, Attorney General, by Kathleen N. Bolton, Assistant Attorney General, and Derrick C. Mertz, Special Deputy Attorney General, for the State-appellant.

Paul E. Smith for defendant-appellee.

MORGAN, Justice.

On 9 September 2014, a law enforcement officer stopped a rental car which was being driven along an interstate highway by the defendant, David Michael Reed. In the seminal case of *Terry v. Ohio*, the Supreme Court of the United States recognized that law enforcement officers need discretion in conducting their investigative duties. 392 U.S. 1 (1968). Since *Terry*, this discretion has been judicially broadened, equipping law enforcement officers with wide latitude within which to effectively fulfill their duties and responsibilities. When complex considerations and exigent circumstances combine in a fluid setting, officers may be prone to exceed their authorized discretion and to intrude upon the rights of individuals to be secure against unreasonable searches and seizures under the Fourth Amendment. This case presents such a situation, as we find here that the law enforcement officer who arrested defendant disregarded the basic tenets of the Fourth Amendment by prolonging the traffic stop at issue without defendant's voluntary consent or a reasonable, articulable suspicion of criminal activity to justify doing so. As a result, we affirm the decision of the Court of Appeals.

Factual and Procedural Background

Defendant was indicted on 6 October 2014 on two counts of trafficking in cocaine for transporting and for possessing 200 grams or more, but less than 400 grams, of the controlled substance. On 27 April 2015, defendant, through his counsel, filed a motion to suppress evidence obtained during a traffic stop of a vehicle operated by defendant, which resulted in the trafficking in cocaine charges. During a suppression hearing which was conducted on 2 June 2015 and 4 June 2015 pursuant to defendant's motion to suppress, the following evidence was adduced:

At approximately 8:18 a.m. on 9 September 2014, Trooper John W. Lamm of the North Carolina State Highway Patrol was in a stationary position in the median of Interstate 95 (I-95) between the towns of Benson and Four Oaks. Trooper Lamm was a member of the Criminal Interdiction Unit of the State Highway Patrol. In that capacity, he was assigned primarily to work major interstates and highways to aggressively enforce traffic laws, as well as to be on the lookout for other criminal activity including drug interdiction and drug activity. Trooper Lamm was in the median facing north in order to clock the southbound traffic, using radar for speed detection, when he determined that a gray passenger vehicle was being operated at a speed of 78 miles per hour in

a 65 mile-per-hour zone.[1] The driver of the vehicle appeared to Trooper Lamm to be a black male. Trooper Lamm left his stationary position to pursue the vehicle. As he caught up to the vehicle, the trooper turned on his vehicle's blue lights and siren. The operator of the car pulled over to the right shoulder of the road, and Trooper Lamm positioned his law enforcement vehicle behind the driver.

Trooper Lamm testified that he stopped the driver of the vehicle for speeding. Defendant was the operator of the vehicle, which was a Nissan Altima. Upon approaching the vehicle from its passenger side, the trooper noticed that there was a black female passenger and a female pit bull dog inside the vehicle with defendant. Trooper Lamm obtained defendant's driver's license along with a rental agreement for the vehicle. Defendant had a New York driver's license. The rental agreement paperwork indicated that a black Kia Rio was the vehicle which had been originally obtained, that there was a replacement vehicle, and that the renter of the vehicle was defendant's fiancée, Ms. Usha Peart. Peart was the female passenger in the vehicle with defendant. The vehicle rental agreement paperwork indicated that defendant was an additional authorized driver. The gray Nissan had not been reported to have been stolen.

After examining the rental agreement, Trooper Lamm requested that defendant come back to the law enforcement vehicle. The trooper inspected defendant for weapons and found a pocketknife, but in the trooper's view it was "no big deal." Trooper Lamm opened the door for defendant to enter the vehicle in order for defendant to sit in the front seat. Defendant left the front right passenger door open where he was seated, leaving his right leg outside the vehicle so that he was not seated completely inside the patrol car. Trooper Lamm asked defendant to get into the vehicle and told defendant to close the door. Defendant hesitated and stated that he was "scared to do that." He explained to the trooper that he had previously been stopped in North Carolina, but that he had never been required to sit in a patrol car with the door closed during a traffic stop. Trooper Lamm ordered defendant to close the door and stated, "[s]hut the door. I'm not asking you, I'm telling you to shut the door . . . Last time I checked we were the good guys." Defendant complied with Trooper Lamm's order and closed the front passenger door of the patrol car. It was at this point in the traffic stop that Trooper Lamm did not consider defendant to be free to leave.

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1. During the traffic stop, defendant admitted that his speed was 84 miles per hour.

The trooper began to pose questions to defendant. Defendant told him that Peart and defendant were going to Fayetteville to visit family and to attend a party before school sessions officially resumed. Defendant was further questioned about his living arrangements with Peart, and whether he or Peart owned the dog in the car. When the trooper asked Peart about their destinations while she was still in the gray Nissan and defendant was in the patrol car, Peart confirmed that family members were in the area, and that she and defendant were going to Fayetteville, and also mentioned Tennessee and Georgia. Although the rental agreement paperwork only authorized the rental vehicle to be in the states of New York, New Jersey, and Connecticut and it was not supposed to be in North Carolina, the trooper determined that the vehicle was properly in the possession of Peart upon actually calling the rental vehicle company in New York.

Trooper Lamm characterized the rental vehicle as being "very dirty inside." It had a "lived-in look," according to the trooper, with "signs of like hard driving, continuous driving—coffee cups, empty energy drinks." There was a large can of dog food, a jar of dog food, and dog food scattered along the floorboard. There were also pillows, blankets, and similar items inside the vehicle.

After receiving confirmation from the rental vehicle company that all was sufficiently in order with the gray Nissan, Trooper Lamm completed the traffic stop by issuing a warning ticket to defendant. The trooper handed all of the paperwork back to defendant—including defendant's driver's license, the vehicle rental agreement, and the warning ticket—and told defendant that the traffic stop was concluded. The traffic stop had already lasted for a duration of fourteen minutes and twelve seconds through the point in time that Trooper Lamm told Peart that "I just have to write Mr. Reed a warning, he just has to slow down, his license is good and then you'll be on your way." After this, the stop was lengthened for an additional five minutes during which Trooper Lamm communicated with the rental vehicle company. While the trooper did not know the time that the traffic stop concluded, he acknowledged that "it did take a little bit longer than some stops." Trooper Lamm testified that defendant was free to leave upon the completion of these actions; nonetheless, the trooper did not inform defendant that defendant was free to leave. Instead, the trooper said to defendant, "[t]his ends the traffic stop and I'm going to ask you a few more questions if it is okay with you." Trooper Lamm construed defendant's continued presence in the front passenger seat of the law enforcement officer's vehicle to be voluntary, testifying: "[h]e complied . . . [h]e stayed there." Trooper Lamm later

said in his testimony that although he informed defendant that the traffic stop was completed, defendant would still have been detained and required to stay seated, even if defendant denied consent to search the rental vehicle and wanted to leave, based upon Trooper Lamm's observations. The trooper went on to testify that at the point that he went to get consent to search the vehicle from Peart, defendant was detained.

When defendant was asked by Trooper Lamm if there was anything illegal inside the vehicle and for permission to search it, the trooper testified that defendant responded, "you could break the car down," and did not give a response to the trooper's inquiry regarding permission to search the vehicle. Defendant instead directed Trooper Lamm to Peart on the matter of searching the vehicle, because she was the individual who had rented it. Trooper Lamm then told defendant to remain seated in the patrol car by instructing defendant to "sit tight." At this point, for safety reasons, the trooper once again would not have allowed defendant to leave the patrol car.

Trooper Kenneth Ellerbe of the North Carolina State Highway Patrol, like Trooper Lamm, was also a member of the Patrol's Criminal Interdiction Unit who was located in a stationary position elsewhere on I-95 in the median, facing northbound as he observed southbound traffic at about 8:30 a.m. Trooper Ellerbe was contacted by Trooper Lamm to meet at the traffic stop in which Trooper Lamm was involved, because the Criminal Interdiction Unit operates in such a manner that a trooper who suspects criminal activity in a traffic stop needs another trooper to provide some security in the event that the investigating trooper eventually searches the vehicle at issue if consent to search is obtained. Trooper Ellerbe proceeded to Trooper Lamm's location, parked behind Trooper Lamm's vehicle to the right off the shoulder while putting on his blue lights and siren, and waited for Trooper Lamm to exit his patrol vehicle. Trooper Lamm was inside of his vehicle, and seconds after Trooper Ellerbe's arrival, exited his vehicle and started to walk back towards Trooper Ellerbe's vehicle. Trooper Ellerbe then got out of his vehicle, with the two law enforcement officers meeting between the rear of Trooper Lamm's vehicle and the front of Trooper Ellerbe's vehicle. Trooper Lamm informed Trooper Ellerbe that Trooper Lamm was going to talk with Peart to see if she would give consent to search the vehicle. Consent to search the rental vehicle had not been given at the time of Trooper Ellerbe's arrival on the scene. The sole reason for Trooper Ellerbe's presence was to provide security. At that point, Trooper Ellerbe approached the passenger side of Trooper Lamm's vehicle and remained beside the car door

for the duration of the traffic stop. Although defendant asked Trooper Ellerbe for permission to smoke a cigarette, defendant did not leave the vehicle. Trooper Ellerbe testified that this had become an officer safety issue, and that he did not want defendant to be outside of the vehicle during the traffic stop to smoke a cigarette. Even while Trooper Ellerbe and defendant engaged in conversation, this occurred through the passenger side window of Trooper Lamm's patrol car while defendant was seated in the vehicle.

As Trooper Ellerbe stood beside the front passenger door of Trooper Lamm's patrol car to provide security while defendant remained in the front passenger seat of Trooper Lamm's vehicle, Trooper Lamm proceeded to talk with Peart. Trooper Lamm asked Peart if there were any items in the rental car that were illegal. When the trooper, in the words of his testimony, "asked her . . . to search the car, she tried to—without saying, she tried to open the door. . . . [when I was] standing right there." Immediately following that portion of Trooper Lamm's testimony, the following exchange took place between the questioning prosecutor and the answering witness, Trooper Lamm:

> Q. What was she opening the door for?
>
> A. She told me she was opening the door so I could – I think she might of said look or search. I don't remember the exact[] verbiage, but she was opening the door to get out so we could search the car.
>
> Q. She was just getting out of your way so you [could] search?
>
> A. Exactly, yes, sir.
>
> Q. So, based on – at least by her actions she was consenting to your search of the vehicle; is that right?
>
> A. Yes, sir.

Trooper Lamm then told Peart that he needed her to complete some paperwork for a search of the rental car. He gave her the State Highway Patrol form "Written Consent to Search," completed the form himself, and obtained Peart's signature on the form.

Trooper Lamm performed an initial search of the rental car and found cocaine in the backseat area of the Nissan. He notified Trooper Ellerbe to place defendant in handcuffs, and Trooper Ellerbe did so.

Upon consideration of all of the evidence presented at the suppression hearing, the trial court entered an order on 14 July 2015 which denied defendant's motion to suppress. On 20 July 2015, defendant pleaded guilty to the offenses of (1) trafficking in cocaine by transporting more than 200 grams but less than 400 grams of cocaine, and (2) trafficking in cocaine by possessing more than 200 grams but less than 400 grams of cocaine. In exchange for defendant's guilty plea, the State agreed to dismiss the charges against his codefendant, Peart; to consolidate his two trafficking offenses for one judgment; and to stipulate to an active sentence of seventy to ninety-three months of imprisonment with a $100,000.00 fine. The trial court accepted defendant's plea, sentenced defendant to seventy to ninety-three months imprisonment, and imposed a $100,000.00 fine and $3,494.50 in costs. Defendant appealed to the Court of Appeals.

In his original appeal, defendant argued that the trial court erred in denying his motion to suppress evidence which was discovered pursuant to an unlawful traffic stop. Specifically, defendant asserted that the trial court made findings of fact which were not supported by competent evidence because his "initial investigatory detention was not properly tailored to address a speeding violation." Defendant further contended that Trooper Lamm seized him without consent or reasonable suspicion of criminal activity when Trooper Lamm ordered him to "sit tight" in the patrol car. Defendant therefore maintained that Trooper Lamm unlawfully seized items from the Nissan Altima vehicle during the ensuing search of the car and that these objects were "the fruit of the poisonous tree." The Court of Appeals agreed.

In a divided opinion, the Court of Appeals determined that Trooper Lamm's authority to seize defendant for speeding had ended when Trooper Lamm informed defendant that the officer was going to issue a warning citation for speeding and provided defendant with a copy of the citation. The majority of the lower appellate court ultimately concluded that Trooper Lamm lacked reasonable suspicion to search the rental car after the traffic stop had been completed because the evidence relied upon by the trial court in support of its finding of reasonable suspicion constituted legal behavior which was consistent with innocent travel. Therefore, the Court of Appeals reversed the trial court's order denying defendant's motion to suppress.

On 5 October 2016, the State filed a petition for writ of *supersedeas* and a motion for temporary stay of this matter with this Court. On the same date, we allowed the State's motion for a temporary stay. The State filed a Notice of Appeal on 25 October 2016 pursuant to a dissenting

opinion in the Court of Appeals which supported the State's position that the traffic stop was properly executed and that the disputed evidence was therefore admissible. On 3 November 2017, this Court vacated the opinion of the Court of Appeals and remanded the matter for reconsideration in light of this Court's recent decision in *State v. Bullock*, 370 N.C. 256, 805 S.E.2d 671 (2017). Upon remand, the Court of Appeals opined:

> In *Bullock*, after the officer required the driver to exit his vehicle, he frisked the driver for weapons. The Supreme Court held this frisk was lawful, due to concerns of officer safety, and the very brief duration of the frisk. The officer then required the driver to sit in the patrol car, while he ran database checks. The [C]ourt determined this did not unlawfully extend the stop either. The [C]ourt then held the officer had reasonable suspicion to thereafter extend the stop and search defendant's vehicle. The defendant's nervous demeanor, as well as his contradictory and illogical statements provided evidence of drug activity. Additionally, he possessed a large amount of cash and multiple cell phones, and he drove a rental car registered in another person's name. The [C]ourt determined these observations provided reasonable suspicion of criminal activity, allowing the officer to lawfully extend the traffic stop and conduct a dog sniff.

State v. Reed, 257 N.C. App. 524, 529, 810 S.E.2d 245, 249 (2018) (citations omitted).

The majority of the panel below went on to conclude:

> In reconsideration of our decision, we are bound by the Supreme Court's holding in *Bullock*. Therefore, we must conclude Trooper Lamm's actions of requiring [d]efendant to exit his car, frisking him, and making him sit in the patrol car while he ran records checks and questioned [d]efendant, did not unlawfully extend the traffic stop. Yet, this case is distinguishable from *Bullock* because after Trooper Lamm returned [d]efendant's paperwork and issued the warning ticket, [d]efendant remained unlawfully seized in the patrol car . . . [T]he governing inquiry is whether under the totality of the circumstances a reasonable person in the detainee's position would have believed that he was not free to leave.

> Here, a reasonable person in [d]efendant's position would not believe he was permitted to leave. When Trooper Lamm returned [d]efendant's paperwork, [d]efendant was sitting in the patrol car. Trooper Lamm continued to question [d]efendant as he sat in the patrol car. When the trooper left the patrol car to seek Peart's consent to search the rental car, he told [d]efendant to "sit tight." At this point, a second trooper was present on the scene, and stood directly beside the passenger door of Trooper Lamm's vehicle where [d]efendant sat. Moreover, at trial Trooper Lamm admitted at this point [d]efendant was not allowed to leave the patrol car.
>
> A reasonable person in [d]efendant's position would not feel free to leave when one trooper told him to stay in the patrol car, and another trooper was positioned outside the vehicle door. Therefore, even after Trooper Lamm returned [d]efendant's paperwork, [d]efendant remained seized. To detain a driver by prolonging the traffic stop, an officer must have reasonable articulable suspicion that illegal activity is afoot.
>
> As we concluded in our first opinion, Trooper Lamm did not have reasonable suspicion of criminal activity to justify prolonging the traffic stop. The facts suggest [d]efendant appeared nervous, Peart held a dog in her lap, dog food was scattered across the floorboard of the vehicle, the car contained air fresheners, trash, and energy drinks—all of which constitute legal activity consistent with lawful travel. While Trooper Lamm initially had suspicions concerning the rental agreement, the rental company confirmed everything was fine.
>
> These facts are distinguishable from *Bullock* in which the officer observed the defendant speeding, following a truck too closely, and weaving briefly over the white line marking the edge of the road. Then the defendant's hand trembled as he handed over his license. Additionally, the defendant was not the authorized driver on his rental agreement, he had two cell phones, and a substantial amount of cash on his person. He failed to maintain eye contact, and made several contradictory, illogical statements.

Id. at 529–32, 810 S.E.2d at 249–50 (citations omitted). Accordingly, the Court of Appeals again held in a divided opinion that the trial court erred

in denying defendant's motion to suppress and reversed the trial court's judgment. The State then exercised its statutory right of appeal to this Court based upon the dissenting opinion in the court below.

In the instant appeal, the State challenges the Court of Appeals decision which reverses the trial court's denial of defendant's motion to suppress. In doing so, the State contends that Trooper Lamm's actions during the traffic stop were reasonable and, therefore, consistent with the Fourth Amendment. The constitutionality of Trooper Lamm's search-and-seizure activities following the traffic stop is the sole question before us.

Standard of Review

When considering on appeal a motion to suppress evidence, we review the trial court's factual findings for clear error and its legal conclusions de novo. *State v. Williams*, 366 N.C. 110, 112, 726 S.E.2d 161, 166 (2012). This requires us to examine "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167–68, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140–41, 446 S.E.2d 579, 585 (1994)).

Analysis

The Fourth Amendment to the United States Constitution guards against "unreasonable searches and seizures." *See* U.S. Const. Amend. IV. The "[t]emporary detention of individuals during the stop of an automobile by police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]." *Whren v. United States*, 517 U.S. 806, 809–10 (1996); *see also Bullock*, 370 N.C. at 257, 805 S.E.2d at 673. Thus, a traffic stop is subject to the reasonableness requirement of the Fourth Amendment. In that regard, because a traffic stop is more analogous to an investigative detention than a custodial arrest, we employ the two-prong standard articulated in *Terry* in determining whether or not a traffic stop is reasonable. *United States v. Bowman*, 884 F.3d 200, 209 (4th Cir. 2018).

Under *Terry's* "dual inquiry," we must evaluate the reasonableness of a traffic stop by examining (1) whether the traffic stop was lawful at its inception, *see United States v. Rusher*, 966 F.2d 868, 875 (4th Cir. 1992), and (2) whether the continued stop was "sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Florida v. Royer*, 460 U.S. 491, 500 (1983). The United States Supreme Court has made clear that "[t]he scope of the search must be strictly

tied to and justified by the circumstances which rendered its initiation permissible." *Terry*, 392 U.S. at 19 (citation omitted). Although "[t]he scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case, . . . the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500. Relatedly, "an investigatory detention must . . . last no longer than is necessary to effectuate the purpose of the stop." *Id.*

Consistent with this approach, "*Terry's* second prong restricts the range of permissible actions that a police officer may take after initiating a traffic stop." *United States v. Palmer*, 820 F.3d 640, 649 (4th Cir. 2016). A stop may become "unlawful if it is prolonged beyond the time reasonably required to complete [its] mission." *Illinois v. Caballas*, 543 U.S. 405, 407 (2005). As the United States Supreme Court explained in *Rodriguez v. United States*,

> [a] seizure for a traffic violation justifies a police investigation of that violation . . . [T]he tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission"—to address the traffic violation that warranted the stop, and attend to related safety concerns. Because addressing the infraction is the purpose of the stop, *it may last no longer than is necessary to effectuate that purpose.* Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed.

575 U.S. 348, 354 (2015) (emphasis added) (citations omitted). Our Court's decisions are obliged to heed and implement these Fourth Amendment constraints, which have been articulated by the United States Supreme Court in *Terry* and its progeny, as the law of the land governing searches and seizures in traffic stops continues in its development, interpretation, and application. To this end, we have expressly held that "the duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission of the stop." *Bullock*, 370 N.C. at 257, 805 S.E.2d at 673 (quoting *Caballas*, 543 U.S. at 407). Thus, a law enforcement officer may not detain a person "even momentarily without reasonable, objective grounds for doing so." *Royer*, 460 U.S. at 497–98. Further, "[i]t is the State's burden to demonstrate that the seizure it seeks to justify . . . was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Id.* at 500.

In this case, defendant initially challenged the announced basis of the traffic stop as being unreasonable. We note, however, that defendant now concedes that the traffic stop was lawful at its inception due to a speeding violation; consequently, there is no issue which arises under the first prong of the *Terry* analysis that requires this Court's attention. However, defendant continues to argue that his seizure continued after the apparent conclusion of the purpose of the traffic stop and that this continuation was unconstitutional because Trooper Lamm had neither voluntary consent for a search of the vehicle nor any reasonable, articulable suspicion that criminal activity was afoot so as to further detain defendant. In response, the State argues that the initial lawful detention resulting from the traffic stop—which all parties agree was proper—had ended, but further contends that thereafter either defendant consented to the search of the rental vehicle and in the alternative, that any ongoing detention of defendant after the completion of the traffic stop was supported by reasonable, articulable suspicion. Therefore, our analysis begins with the second prong of *Terry* and its operation in the traffic stop context: whether Trooper Lamm "diligently pursued a means of investigation that was likely to confirm or dispel [his] suspicions quickly, during which time it was necessary to detain the defendant." *United States v. Sharpe*, 470 U.S. 675, 686 (1985). Specifically, we must determine whether Trooper Lamm trenched upon defendant's Fourth Amendment rights when he extended an otherwise-completed traffic stop.

In the context of traffic stops, we recognize that police diligence "includes more than just the time needed to issue a citation." *Bullock*, 370 N.C. at 257, 805 S.E.2d at 673. Beyond determining whether to issue a traffic ticket, an "officer's mission includes ordinary inquiries incident to the traffic stop, such as checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* In addition, "[w]hile conducting the tasks associated with a traffic stop, a police officer's 'questions or actions . . . need not be solely and exclusively focused on the purpose of that detention.' " *United States v. Digiovanni*, 650 F.3d 498, 507 (2011) (quoting *United States v. Mason*, 628 F.3d 123, 131 (4th Cir. 2010)). An officer is permitted to ask a detainee questions unrelated to the purpose of the stop "in order to obtain information confirming or dispelling the officer's suspicions." *State v. Williams*, 366 N.C. at 116, 726 S.E.2d at 167 (citation omitted). However, an investigation unrelated to the reasons for the traffic stop must not prolong the roadside detention. *See Bullock*, 370 N.C. at 258, 805 S.E.2d at 674 ("Safety precautions taken to facilitate investigations into crimes that are unrelated to the reasons for which a driver has been stopped . . . are not

permitted if they extend the duration of the stop." (citing *Rodriguez*, 575 U.S. at 356)); *see also Bowman*, 884 F.3d at 210 ("[P]olice during the course of a traffic stop may question a vehicle's occupants on topics unrelated to the traffic infraction . . . as long as the police do not extend an otherwise-completed traffic stop in order to conduct these unrelated investigations." (citation omitted)). To prolong a detention "beyond the scope of a routine traffic stop" requires that an officer "possess a justification for doing so other than the initial traffic violation that prompted the stop in the first place." *United States v. Branch*, 537 F.3d 328, 336 (4th Cir. 2008). This requires "either the driver's consent or a 'reasonable suspicion' that illegal activity is afoot." *Id.*

"Implicit in the very nature of the term 'consent' is the requirement of voluntariness. To be voluntary the consent must be 'unequivocal and specific,' and 'freely and intelligently given.' " *State v. Little*, 270 N.C. 234, 239, 154 S.E.2d 61, 65 (1967) (citation omitted). On the other hand, a determination of the existence of reasonable suspicion requires an assessment of "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Ornelas v. United States*, 517 U.S. 690, 695 (1996).

In applying these binding legal principles to the present case, we embrace the exercise of the law enforcement officer's diligence to actively engage defendant, upon the effectuation of the traffic stop, in the performance of the fundamental tasks which this Court identified in *Bullock* as being inherent in a routine, thorough traffic stop. In detaining defendant for the speeding violation, Trooper Lamm discovered that defendant had no outstanding warrants and that defendant's driver's license was valid. The trooper reviewed the registration documents of the Nissan Altima which defendant was operating and the proof of insurance materials and, while the officer found nothing illegal, nonetheless there were inconsistencies in the vehicle rental agreement paperwork which prompted Trooper Lamm to dutifully question defendant and Peart about the details underlying the inconsistencies. Even after instructing defendant to exit the rental car, to enter the patrol car, and to close the front passenger door immediately beside defendant's seated position, the law enforcement officer was still properly within his authority to detain defendant as the trooper explored varying subjects with defendant; while some of these areas of inquiry were directly related to the rental agreement details and other areas meandered into more questionable categories such as the personal relationship between defendant and Peart as well as the ownership of the dog, nonetheless the United States Supreme Court in *Rodriguez* and our Court in *Bullock* and

in *Williams* authorize such wide-ranging investigatory authority if they do not extend the duration of the traffic stop. The trooper even saw fit to contact the rental vehicle company office in New York while defendant remained seated in the law enforcement vehicle, as the officer received confirmation from the rental business that the vehicle was properly in the possession of Peart, with defendant as an authorized driver. While Trooper Lamm's exercise of his authority to seize defendant's liberty and to detain defendant's movement through this juncture was authorized by the cited case holdings of the United States Supreme Court, the Fourth Circuit Court of Appeals, and this Court, the return of the vehicle rental agreement paperwork, the issuance of the traffic warning ticket to defendant, and Trooper Lamm's unequivocal statement to defendant that the traffic stop had concluded all combine to bring an end to the law enforcement officer's entitled interaction with defendant. The mission of defendant's initial seizure—to address the traffic violation and attend to related safety concerns—was accomplished. Trooper Lamm's authority for the seizure of defendant terminated when the trooper's tasks which were tied to the speeding violation had been executed. Therefore, as dictated by the United States Supreme Court in *Cabellas* and reinforced by *Rodriguez*, the traffic stop in the instant case became unlawful after this point because the law enforcement officer prolonged it beyond the time reasonably required to complete its mission.

While this Court determined that the law enforcement officer in *Bullock* did not unlawfully prolong the traffic stop at issue under the *Rodriguez* standard, *see Bullock*, 370 N.C. at 256, 257, 805 S.E.2d at 671, 673, the Court's reasoning in this case is quite instructive regarding the mission of a traffic stop in examining its factual distinctions from the current case. We have already noted our reiteration in *Bullock* of the well-established principle that the duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission of the stop. In *Bullock*, we expressly opined that "[t]he conversation that [the law enforcement officer] had with defendant while the database checks were running enabled [the officer] to constitutionally extend the traffic stop's duration" and noted that the officer "had three database checks to run before the stop could be finished." *Id.* at 263, 805 S.E.2d at 677. Here, in contrast, the record shows that Trooper Lamm testified at the suppression hearing that after the stop was finished, he said to defendant, "[t]his ends the traffic stop and I'm going to ask you a few more questions if it is okay with you." This interaction, which was initiated by the law enforcement officer with defendant, occurred after the traffic stop was categorically recognized by the trooper to have concluded and before reasonable suspicion

existed. This significant feature of the clear conclusion of the traffic stop in the case at bar, coupled with other vital factual dissimilarities between this case and *Bullock*—as persuasively detailed by the lower appellate court in its decision— effectively establish that the mission of the traffic stop had been consummated, that the continued pursuit of involvement with defendant by Trooper Lamm wrongly prolonged the traffic stop, and that defendant was unconstitutionally detained beyond the announced end of the traffic stop because reasonable suspicion did not exist to justify defendant's further detainment.

Similarly, the State's heavy reliance on *State v. Heien*, 226 N.C. App. 280, 741 S.E.2d 1, *aff'd per curiam*, 367 N.C. 163, 749 S.E.2d 278 (2013), *aff'd sub nom. on other grounds*, *Heien v. North Carolina*, 574 U.S. 54 (2014), is also unpersuasive in light of the factual distinctions and major legal differences regarding not only the existence of reasonable suspicion, but also a defendant's expression of his or her consent to search as conveyed to a law enforcement officer. In *Heien*, two law enforcement officers initiated a traffic stop of a vehicle based upon a malfunctioning brake light. *Id.* at 281, 741 S.E.2d at 3. There were two individuals in the subject vehicle: its operator and the defendant, who was lying down in the backseat of the vehicle. *Id.* at 284, 741 S.E.2d at 4. As the interaction occurred between the officers and the vehicle's occupants, circumstances unfolded which ultimately led the lower appellate court to resolve legal issues pertaining to the concepts of reasonable suspicion and consent to search. *Id.* at 284–86, 741 S.E.2d at 4–5. In the present case, while the State extensively cites the Court of Appeals decision in *Heien* as persuasive authority, based on a number of factual similarities between the two cases, along with the Court of Appeals' interpretation and application of the law in determining that the encounter between the officers and the vehicle's occupants was consensual, nonetheless the differences between the two fact patterns and the resulting legal outcomes are consequential:

Heien case	Present case
The operator of the vehicle was standing outside between the officer's vehicle and the subject car as the officer interacted with the driver.	The operator of the vehicle—defendant—was sitting inside the officer's vehicle as the officer interacted with defendant.
The second officer was positioned outside with the subject car's operator who was also allowed to be outside.	The second officer was positioned outside of the front passenger door of the patrol car in which defendant sat, as defendant was not allowed to be outside.

The officer who had received the pertinent documents from the subject car's operator during the traffic stop returned them, gave the driver a warning citation, and then asked the driver while both were outdoors if the driver would be willing to answer some questions.	The officer who had received the pertinent documents from the subject car's operator—defendant—during the traffic stop returned them, gave defendant a warning citation, and then asked defendant while both were inside the officer's patrol car if the driver would be willing to answer some questions.
The officer asked the person in charge of the subject car—the defendant—for permission to search the vehicle, and the defendant had no objection to the search.	The officer testified at the suppression hearing that he "told" the person in charge of the subject car—defendant's fiancée—that he "wanted to search the car," and "without saying anything, she tried to open the door so I could—I *think* she *might* of said look or search. I don't remember the exact verbiage, but she was opening the door to get out so we could search the car." (emphasis added)
The interaction between one of the officers and the operator of the subject car occurred in approximately one to two minutes, and the conversation between the other officer and the vehicle's driver lasted within a period of a minute to two minutes.	The traffic stop lasted for a duration of 14 minutes and 12 seconds, followed by an additional five minutes until the officer began his communication with the rental vehicle company for an unspecified period of time.

In determining the result in *Heien*, the court below concluded:

> We believe that the trial court's conclusion that defendant consented to this search is reasonable and should be upheld, as we further believe a reasonable motorist or vehicle owner would understand that with the return of his license or other documents, the purpose of the initial stop had been accomplished and he was free to leave, was free to refuse to discuss matters further, and was free to refuse to allow a search.

Id. at 288, 741 S.E.2d at 6. The critical factual distinctions between *Heien* and the case at bar, and their collective effect upon the presence of reasonable suspicion and consent to search, render the Court of Appeals decision in *Heien* inapposite in the present case. Not only do these pertinent differences operate so as to make the State's major dependence upon *Heien* ineffective, but they also accentuate the fallacies and

frailties of the dissenters' positions regarding the acceptability of the law enforcement officer's actions after the conclusion of the traffic stop in the instant case based upon what the dissenters contend is the existence of reasonable suspicion or consent to search defendant's vehicle.

An officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). An obvious, intrinsic element of reasonable suspicion is a law enforcement officer's ability to articulate the objective justification of his or her suspicion. Both dissenting opinions conveniently presuppose a fundamental premise which is lacking here in the identification of reasonable, articulable suspicion: the suspicion must be articulable as well as reasonable. In the present case, Trooper Lamm offered contradictory statements during the suppression hearing concerning his formation of reasonable suspicion to validate his detainment of defendant. On one hand, Trooper Lamm testified that defendant was free to leave upon the completion of the traffic stop and construed defendant's act of remaining seated in the patrol car to be voluntary after its conclusion, despite having ordered defendant to close the passenger door of the patrol vehicle after defendant had entered it. However, on the other hand, Trooper Lamm later testified at the suppression hearing that although he had informed defendant that the traffic stop was completed, the officer still would have detained defendant in the patrol car, even if defendant wanted to leave, based upon Trooper Lamm's observations. These inconsistencies in the law enforcement officer's testimony illustrate the inability on the trooper's part to articulate the objective basis for his determination of reasonable suspicion and, of equal importance, the time at which he formulated such basis.

While our dissenting colleagues address the existence of reasonable suspicion and the consent to conduct a vehicle search by assuming that we have not properly considered the binding nature of the trial court's findings of fact in its order denying defendant's motion to suppress, we have indeed evaluated these findings and determined that they do not support the trial court's conclusions of law that Trooper Lamm was justified in prolonging the stop based upon a reasonable, articulable suspicion and that the trooper had received consent from defendant to extend the stop. In applying the very standard recognized by the dissenting opinion discussing reasonable suspicion that "[c]onclusions of law are reviewed de novo and are subject to full review," *Biber*, 365 N.C. at 168, 712 S.E.2d at 878 (citations omitted), coupled with our acceptance of the responsibility that "[u]nder a de novo review, the court considers

the matter anew and freely substitutes its own judgment for that of the lower tribunal," *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted), we determine that the legal conclusions drawn by the trial court that the law enforcement officer had reasonable suspicion to prolong the traffic stop, and that the officer received voluntary consent to extend the stop and to search the vehicle, are not supported by the trial court's findings of fact.

With the two dissenting opinions' joint focus on the trial court's conclusions of law, our de novo review further reveals that the dissenters' dependence upon these conclusions of law to buttress their disagreement with our decision in this case is faulty upon an examination of the combination of factors cited to constitute reasonable suspicion. Firstly, the reasonable suspicion dissent creatively conflates Peart's statement to Trooper Lamm that "they [Peart and defendant] were going to Fayetteville, and then she [Peart] also mentioned Tennessee and Georgia," coupled with defendant's failure to mention "anything about going to Tennessee or Georgia," with an inability by Peart to articulate where she and defendant were going so as to discern the presence of a factor which contributed to reasonable suspicion. Secondly, this dissent considered the trooper's view that it was "out of the ordinary" for the rental car to be a decided distance away from its designated geographic area to constitute reasonable suspicion pursuant to a cited case from the state of Arkansas. However, as noted earlier, the trooper was "able to determine the vehicle was in fact *properly* in possession of Ms. Pert [sic]" upon contacting the vehicle rental company by telephone. (Emphasis added). While the dissent regards the presence of coffee cups, energy drinks, pillows, sheets, trash, and dog food as raising Trooper Lamm's suspicions, "the presence of these items in a vehicle, without more, is utterly unremarkable." *Bowman*, 884 F.3d at 216. The dissent particularly emphasizes the presence of dog food scattered along the floor of the rental vehicle as a factor contributing to Trooper Lamm's reasonable suspicion; the importance of this element dims, however, when the existence of this dog food, along with a can of dog food and a jar of dog food, are available in the rental vehicle to feed the pit bull dog on a road trip traversing hundreds of miles. In continuing to identify the factors which constituted the existence of the trooper's reasonable suspicion in its view, the dissent frames defendant's nervousness to close the passenger door of the patrol car as a solid indicator of the potential of defendant to flee the scene. This Court has expressly determined that general nervousness is not significant to reasonable suspicion analysis because "[m]any people become nervous when stopped by a state trooper." *Pearson*, 348 N.C. at 276, 498 S.E.2d at 601; *see also United States v. Palmer*, 820

F.3d 640, 649–50 (4th Cir. 2016) (concluding that a "driver's nervousness is not a particularly good indicator of criminal activity, because most everyone is nervous when interacting with the police"). Indeed,

> [i]t is common for most people to exhibit signs of nervousness when confronted by a law enforcement officer whether or not the person is currently engaged in criminal activity. *Thus, absent signs of nervousness beyond the norm, we will discount the detaining officer's reliance on the detainee's nervousness as a basis for reasonable suspicion.*

United State v. Salzano, 158 F.3d 1107, 1113 (10th Cir. 1998) (internal quotation marks and citations omitted) (emphasis added); *see also United States v. Massenburg*, 654 F.3d 480, 490 (4th Cir. 2011).

Just as the dissenting opinion labors to elevate the payment of cash for the rental vehicle and other enumerated factors to the level of reasonable suspicion by adopting the same convenient speculative conclusions which the investigating trooper utilized to unlawfully prolong the traffic stop, the other dissenting opinion is plagued by identical shortcomings regarding the officer's attempts to justify the voluntariness of the consent to search the rental vehicle. In the first instance, this dissent repeats the flimsy premise of the reasonable suspicion dissent that the trial court's findings of fact support the order's conclusions of law. In doing so, this dissent unfortunately confuses our de novo review of the conclusions of law in light of the findings of fact with a reevaluation of the evidence and the credibility of witnesses in order to find different facts. The dissent discussing consent to search shares the convenient approach of the dissent discussing reasonable suspicion in casually choosing to ignore the inconsistent testimony rendered by Trooper Lamm in his liberal discernment that he was somehow granted consent to search the rental car.

The dissent expressly agrees with the trial court's conclusion that, as a matter of law, Trooper Lamm received consent to extend the stop. It bases this ratification of the trial court's determination on the recognized principle that officers must determine whether a reasonable person, viewing the particular police conduct as a whole and within the setting of all of the surrounding circumstances, would have concluded that the officer had in some way restrained the defendant's liberty so that such a defendant was not free to leave. However, the trial court erred in its conclusion of law that "[d]efendant had no standing to contest the search of the grey Nissan Altima that he was driving since he

was not the owner nor legal possessor of the vehicle and deferred to Ms. Peart, the legal possessor, when asked for consent to search the vehicle." The trial court made no finding of fact upon which to base this unsupported conclusion of law that defendant here had no standing to contest the search. Defendant was an authorized operator of the rental vehicle, and his referral of the trooper to Peart about searching the vehicle did not divest defendant of the authority to grant consent to search the vehicle. The dissent further compounds its wayward stance on the trial court's conclusion of law that Trooper Lamm was justified in prolonging the traffic stop through the dissent's position that defendant himself prolonged the traffic stop by voluntarily remaining in the officer's patrol car to answer the trooper's questions after the conclusion of the stop, which is inconsistent with the dissent's simultaneous embrace of the trial court's determination that Peart prolonged the traffic stop through her grant of consent to search the rental vehicle. These inconsistent articulations by the dissent, which mirror the inconsistent articulations by the trooper on the matters of reasonable suspicion and consent to search, contribute largely to the dissent's agreement with the trial court's conclusions of law regarding these issues and to the dissent's misplaced reliance on *Heien*. The dissent cannot logically, on one hand, agree with the trial court's conclusion of law that defendant had no standing to contest the search and that Peart's consent to search validly prolonged the stop, while on the other hand, determining in its own analysis that defendant validly prolonged the stop by voluntarily remaining seated in Trooper Lamm's patrol car even following the trooper's inconsistent testimony about defendant's freedom to leave and after Trooper Lamm told defendant to "sit tight" as another trooper stood directly beside defendant's front passenger door.

Finally, while the dissenters couch our decision in a manner which they view as creating uncertainty among law enforcement officers and upsetting established law regarding the concepts of reasonable suspicion and consent to search, their collective desire to extend and to expand the ample discretion afforded to law enforcement officers to utilize their established and recognized authority in the development of reasonable suspicion and the attainment of consent to search would constitute the type of legal upheaval which they ironically claim our decision in this case creates. Clarity regarding a detained individual's freedom to leave serves to preserve and to promote the safety of both the motorist and the investigating law enforcement officer; the equivocal, presumptive, and inarticulable observations of the trooper here which the dissenters would implement as legal standards would serve to detract from such clarity. In reiterating the guiding principles established in the landmark

United States Supreme Court cases of *Terry v. Ohio*, *Rodriguez v. United States*, and their progeny, applying the sturdy guidelines reiterated in our Court's opinions in *State v. Bullock* and *State v. Williams*, and explaining the distinguishing features of *State v. Heien*, we choose to sharpen the existing parameters of reasonable suspicion and consent to search rather than to blur them through an undefined and imprecise augmentation of these principles.

Conclusion

Based upon the foregoing matters as addressed, we agree with the determination of the Court of Appeals that the trial court erred in denying defendant's motion to suppress evidence which was obtained as a result of the law enforcement officer's unlawful detainment of defendant without reasonable suspicion of criminal activity after the lawful duration of the traffic stop had concluded. The officer impermissibly prolonged the traffic stop without a reasonable, articulable suspicion to justify his action to do so and without defendant's voluntary consent. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice NEWBY dissenting.

After the paperwork has been returned at the end of a traffic stop, can an officer ask an individual for consent to ask a few more questions? The majority seems to answer this question no, holding that asking for permission to ask a few more questions unlawfully prolongs the traffic stop. In so holding, the majority removes a long-standing important law enforcement tool, consent to search. A traffic stop can be lawfully extended based on reasonable suspicion or consent. I fully join Justice Davis's dissent and agree, as the trial court held, that Officer Lamm had reasonable suspicion to detain defendant and conduct the search after the initial traffic stop concluded. I write separately, however, to state that I would also uphold the search of the car based on defendant's consent to prolong the stop to answer a few more questions and the subsequent valid consent to search the car. I respectfully dissent.

Traffic stops present one of the most dangerous situations for law enforcement officers, yet policing our highways is vital for public safety. Knowing how to lawfully extend a traffic stop is important to law enforcement officers who daily encounter circumstances similar to those presented by this case. Before today's decision, the law regarding reasonable suspicion and consent was clear. Now the majority upsets

this settled law and provides little guidance to law enforcement about how to proceed under these circumstances.

The majority holds that Officer Lamm's returning paperwork, issuing a traffic warning, and stating that the traffic stop had concluded ended his ability to interact with defendant, meaning that "the traffic stop in the instant case became unlawful after this point because the law enforcement officer prolonged [the stop] beyond the time reasonably required to complete its mission." Under the majority's approach, the traffic stop could not be lawfully prolonged even when defendant expressly permitted the officer to ask a few more questions. This holding effectively removes consent as a tool for law enforcement. Further, to reach its decision the majority fails to conduct the proper analysis of the trial court's order: An appellate court must determine whether the trial court's findings of fact are supported by competent evidence and whether those findings of fact support the trial court's conclusions of law. *State v. Williams*, 366 N.C. 110, 114, 726 S.E.2d 161, 165 (2012). Instead, on a cold record the majority reweighs the evidence and makes its own credibility determinations in finding facts. It then misapplies our precedent to unduly undermine the vital role of law enforcement.

Applying the appropriate standard, an appellate court first reviews the trial court's findings of fact. Here the trial court made the following findings:

> 24. That after Trooper Lamm told the Defendant that the traffic stop was complete, he then asked Defendant if he could ask him a few questions, and the Defendant responded in the affirmative.
>
> 25. That after asking the Defendant if there was anything illegal in the vehicle, the Defendant stated that "you can break the car down[.]"
>
> 26. That after asking the Defendant if he could search his car, the defendant expressed *reluctance before directing Trooper Lamm to ask Ms. Peart since she was the lessee of the vehicle.* [(Emphasis added.)] At which time, Trooper Lamm left the patrol car, asked the defendant to sit tight, and went to ask Ms. Peart.
>
> 27. That when Trooper Lamm asked Ms. Peart for consent to search the vehicle, she verbally consented and signed a written consent form, and Trooper Lamm began the search of the grey Nissan Altima.

> 28. That during the search of the grey Nissan Altima, Trooper Lamm found suspected cocaine under the back seat of the vehicle.
>
> 29. Upon seeing the suspected cocaine that had been found under the back seat of the grey Nissan Altima, the Defendant made statements denying ownership or knowledge that the cocaine was in the car and stated he had even given his consent to search, and had also stated that "I said you can ask her (Ms. Peart)" and that "she gave consent."

These findings are supported by competent evidence in the record.[1]

Based on its findings of fact, the trial court concluded as a matter of law that Trooper Lamm "received consent to extend the stop."[2] The

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1. The trial court's findings of fact were based on the following evidence admitted at trial: After Officer Lamm issued defendant a warning ticket for speeding, Officer Lamm told defendant, "That concludes the traffic stop." At that point, defendant remained in Officer Lamm's patrol car. Officer Lamm then stated, "I'm completely done with the traffic stop, but I'd like to ask you a few more questions if it's okay with you. Is that okay?" Defendant responded in the affirmative. Officer Lamm asked defendant if he was carrying various controlled substances, firearms, or illegal cigarettes in the rental car. Defendant responded, "No, nothing, you can break the car down," which Officer Lamm interpreted as defendant giving permission to search the rental car. Nonetheless, to clarify defendant's response, Officer Lamm continued questioning defendant and subsequently said, "Look, I want to search your car, is that okay with you?" When defendant did not immediately respond, Officer Lamm stated, "It's up to you." Defendant asked why the officer wanted to search the vehicle, and Officer Lamm explained he wanted to look for any of the things previously mentioned, such as illegal drugs or firearms. Defendant then responded, "You gotta ask [Peart]. I don't see a reason why." Officer Lamm then questioned, "Okay. You want me to ask her since she is the renter on the agreement, right?" Defendant neither agreed nor disagreed but stated that he needed to go to the restroom, wanted to smoke a cigarette, and added that they were getting close to the hotel so he did not "see a reason why." At that point Officer Lamm asked, "Okay, so you're saying no?" Defendant did not answer the question but mentioned that Officer Lamm had initially frisked defendant at the beginning of the traffic stop. After further conversation, Officer Lamm said, "Alright, let me go talk to her, then. Sit tight for me, okay?"

Officer Lamm then got out of the patrol car and approached the rental car to speak to Peart. Officer Lamm asked Peart if he could search the rental car, and Peart, without verbally responding, immediately opened the door. Peart then explained that she was opening the door for Officer Lamm to search the car. Peart thereafter noted, "There's nothing in my car," but she gave verbal consent and then signed the form authorizing officers to search the rental car. During the search, officers discovered suspected cocaine under the back passenger seat. Thereafter, defendant stated that he, too, had given his consent to search.

2. Notably, the trial court further concluded as a matter of law "[t]hat the Defendant had no standing to contest the search of the grey Nissan Altima that he was driving since he was not the owner nor legal possessor of the vehicle and deferred to Ms. Peart, the legal possessor, when asked for consent to search the vehicle." The State failed to present for review the issue of defendant's standing to challenge the search. Nonetheless, the majority

trial court also concluded that Officer Lamm's search was justified based on reasonable suspicion. Therefore, the trial court denied defendant's motion to suppress.

"[T]o detain a driver beyond the scope of the traffic stop, the officer must have the [appropriate person's] consent or reasonable articulable suspicion that illegal activity is afoot." *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 166–67 (2012) (first citing *Florida v. Royer*, 460 U.S. 491, 497–98, 103 S. Ct. 1319, 1324, 75 L. Ed. 2d 229, 236 (1983); then citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). The State argues before this Court that the search was supported by reasonable suspicion and was also valid as consensual. The State must prove "that the consent resulted from an independent act of free will." *United States v. Thompson*, 106 F.3d 794, 797–98 (7th Cir. 1997) (citing *Royer*, 460 U.S. at 501, 103 S. Ct. at 1319, 75 L. Ed. 2d at 238). Whether a defendant was seized at the time that officers obtained her consent requires an objective determination of "whether a reasonable person, viewing the particular police conduct as a whole and within the setting of all the surrounding circumstances, would have concluded that the officer had in some way restrained her liberty so she was not free to leave." *Id.* at 798 (citing *Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S. Ct. 1975, 1979, 100 L. Ed. 2d 565, 571 (1988)) (recognizing that a defendant may still be free to leave, and interaction with police officers may still be consensual, even when the defendant is sitting in a police car). Whether an individual is free to leave is evaluated based on an objective standard, meaning it does not take into account the officer or individual's beliefs in that particular situation. *See id.*; *State v. Nicholson*, 371 N.C. 284, 292, 813 S.E.2d 840, 845 (2018) ("It is well established, however, that '[a]n action is "reasonable" under the Fourth Amendment, regardless of the individual officer's state of mind, "as long as the circumstances, viewed *objectively*, justify [the] action." ' " (quoting *Brigham City v. Stuart*, 547 U.S. 398, 404, 126 S. Ct. 1943, 1948, 164 L. Ed. 2d 650, 658 (2006) (brackets and emphasis in original))).

While consent must be obtained voluntarily, a defendant need not be informed that he has a right to refuse. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 248–49, 93 S. Ct. 2041, 2059, 36 L. Ed. 2d 854, 875 (1973). Instead, whether a person gives consent voluntarily is evaluated based on "the totality of the circumstances surrounding the consent." *United*

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incorrectly attempts to reach this issue despite it not being before this Court. Regardless, it is undisputed that defendant told Officer Lamm to seek permission from Peart and that Peart consented to the search.

States v. Lattimore, 87 F.3d 647, 650 (4th Cir. 1996) (7–6 decision) (citing *Schneckloth*, 412 U.S. at 227, 93 S. Ct. at 2047–48, 36 L. Ed. 2d at 862–63). This determination requires an evaluation of factors like "the characteristics of the accused (such as age, maturity, education, intelligence, and experience) as well as the conditions under which the consent to search was given (such as the officer's conduct; the number of officers present; and the duration, location, and time of the encounter)." *See id.* (first citing *United States v. Watson*, 423 U.S. 411, 424, 96 S. Ct. 820, 828, 46 L. Ed. 2d 598, 609 (1976); then citing *United States v. Analla*, 975 F.2d 119, 125 (4th Cir. 1992), *cert. denied*, 507 U.S. 1033, 113 S. Ct. 1853, 123 L. Ed. 2d 476 (1993); and then citing *United States v. Morrow*, 731 F.2d 233, 236 (4th Cir.), *cert. denied*, 467 U.S. 1230, 104 S. Ct. 2689, 81 L. Ed. 2d 883 (1984)).

The majority here cites the correct standard of review. The majority then proceeds with its analysis, without even mentioning any of the trial court's findings of fact, making only a passing reference to the trial court order. The majority instead finds its own facts to reach its conclusion. In doing so, it relies on its view of the officer's subjective state of mind instead of employing the correct objective standard. Finding facts is not the job of an appellate court. This responsibility resides with the trial court, which makes credibility determinations based on face-to-face interactions with the parties before it.

When applying the correct standard of review, it is clear that the trial court's findings of fact here are supported by competent evidence in the record and that those factual findings support the trial court's conclusions of law. Officer Lamm explicitly told defendant that the traffic stop was finished before inquiring whether he could ask defendant additional questions. At this point defendant was no longer seized but was free to leave and to refuse Officer Lamm's request. *See State v. Heien*, 226 N.C. App. 280, 287, 741 S.E.2d 1, 5–6 ("Generally, the return of the driver's license or other documents to those who have been detained indicates the investigatory detention has ended."), *aff'd per curiam*, 367 N.C. 163, 749 S.E.2d 278 (2013), *aff'd sub nom. on other grounds*, *Heien v. North Carolina*, 574 U.S. 54, 135 S. Ct. 530, 190 L. Ed. 2d 475 (2014).[3] Notably, Officer Lamm asked defendant if he could proceed with additional questions, and defendant expressly consented; Officer Lamm did not just begin questioning defendant without first acquiring defendant's

3. In rejecting the State's arguments about the similarities between *Heien* and this case, the majority frequently refers to the Court of Appeals' opinion in that case. Importantly, this Court affirmed *Heien* in a per curiam opinion, placing its approval on the Court of Appeals' opinion.

consent to do so. Though defendant was still sitting in the patrol car at the time, this factor alone does not transform the consensual encounter, during which defendant was free to leave because the traffic stop had ended, into a nonconsensual interaction. *See Thompson*, 106 F.3d at 798. Thus, Officer Lamm initially prolonged the stop with defendant's consent. When asked if defendant and Peart had any illegal substances in the car, defendant responded, "No, nothing, you can break the car down." Defendant then told Officer Lamm that he would need to obtain Peart's consent to search the rental car. The officer reasonably kept defendant in the patrol car for officer safety while he talked with Peart.

Thereafter, Peart, the authorized renter of the car and the person with the authority to give consent, gave both verbal and written consent authorizing the search. Thus, at a time when defendant was not seized for Fourth Amendment purposes, Officer Lamm had, per defendant's express direction, obtained Peart's consent to search the car. *See Heien*, 226 N.C. App. at 287–88, 741 S.E.2d at 5–6 (concluding that, after officers had issued a warning ticket to the driver of a vehicle in which the defendant was the passenger and also returned the defendant passenger's driver's license, the encounter became consensual and officers could obtain valid consent to search the car from the defendant, who owned the car). Once defendant advised Officer Lamm to ask Peart for consent to search the car, Officer Lamm's request for defendant to stay in the patrol car for officer safety reasons was reasonable. *See State v. Bullock*, 370 N.C. 256, 262, 805 S.E.2d 671, 676 (2017) (recognizing that, in the context of facilitating the mission of the traffic stop itself, officers may take certain precautions justified by officer safety). Additionally, no one contests that Peart's consent was voluntarily given. Significantly, once officers discovered drugs in the car, defendant told the officers he had consented to the search.

The trial court's findings of fact are supported by competent evidence in the record, and those findings of fact support the trial court's conclusion of law that the search was lawful. Thus, because I would also uphold the trial court's order denying defendant's motion to suppress based on valid consent as well as the existence of reasonable suspicion, I respectfully dissent.

Justice DAVIS dissenting.

I respectfully dissent from the majority's opinion. Even assuming *arguendo* that defendant's consent to the search of the vehicle was not voluntary, I believe that Trooper Lamm possessed reasonable suspicion to extend the traffic stop after issuing the warning ticket.

"The reasonable suspicion standard is a 'less demanding standard than probable cause' and a 'considerably less [demanding standard] than preponderance of the evidence.' " *State v. Bullock*, 370 N.C. 256, 258, 805 S.E.2d 671, 674 (2017) (alteration in original) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000)); *see also State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994) ("The only requirement is a minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.' " (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989))). The reviewing court must consider "the totality of the circumstances—the whole picture." *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70 (quoting *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 628 (1981)).

All of the evidence, when considered together, must yield "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015) (quoting *Navarette v. California*, 572 U.S. 393, 396, 188 L. Ed. 2d 680, 686 (2014)). This objective basis must be premised upon "specific and articulable facts" and the "rational inferences" therefrom, *Terry v. Ohio*, 392 U.S. 1, 21, 20 L. Ed. 2d 889, 906 (1968), as understood by a "an objectively reasonable police officer," *Bullock*, 370 N.C. at 258, 805 S.E.2d at 674 (citation omitted). *See Watkins*, 337 N.C. at 441, 446 S.E.2d at 70 (holding that reasonable suspicion "must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training").

Our standard of review on appeal from orders ruling on motions to suppress is well-settled. We review a trial court's order to determine "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Nicholson*, 371 N.C. 284, 288, 813 S.E.2d 840, 843 (2018) (quoting *Jackson*, 368 N.C. at 78, 772 S.E.2d at 849). When a trial court's findings of fact are not challenged on appeal, "they are deemed to be supported by competent evidence and are binding on appeal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted). The trial court's conclusions of law are reviewed *de novo*. *Id.*

In my view, a proper application of this standard of review in the present case requires that the trial court's order denying defendant's motion to suppress be affirmed. Here, the pertinent findings made by the court are largely unchallenged and therefore binding on us in this appeal. I believe that the majority has failed to properly consider these

findings, which are sufficient to support the trial court's conclusion that Trooper Lamm had a reasonable basis to believe that further investigation was warranted. As the trial court recognized, Trooper Lamm identified at the suppression hearing numerous factors that combined to create a reasonable suspicion that further investigation of possible criminal activity was appropriate.

First, the inconsistent statements of defendant and Peart concerning their travel plans raised Trooper Lamm's suspicions. Defendant stated that they were traveling from New York to Fayetteville to visit family, while Peart said that they were going to Fayetteville for a two-day trip but also mentioned driving to Tennessee and Georgia to visit some of her family members.[1] *See State v. Williams*, 366 N.C. 110, 117, 726 S.E.2d 161, 167 (2012) (holding that a passenger's "inability to articulate where they were going" is a factor contributing to reasonable suspicion).

Second, the rental agreement authorized the vehicle to be driven only in New York, New Jersey, and Connecticut. Trooper Lamm testified that he considered it "out of the ordinary" that the car was located approximately 500 miles away from the geographic area designated in the rental agreement. *Cf. Burks v. State*, 362 Ark. 558, 561, 210 S.W.3d 62, 65 (2005) (holding that officer had reasonable suspicion to extend traffic stop in part because defendant's rental vehicle was "half a continent away" from the permitted driving locations).

Third, the fact that the rental car had been paid for with $750 in cash was also a factor in Trooper Lamm's decision to extend the stop, as he testified that "the majority of [rental car payments] we see [are] usually on a credit card." *Cf. Sokolow*, 490 U.S. at 8–9, 104 L. Ed. 2d at 11 (1989) (holding that paying for airline tickets with large sums of cash was "out of the ordinary" and could be considered as relevant when determining whether reasonable suspicion existed to investigate suspected drug couriers).

Fourth, the presence of empty coffee cups, energy drinks, pillows and blankets, and trash in the car—which gave the vehicle a "lived-in

1. At the suppression hearing, Trooper Lamm testified at one point that "all [Peart] wanted to say was they had family down and they were going to Fayetteville, and then she also mentioned Tennessee and Georgia." Shortly thereafter, Trooper Lamm stated that "the passenger was not certain where she was going with the driver other than they were going — that she was on a trip with him and it was a trip from New York to Fayetteville for a two-day turnaround trip." The trial court's finding of fact on this issue was that Trooper Lamm "learned from [Peart] that she was unsure of her travel plans." This finding is binding upon us in this appeal.

look"—also raised Trooper Lamm's suspicions. He testified that signs of "hard" and "continuous" driving are consistent with drug trafficking. Trooper Lamm further stated that indicia of attempts to "sleep and drive at the same time" are "things we've been trained to look for beyond the normal traffic stop [as] . . . an indicator [of criminal activity]." *See United States v. Finke*, 85 F.3d 1275, 1277–1280 (7th Cir. 1996) (holding that a vehicle that looked like the defendant "had been living in [it] for the last few days" was a factor supporting a finding of reasonable suspicion because the officer making the stop "knew from his training that drug couriers frequently make straight trips because they do not want to stop anywhere with a load of drugs in their vehicle").

Fifth, Trooper Lamm testified that the presence of dog food "strung throughout the car" is a tactic used by drug traffickers to distract police canines from detecting the scent of narcotics. *See Grimm v. State*, 458 Md. 602, 618, 183 A.3d 167, 176 (2018) (noting that dog food can be used as a distraction for police canines searching for narcotics).

Sixth, the presence of air fresheners in the vehicle—which Trooper Lamm believed to be unusual given that the vehicle was a rental car—was consistent with an additional tactic utilized by drug traffickers to mask the scent of narcotics and act as a diversion for police canines. *See*, *e.g.*, *Jackson v. State*, 190 Md. App. 497, 521, 988 A.2d 1154, 1167 (2010) (stating that drug traffickers "seem to enjoy an incorrigible affinity for air fresheners" and although "[t]here is nothing criminal" about them, their presence in a vehicle may be a "tell-tale characteristic[] of a drug courier").

Finally, Trooper Lamm testified that it was unusual for a person in defendant's position to be scared to shut the door of the patrol car upon entering the vehicle, despite the officer's order to close the door and the fact that it was raining outside. This conduct suggested to Trooper Lamm that defendant may have considered fleeing, an unusual desire for a person stopped for a mere speeding violation. *See Illinois v. Wardlow*, 528 U.S. 119, 124, 145 L. Ed. 2d 570, 576 (2000) (holding that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion"); *see also United States v. Moorefield*, 111 F.3d 10, 14 (3d Cir. 1997) (holding that a defendant's "refusal to obey the officers' orders," when combined with other factors, supported a finding of reasonable suspicion).

None of the above referenced circumstances would give rise to reasonable suspicion *when viewed in isolation*. But that is not the test. To the contrary, it is the *totality* of the circumstances that must be examined. Here, the factors discussed above—when considered together—went

well beyond a mere "unparticularized suspicion or hunch" that criminal activity may have been afoot. *Sokolow*, 490 U.S. at 15, 104 L. Ed. 2d at 15; *see id.* at 9, 104 L. Ed. 2d at 11 ("Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion." (citation omitted)).

The majority fails to offer any explanation as to why these factors—when looked at together—were not enough to meet the relatively low standard necessary to establish reasonable suspicion. Instead, the majority examines each factor individually and in isolation despite the wealth of caselaw cautioning against such an approach. Not surprisingly, the majority fails to cite any case in which either this Court or the United States Supreme Court has held that reasonable suspicion was lacking in the face of anything close to the combination of circumstances presented here. Moreover, the majority incorrectly attempts to reweigh the credibility of Trooper Lamm's testimony despite the fact that the trial court expressly made findings as to his observations that are binding upon us in this appeal.

In determining that no reasonable suspicion existed, the majority also fails to view the evidence through the eyes of a law enforcement officer in light of his training and experience. This Court has recognized that the facts and inferences that can give rise to a trained law enforcement officer's suspicion of criminal activity "might well elude an untrained person." *Williams*, 366 N.C. at 116–17, 726 S.E.2d at 167 (citation omitted); *see also Cortez*, 449 U.S. at 419, 66 L. Ed. 2d at 629 ("[W]hen used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person and for action on that suspicion."). The United States Supreme Court has made clear that "the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Cortez*, 449 U.S. at 418, 66 L. Ed. 2d at 629. (1996). As we stated in *Williams*:

> Viewed individually and in isolation, any of these facts might not support a reasonable suspicion of criminal activity. But viewed as a whole by a trained law enforcement officer who is familiar with drug trafficking and illegal activity on interstate highways, the responses were sufficient to provoke a reasonable articulable suspicion that criminal activity was afoot and to justify extending the detention until a canine unit arrived.

Williams, 366 N.C. at 117, 726 S.E.2d at 167; *see Ornelas v. United States*, 517 U.S. 690, 700, 134 L. Ed. 2d 911, 921 (1996) ("To a layman the sort of loose panel below the back seat armrest in the automobile involved in this case may suggest only wear and tear, but to [the officer conducting the search], who had searched roughly 2,000 cars for narcotics, it suggested that drugs may be secreted inside the panel.").

Here, the undisputed evidence showed that Trooper Lamm is an experienced law enforcement officer who has been employed by the State Highway Patrol for over eleven years, three of which were spent in the drug interdiction unit. I believe the majority errs in failing to take into any account whatsoever his training and experience upon being confronted by these circumstances.

This Court's recent decision in *State v. Bullock* constitutes a proper application of these principles. The defendant in *Bullock* was stopped on a highway for speeding while driving a rental car that contained a large amount of drugs. 370 N.C. at 256, 805 S.E.2d at 673. The defendant moved to suppress the evidence of the drugs, claiming that they were found only after the officer at the scene had unlawfully extended the stop without reasonable suspicion. *Id.* at 256, 805 S.E.2d at 673. We disagreed and held that the officer possessed reasonable suspicion to extend the stop and search defendant's vehicle. *Id.* at 256, 805 S.E.2d at 673. In so doing, this Court identified a number of factors that gave rise to reasonable suspicion: (1) Highway I-85 is a major thoroughfare for drug trafficking, (2) defendant possessed two cell phones, (3) the rental car was rented in another person's name, (4) the defendant appeared nervous when he was asked questions about where he was going and had driven miles past his alleged destination, (5) a frisk of defendant's person revealed $372 in cash, (6) defendant gave contradictory statements about the person he claimed to be visiting, and (7) defendant lied about recently moving to North Carolina. *Id.* at 263–64, 805 S.E.2d at 677–78. None of these factors in isolation would likely have been sufficient to create reasonable suspicion. But collectively, they were enough for the officer to lawfully extend the traffic stop.

The same is true in the present case. Under the majority's analysis, Trooper Lamm somehow acted unconstitutionally simply by responding in accordance with his training upon his recognition of seven factors that were suggestive of criminal activity. Based on the majority's opinion, law enforcement officers in future cases who similarly observe a combination of circumstances that they have been taught to view as suspicious will presumably be forced to ignore their training and forego

further investigation for fear of being deemed to have acted without reasonable suspicion. Accordingly, I respectfully dissent.

Justices NEWBY and ERVIN join in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
SETHY TONY SEAM

No. 82A14-2

Filed 28 February 2020

Constitutional Law—Eighth Amendment—opportunity for parole—not ripe for review

Defendant's argument that he had no opportunity for parole was not ripe for review where he had not yet reached parole eligibility.

Justices ERVIN and DAVIS did not participate in the consideration or resolution of this decision.

Appeal pursuant to N.C.G.S. § 7A-31 from a unanimous decision of the Court of Appeals affirming the judgment entered on 11 October 2017 by Judge Jeffrey K. Carpenter in Superior Court, Davidson County. Heard in the Supreme Court on 7 January 2020.

Joshua H. Stein, *Attorney General*, *by Kimberly N. Callahan*, *Assistant Attorney General*, *for the State.*

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

PER CURIAM.

We affirm the decision of the Court of Appeals which leaves intact the sentence entered by the trial court. Defendant's arguments regarding his constitutional rights under the Eighth Amendment in which he asserts that he has no meaningful opportunity for parole are not ripe for a determination by this Court, because the time at which he is eligible to apply for parole has not yet arrived. We recognize that the potential for parole constitutionally cannot be illusory for offenders sentenced to

life with the possibility of parole. Defendant is not precluded from raising his claims at a later date, in the event that said claims become ripe for resolution.

AFFIRMED.

Justices ERVIN and DAVIS did not participate in the consideration or resolution of this decision.

STATE OF NORTH CAROLINA
v.
JEFFERY MARTAEZ SIMPKINS

No. 188A19

Filed 28 February 2020

Constitutional Law—right to counsel—forfeiture—egregious conduct by defendant

The Supreme Court recognized that a criminal defendant may forfeit the right to counsel by committing egregious acts that frustrate the legal process. In a case involving charges related to a defendant's failure to maintain a valid driver's license, defendant's conduct was not so egregiously disruptive as to forfeit his right to counsel, and the failure of the trial court to conduct the colloquy in N.C.G.S. § 15A-1242 before allowing defendant to proceed pro se violated defendant's constitutional right to counsel, entitling him to a new trial.

Justice NEWBY dissenting.

Justice MORGAN joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 826 S.E.2d 845 (N.C. Ct. App. 2019), vacating a judgment entered on 8 June 2017 by Judge Andrew Heath in Superior Court, Stanly County. Heard in the Supreme Court on 10 December 2019.

Joshua H. Stein, Attorney General, by Alexandra M. Hightower, Assistant Attorney General, for the State.

Kimberly P. Hoppin, for defendant-appellee.

EARLS, Justice.

On 4 July 2016, Jeffery Martaez Simpkins was arrested and charged with offenses related to his failure to maintain a valid driver's license. He was first tried in the district court of Stanly County, where he was convicted and sentenced to a 30-day suspended period of confinement with 18 months of supervised probation to include 24 hours of community service. He appealed to the Stanly County Superior Court, where he was tried before a jury without counsel and convicted. He was sentenced to two years of supervised probation with two consecutive active terms of 15 days to be served on weekends and holidays, and with two consecutive 60-day suspended sentences of incarceration. Simpkins appealed to the Court of Appeals. On appeal, he argued that the trial court failed to satisfy the requirements of N.C.G.S. § 15A-1242 (2019)[1] before allowing Simpkins to proceed pro se. In a divided opinion, the Court of Appeals majority agreed. The State conceded that Simpkins had not received the required colloquy before waiving counsel and the court concluded that Simpkins had not forfeited his right to counsel, which would have negated the need for the colloquy. *State v. Simpkins*, 826 S.E.2d 845, 845 (N.C. Ct. App. 2019). We affirm. The Court of Appeals was correct in holding that Simpkins did not forfeit his right to counsel and that the trial court was therefore required to ensure that Simpkins's waiver of counsel was knowing, intelligent, and voluntary.

Background

On 4 July 2016, Simpkins was arrested during a traffic stop after a local police officer ran his license plate and discovered that Simpkins had a suspended license and an arrest warrant. Simpkins appeared in

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1. The statute provides that:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

Stanly County District Court on 16 August 2016. At some point during the proceedings in district court, the court noted on an unsigned waiver of counsel form that Simpkins refused to respond to the court's inquiry. The record also contains a waiver of counsel form, signed by the trial judge, with a handwritten note indicating that Simpkins refused to sign the form.[2] He was tried without counsel and convicted of resisting a public officer, failing to carry a registration card, and driving on a revoked license.

Simpkins then appealed to the Stanly County Superior Court for a new trial. There, Simpkins was charged with (1) failure to carry a registration card, (2) resisting a public officer, (3) driving with a revoked license, and (4) failure to exhibit or surrender a driver's license. The proceedings began at 9:41 a.m. on 7 June 2017. Simpkins appeared without counsel and, following a brief exchange during which Simpkins objected to the court's jurisdiction, the trial court examined him regarding his desire to waive his right to an attorney. During the examination, Simpkins stated that he "would like counsel that's not paid for by the State of North Carolina." The trial court interpreted this as a request to hire his own counsel, and the State objected "unless he can obtain counsel in the next 15 minutes." The trial court called in standby counsel, found that Simpkins had waived his right to an attorney, and appointed standby counsel to assist Simpkins in his defense. At 10:00 a.m., the court allowed Simpkins and standby counsel to review the case together. From the beginning of the trial until the time the court determined that Simpkins had waived his right to an attorney and would proceed pro se, fewer than twenty minutes had passed.

As jury selection was beginning, standby counsel requested a bench conference and the court permitted the parties to discuss the possibility of a plea arrangement. The parties returned at 11:04 a.m., and the State reported that they were unable to reach a plea agreement. The trial court then asked Simpkins if he wished to continue with standby counsel, and Simpkins responded that he would waive his rights to standby

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2. Assuming that Mr. Simpkins waived his right to counsel in the district court, any waiver would no longer have been effective in the superior court proceedings. In addition to the long period of time between the two proceedings, Mr. Simpkins was charged with different crimes in superior court. *See State v. Anderson*, 215 N.C. App. 169, 171, 721 S.E.2d 233, 235 (2011), *aff'd per curiam* 365 N.C. 466, 722 S.E.2d 509 (2012) (defendant's district court waiver of counsel insufficient to constitute waiver for superior court trial where record does not demonstrate defendant was informed of the superior court charges at time of district court waiver). In any case, the only question before us is whether Simpkins forfeited, rather than waived, his right to counsel.

counsel. The proceedings moved forward from that point with the jury returning at 11:10 a.m. Simpkins was ultimately convicted of failure to exhibit or surrender a license and of resisting a public officer. He was found not responsible for failure to carry a registration card. The charge for driving with a revoked license was dismissed before the jury was instructed on the law.

On appeal, Simpkins argued principally that the trial court erred by not thoroughly inquiring into his decision to proceed pro se. *Simpkins*, 826 S.E.2d at 846. The inquiry is required both by statute and by the state and federal constitutions to ensure that a defendant's waiver of the right to counsel is knowing, intelligent, and voluntary. *See*, *e.g.*, *State v. Moore*, 362 N.C. 319, 322, 661 S.E.2d 722, 724 (2008) (stating requirement and quoting N.C.G.S. § 15A-1242). The State argued that the inquiry was not required because Simpkins forfeited, rather than waived, his right to counsel. *Simpkins*, 826 S.E.2d at 846. The Court of Appeals applied its own precedent, which had previously held that a defendant may lose the right to be represented by counsel through voluntary waiver or through forfeiture. *Id.* Comparing the facts below to prior cases in which the court had found forfeiture, the majority determined that Simpkins did not "engage[] in such serious misconduct as to warrant forfeiture of the right to counsel." *Id.* at 852 (quoting *State v. Blakeney*, 245 N.C. App. 452, 468, 782 S.E.2d 88, 98 (2016)) (alteration in original). The State appealed to this Court on the basis of the dissent, which concluded the opposite.

Standard of Review

The right to counsel in a criminal proceeding is protected by both the federal and state constitutions. *See* U.S. Const. amend. VI; N.C. Const. art. I, §§ 19, 23. Our review is *de novo* in cases implicating constitutional rights. *See*, *e.g.*, *State v. Diaz*, 372 N.C. 493, 498, 831 S.E.2d 532, 536 (2019). Accordingly, we review *de novo* a trial court's determination that a defendant has either waived or forfeited the right to counsel. *Cf. Moore*, 362 N.C. at 321–26, 661 S.E.2d at 724–27 (reviewing *de novo* whether defendant was appropriately allowed to proceed without counsel after trial court found waiver of right to counsel); *State v. Thomas*, 331 N.C. 671, 673–78, 417 S.E.2d 473, 475–78 (1992) (same).[3]

3. We note that the trial court below did not conclude that Simpkins forfeited his right to counsel. If it had, and had made findings of fact supporting that conclusion, then those findings would be entitled to deference. *See*, *e.g.*, *State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010). However, in this case the trial court did not make any findings of fact before concluding that Mr. Simpkins had waived his right to counsel. Finally,

Analysis

"A cardinal principle of the criminal law is that the sixth amendment to the United States Constitution requires that in a serious criminal prosecution the accused shall have the right to have the assistance of counsel for his defense." *State v. Hutchins*, 303 N.C. 321, 335, 279 S.E.2d 788, 797 (1981) (citations omitted). Even so, a criminal defendant may choose to forgo representation and "conduct his own defense." *Id.* at 337, 279 S.E.2d at 798. In such a case, the waiver "must be knowingly, intelligently, and voluntarily made." *Moore*, 362 N.C. at 326, 661 S.E.2d at 726 (quoting *Thomas*, 331 N.C. at 674, 417 S.E.2d at 476).

In the case below, the trial court determined that Simpkins had waived, rather than forfeited, counsel. When a defendant seeks to waive counsel and proceed pro se, the trial court must satisfy the requirements of N.C.G.S. § 15A-1242. *See State v. Pruitt*, 322 N.C. 600, 603, 369 S.E.2d 590, 592 (1988); *see also Moore*, 362 N.C. at 326, 661 S.E.2d at 727 (referencing "the 'thorough inquiry' mandated by N.C.G.S. § 15A-1242 to ensure the defendant's decision to represent himself was knowingly, intelligently, and voluntarily made"). Given the significant importance of an accused's right to counsel, a defendant must "clearly and unequivocally" express a desire to proceed pro se before we will deem the right to be waived. *Thomas*, 331 N.C. at 673–74, 417 S.E.2d at 475 (1992) (quoting *State v. McGuire*, 297 N.C. 69, 81, 254 S.E.2d 165, 173 (1979)). Upon receiving this clear request, the trial court is required to ensure that the waiver is knowing, intelligent, and voluntary. *Id.* at 674, 417 S.E.2d at 476. The court does so by fulfilling the mandates of N.C.G.S. § 15A-1242, which requires the court to conduct a "thorough inquiry" and to be satisfied that (1) the defendant was clearly advised of the right to counsel, including the right to assignment of counsel; (2) the defendant "[u]nderstands and appreciates the consequences" of proceeding without counsel; and (3) the defendant understands what is happening in the proceeding as well as "the range of permissible punishments." N.C.G.S. § 15A-1242. The transcript in this case demonstrates that the trial court did not fully comply with the statutory mandate and the State concedes as much. *Simpkins*, 826 S.E.2d at 846. Therefore, because an effective waiver did not occur, the Court of Appeals in this case decided a further

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acceptance of our dissenting colleague's argument concerning the degree of deference to which a trial judge's forfeiture determinations should be afforded would effectively insulate those decisions from any meaningful appellate review.

issue, namely whether Mr. Simpkins, by his behavior, forfeited his right to counsel. *Id.* at 851.[4]

The dissent briefly states and then completely ignores the fact that the trial court found Mr. Simpkins had waived his right to counsel. In fact, the dissent states that the waiver requirements are "inapplicable here." However, in order to find that Simpkins waived his right to counsel, the trial court needed to conduct the inquiry required by N.C.G.S. § 15A-1242. The only reason this case is before us is that the State argues, contrary to the finding of the trial court, that Mr. Simpkins actually forfeited, rather than waived, his right to counsel. The decision in this case does not threaten the trial court's "discretion to ensure that legal proceedings are respected by all." Nor does it prevent the trial court from "provid[ing] orderly and just proceedings for all." Instead, it does two things. First, it reinforces the longstanding principle that a waiver of the right to counsel must be knowing, intelligent, and voluntary. Second, it provides trial courts with an additional avenue to ensure the orderly administration of justice,[5] which is to find forfeiture where it is impossible to fulfill the mandate of N.C.G.S. § 15A-1242.

Forfeiture of the right to counsel

We have never previously held that a criminal defendant in North Carolina can forfeit the right to counsel. However, the Court of Appeals has recognized, in addition to waiver of counsel, that "a defendant who engages in serious misconduct may forfeit his constitutional rights to counsel." *State v. Forte*, 817 S.E.2d 764, 774 (N.C. Ct. App. 2018) (citing *Blakeney*, 245 N.C. App. at 460, 782 S.E.2d at 93). That court has noted that forfeiture is generally "restricted to situations involving egregious conduct by a defendant." *Blakeney*, 245 N.C. App. at 461, 782 S.E.2d at 94. We agree and hold that, in situations evincing egregious misconduct by a defendant, a defendant may forfeit the right to counsel.

The purpose of the right to counsel "is to assure that in any criminal prosecution, the accused shall not be left to his own devices in facing

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4. Because forfeiture is the issue presented to us by this case, we do not address (1) whether the trial court was correct that Simpkins waived his right to counsel; (2) whether "waiver by conduct" is a method by which a defendant may appropriately be required to proceed pro se, *see Blakeney*, 245 N.C. App. at 464–65, 782 S.E.2d at 96 (discussing waiver by conduct); or (3) whether a trial court, upon finding that a defendant has waived through conduct the right to counsel's assistance, must still satisfy the requirements of N.C.G.S. § 15A-1242.

5. Justice, of course, also requires honoring the right to the effective assistance of counsel.

the prosecutorial forces of organized society." *Moran v. Burbine*, 475 U.S. 412, 430, 106 S. Ct. 1135, 1146 (1986) (cleaned up). It guarantees "that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067 (1984). It "safeguard[s] the fairness of the trial and the integrity of the factfinding process." *Brewer v. Williams*, 430 U.S. 387, 426, 97 S. Ct. 1232, 1253 (1977) (Burger, C.J., dissenting). Unfortunately, in rare circumstances a defendant's actions frustrate the purpose of the right to counsel itself and prevent the trial court from moving the case forward. In such circumstances, a defendant may be deemed to have forfeited the right to counsel because, by his or her own actions, the defendant has totally frustrated that right. If one purpose of the right to counsel is to "justify reliance on the outcome of the proceeding," *Strickland*, 466 U.S. at 692, 104 S. Ct. at 2067, then totally frustrating the ability of the trial court to reach an outcome thwarts the purpose of the right to counsel.

The Court of Appeals previously found forfeiture in *State v. Montgomery*, 138 N.C. App. 521, 530 S.E.2d 66 (2000). There, the court considered whether a defendant had been denied his right to counsel where the trial court failed to conduct the Section 15A-1242 inquiry and defendant was tried with standby counsel. *Montgomery*, 138 N.C. App. at 522–23, 530 S.E.2d at 67–68. The defendant in that case received appointed counsel on 7 January 1997. *Id.* at 522, 530 S.E.2d at 67. After switching counsel three times, the defendant appeared on his initially scheduled trial date, 16 February 1998, insisting that his then-current counsel be allowed to withdraw because "defendant no longer wished to be represented by him." *Id.* Over multiple pre-trial appearances it became clear that the defendant had refused to allow witnesses to meet with defense counsel; the defendant repeatedly disrupted the proceedings with profanity, receiving multiple findings of contempt; and the defendant assaulted his attorney in court. *Id.* at 522–53, 530 S.E.2d at 67–68. The court permitted counsel to withdraw and found that the defendant had waived his right to appointed counsel. *Id.* at 523, 530 S.E.2d at 68. When the defendant finally came on for trial on 6 April 1998, a month and a half after his original trial date, the trial court permitted an appointed attorney to serve as standby counsel and defendant represented himself. *Id.* These facts demonstrate forfeiture of the right to counsel because the defendant's actions totally undermine the purposes of the right itself by making representation impossible and seeking to prevent a trial from happening at all.

In *State v. Brown*, the Court of Appeals considered whether the trial court erred in permitting the defendant to proceed pro se. *Brown*,

239 N.C. App. 510, 510, 768 S.E.2d 896, 897 (2015). There, the defendant "refus[ed] to answer whether he wanted assistance of counsel at three separate pretrial hearings" and "repeatedly and vigorously objected to the trial court's authority to proceed." *Id.* at 519, 768 S.E.2d at 901. Of particular importance to the question of forfeiture, it appears from the court's opinion that the defendant refused to participate in the proceedings and utilized the hiring and firing of counsel to delay the trial. *See id.* at 513–16, 768 S.E.2d at 898–900 (detailing defendant's refusal to give a clear answer as to desire for counsel and refusal to engage in waiver inquiry upon persistent inquiry by the court); *id.* at 516–517, 768 S.E.2d at 900 (detailing delay of nearly one month caused by defendant's attempts to dismiss counsel). By refusing to make an election as to whether to proceed with counsel and by using the appointment and firing of counsel to delay the proceedings, the defendant in *Brown* completely frustrated his own right to assistance, warranting a finding of forfeiture.

In *State v. Joiner*, the defendant instructed his counsel to withdraw and then offered "evasive and bizarre answers" when the trial court conducted a hearing to investigate the defendant's desire to represent himself. *Joiner*, 237 N.C. App. 513, 514–15, 767 S.E.2d 557, 558–59 (2014). In a subsequent hearing on the same issue, the defendant "refused to answer questions and declared that the trial court had no authority to conduct the trial." *Id.* at 515, 767 S.E.2d at 559. While the trial court attempted to conduct the inquiry required by N.C.G.S. § 15A-1242, the defendant refused to participate by refusing to acknowledge understanding, answering in contradictory ways, refusing to answer at all, yelling obscenities and being "otherwise extremely disruptive." *Id.* The trial court found that the defendant was "refus[ing] to engage appropriately simply as a means of delaying the proceedings." *Id.* While it is not relevant to the question of forfeiture, having occurred after the alleged deprivation of the right to counsel,[6] the defendant later threatened to "punch the judge in the 'f***ing face,' " he "refused to leave his cell on the second day of trial," he "threatened to stab an officer," and, for good measure, "defecated and smeared his feces on the cell walls" in addition to various other "extremely disruptive and belligerent" activity. *Id.* at 515–16, 767 S.E.2d at 559. Prior to this extremely disruptive behavior, the defendant had been evaluated to determine his competence to participate in a criminal proceeding and was found competent to stand trial. *Id.* at 514–15, 767 S.E.2d at 558.

6. *See Moore*, 362 N.C. at 326, 661 S.E.2d at 726 (holding information learned by court after waiver of right to counsel irrelevant to question of whether defendant's sixth amendment right violated).

If a defendant refuses to obtain counsel after multiple opportunities to do so, refuses to say whether he or she wishes to proceed with counsel, refuses to participate in the proceedings, or continually hires and fires counsel and significantly delays the proceedings, then a trial court may appropriately determine that the defendant is attempting to obstruct the proceedings and prevent them from coming to completion. In that circumstance, the defendant's obstructionist actions completely undermine the purposes of the right to counsel. If the defendant's actions also prevent the trial court from fulfilling the mandate of N.C.G.S. § 15A-1242, the defendant has forfeited his or her right to counsel and the trial court is not required to abide by the statute's directive to engage in a colloquy regarding a knowing waiver.

Serious obstruction[7] of the proceedings is not the only way in which a defendant may forfeit the right to counsel. Other courts have held that a defendant who assaults his or her attorney, thereby making the representation itself physically dangerous, forfeits the right to counsel. *See*, *e.g.*, *United States v. Leggett*, 162 F.3d 237, 240 (3d Cir. 1998) (finding of forfeiture where defendant "lunged at his attorney and punched him in the head" and then "straddled him and began to choke, scratch and spit on him"); *Gilchrist v. O'Keefe*, 260 F.3d 87, 90 (2d Cir. 2001) (reviewing habeas claim where New York state court found forfeiture appropriate when defendant "punched [counsel] in the ear and ruptured his eardrum");[8] *cf. State v. Holmes*, 302 S.W.3d 831, 847–48

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7. The Court of Appeals has previously stated that "[a]ny willful actions on the part of the defendant that result in the absence of defense counsel [constitute] a forfeiture of the right to counsel." *State v. Quick*, 179 N.C. App. 647, 650, 634 S.E.2d 915, 917 (2006). This statement is unsupported. *Quick* cites the Court of Appeals decision in *Montgomery*, which states nothing of the sort. *Montgomery*, 138 N.C. App. at 524, 530 S.E.2d at 69. Further, it is far too broad a statement to be consistent with the constitutional guarantee of the right to counsel and the law of this state.

8. Then-Judge Sotomayor, writing for the panel in *Gilchrist*, provided the following warning:

> Although, of course, under no circumstances do we condone a defendant's use of violence against his attorney, had this been a direct appeal from a federal conviction we might well have agreed with petitioner that the constitutional interests protected by the right to counsel prohibit a finding that a defendant forfeits that right based on a single incident, where there were no warnings that a loss of counsel could result from such misbehavior, where there was no evidence that such action was taken to manipulate the court or delay proceedings, and where it was possible that other measures short of outright denial of counsel could have been taken to protect the safety of counsel.

260 F.3d at 89 (Sotomayor, J.).

(Tenn. 2010) (after review of cases from many jurisdictions, concluding that defendant had not forfeited right to counsel where defendant pushed his finger at counsel and knocked counsel's glasses askew). In such a circumstance the trial court has permitted counsel to withdraw without appointing new counsel who would be subject to physical harm. Obviously, a defendant who intentionally seriously assaults their attorney has undermined the right to counsel.

Here, we agree with the Court of Appeals majority that Simpkins did not "engage in such serious misconduct as to warrant forfeiture of the right to counsel." *Simpkins*, 826 S.E.2d at 852. The dissent urges a holding that Simpkins forfeited his right to counsel because, in the dissent's view, "it is clear that defendant would not accept the court's authority." However, the record belies that claim. Mr. Simpkins appeared for the first time in Superior Court at 9:41 a.m. on 7 June 2017. By 10:00 a.m., the trial court had determined Simpkins had waived his right to an attorney and the court appointed standby counsel to assist Simpkins in his defense. In that twenty minutes, Simpkins made an untimely objection, stating that there was "no proof of jurisdiction," asked questions of the court out of turn, stated, in response to the court's inquiry, that he "would like counsel that's not paid for by the State of North Carolina," asked four more questions of the court out of turn, and continued to speak out of turn and argue with the court. However, the transcript of the proceedings reflects that, when the court instructed Simpkins to stop asking questions, he did so. When the court asked Simpkins whether he wished to proceed with or without an attorney, he responded, for the most part, appropriately, first requesting "counsel that's not paid for by the State of North Carolina" and later acquiescing when the court suggested he be appointed standby counsel. Throughout the proceedings, including up to the point that he was required to proceed pro se, nothing in the record suggests that Simpkins was rude or disrespectful to the trial court. Simpkins's conduct, while probably highly frustrating, was not so egregious that it frustrated the purposes of the right to counsel itself. As a result, his conduct[9] did not amount to "such serious misconduct as to

9. The dissent, urging that we should find forfeiture, points to conduct which occurred both before Mr. Simpkins came on for trial and after Mr. Simpkins was denied the right to counsel. It is the Superior Court proceedings, and what happened there, which are presented to us for review. As to conduct occurring after Mr. Simpkins proceeded without counsel, the question before us is whether Mr. Simpkins forfeited his right to counsel. It seems curiously perverse to rule, as the dissent suggests, that a defendant can be deemed to have forfeited his right to counsel based on conduct occurring after the defendant is denied counsel.

warrant forfeiture of the right to counsel." *See Blakeney*, 245 N.C. App. at 468, 782 S.E.2d at 98.

The State urges us to find that Simpkins forfeited his right to counsel largely based on the frivolous legal arguments about jurisdiction that Simpkins put forward throughout the proceeding. However, the State provides us with no reason to hold that a pro se defendant can be held to have forfeited the right to counsel because the defendant makes frivolous legal arguments. After all, a large part of the reason defendants have a right to counsel is to prevent them from making frivolous legal arguments. *See*, *e.g.*, *Burbine*, 475 U.S. at 430, 106 S. Ct. at 1146 (stating that right to counsel assures the accused is "not left to his own devices"). We reject the State's invitation to hold that a defendant, having been required to proceed without the assistance of counsel without the necessary advisories,[10] forfeits the right to counsel because he suffers the very injury the right is intended to prevent.

Further, the State argues that Simpkins forfeited his right to counsel because he failed to employ counsel before appearing for trial. However, the record evidence does not establish that Simpkins consistently refused to retain counsel in an attempt to delay the proceedings. "We are not here dealing with a situation where the record shows that a criminal defendant, capable of employing counsel, has attempted to prevent his trial by refusing to employ counsel and also refusing to waive counsel and respond to the inquiry required by N.C.G.S. § 15A-1242." *State v. Bullock*, 316 N.C. 180, 186, 340 S.E.2d 106, 109 (1986). Instead, the record reflects that Simpkins engaged with the trial court throughout, coherently responding to the court's questions and ultimately agreeing to accept standby counsel. Further, on this record we simply cannot conclude that the failure to retain counsel was an attempt to delay the proceedings, and certainly not an attempt so egregious as to justify forfeiture of the right to counsel. The record is silent on whether Simpkins made any efforts to employ counsel. Here, where it appears that any question as to counsel was disposed of on the first day Simpkins was called to trial in Superior Court, there is simply no evidence of delay rising to the level of obstruction that would support a finding of forfeiture.

The State also argues that Simpkins was generally uncooperative and "intended to frustrate the orderly workings of the court." As we noted previously, defendant's behavior was probably very frustrating, and may have been intended to be frustrating. The trial court exhibited

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10. *See* N.C.G.S. § 15A-1242.

the utmost patience and should be commended for the even-handedness with which it conducted the proceedings. However, absent egregious conduct by the defendant, a defendant must be advised of the right to counsel, the consequences of proceeding without counsel, and "the nature of the charges and proceedings and the range of permissible punishments" before the defendant can proceed without counsel. N.C.G.S. § 15A-1242. Thus, where, as here, the defendant's behavior was not so egregious as to prevent the court from proceeding, or to create a danger of any kind, forfeiture of the constitutional right to counsel has not occurred. The full inquiry required by statute should have taken place to determine if the defendant was knowingly waiving his right to counsel. The trial court should have engaged in the required colloquy prior to appointing standby counsel and permitting Simpkins to proceed pro se. *See State v. Dunlap*, 318 N.C. 384, 389, 348 S.E.2d 801, 805 (1986) (stating that standby counsel is not "a satisfactory substitute for the right to counsel in the absence of a knowing and voluntary waiver").

Conclusion

A trial court may find that a criminal defendant has forfeited the right to counsel. In such a case, the court is not required to follow the requirements of N.C.G.S. § 15A-1242, which the court would otherwise be required to do before permitting a defendant to proceed pro se. A finding that a defendant has forfeited the right to counsel requires egregious dilatory or abusive conduct on the part of the defendant which undermines the purposes of the right to counsel and prevents the trial court from complying with N.C.G.S. § 15A-1242. Such conduct is not apparent here, where the record reflects that the defendant was allowed to proceed without counsel within twenty minutes of the start of the proceeding, was generally cooperative with the court's requests, participated in the proceedings, and did not utilize the right to counsel as a means of preventing the trial from moving forward. Because of the violation of his right to counsel under the Sixth Amendment to the U.S. Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution, the defendant is entitled to a new trial.

AFFIRMED.

Justice NEWBY dissenting.

This case implicates the trial court's authority over the courtroom and its responsibility to maintain the dignity and legitimacy of trial court proceedings. A criminal defendant has a constitutional right to counsel;

however, that right may be lost. Here defendant continually refused to acknowledge the authority of the court to manage the case proceedings or the authority of the State to pursue defendant's criminal prosecution for misdemeanor crimes. By continually refusing to answer the trial court's questions and posing his own questions to the court, defendant demonstrated his unwillingness to accept the judicial process, forfeiting his right to an attorney. Nonetheless, the majority finds facts from a cold record to reverse the trial court's determination. The majority's decision undermines the trial court's fundamental authority over the courtroom. I respectfully dissent.

In July 2016, Officer Trent Middlebrook ran defendant's license plate through his database and discovered that defendant, who owned the vehicle, had a suspended driver's license and a pending warrant for his arrest. When Officer Middlebrook stopped defendant's vehicle and asked for his license and registration, defendant refused to provide the documents, continuously questioned the officer's authority, and behaved uncooperatively and belligerently. Officer Middlebrook then arrested defendant.

Defendant was initially tried in district court for, *inter alia*, resisting a public officer and failing to carry a registration card. While there is no transcript of those proceedings, the record contains an unsigned, undated "Waiver of Counsel" form with the following handwritten notation: "Refused to respond to . . . inquiry by the Court and mark as refusal at this point." The record also contains a Waiver of Counsel form dated 16 August 2016, signed by the district court, which includes a handwritten notation stating, "Defendant refused to sign waiver of counsel upon request by the Court." On that date, the district court found defendant guilty of resisting a public officer and failing to carry a registration card. The district court judgment sheet again twice notes that defendant had waived counsel.

Defendant appealed to superior court. On 6 March 2017, defendant moved to dismiss the case, asserting that the court lacked jurisdiction to conduct the proceedings. (This motion was denied at defendant's superior court trial.) Three months later, on 5 June 2017, defendant appeared before the court for a pre-trial hearing. On 7 June 2017, defendant's case came for trial in superior court. From the outset, defendant continued to object to the proceeding on jurisdictional grounds:

> [Defendant]: Objection, sir. I did not enter any pleas. Do I need to stand?

> The Court: What is the basis of your objection?
>
> [Defendant]: There is no proof of jurisdiction here. There hasn't been since last year. I've been coming here over a year, and there's no evidence of anything besides the allegation.
>
> The Court: Well, sir, evidence is put on at the trial. So there is no evidence at this point.
>
> [Defendant]: So how can you force someone here without evidence, sir?
>
> The Court: You've been charged with a crime. And this is your day in court, your opportunity to be heard.
>
> [Defendant]: Who's the injured party, sir?
>
> The Court: Sir, it is not consistent with judicial proceedings for you to ask questions of the Judge. It's the Judge that will ask questions of you.
>
> [Defendant]: Can I ask questions of the prosecution then?
>
> The Court: Not at this time. Thank you, sir.

Defendant then contended that, though he had been coming to the court since August of 2016, he had never been advised of "anything," including his right to counsel. The trial court stated:

> I see that in the Court's file there are waiver of counsel forms with notations that you refused to respond when you were notified of your right to an attorney, and so you were marked down as having waived an attorney.
>
> You are charged with violations that could subject you to periods of incarceration. And so I would like to advise you that it is your right to have an attorney and if you cannot afford an attorney, the State can provide one for you. If you would like to apply for court-appointed counsel, we'll have you fill out an affidavit. If you wish to retain your own, you certainly have that opportunity as well.

Defendant then requested counsel "not paid for by the plaintiff" and questioned the court as to why there was no plaintiff in his case. The State objected, contending that defendant had time to retain private counsel

because the matter had been pending for nearly a year and that defendant had been advised of his right to obtain an attorney on two to three occasions. Defendant then indicated that he would like to be appointed standby counsel, but thereafter three times questioned whether standby counsel would be licensed by the State of North Carolina, implying that if counsel were so licensed, counsel would be unfit to assist him. Defendant again questioned the court, inquiring to which court he should appeal if he did not "get the right judgment." When the trial court responded that it could not give legal advice from the bench, defendant asked, "How is that legal advice, sir?"

After the trial court identified a potential standby counsel, the following exchange occurred:

> [Defendant]: Do I have the right to be informed of the cause of nature of these proceedings?
>
> The Court: You are—you have been charged with some crimes. We are here for a trial in your cases. We are going through preliminary matters at this time. Specifically, we are addressing your right to an attorney. You've indicated that you would like to represent yourself but that you'd like standby.
>
> [Defendant]: No, sir. I did not say I want to represent myself. I did not. I asked for standby counsel just to assist me with what I have to ask you.
>
> The Court: So let me inform you of the difference between standby counsel and retaining an attorney. If you wish to have an attorney appointed to represent you, you can ask for that.
>
> [Defendant]: Uh-huh.
>
> The Court: If you wish to represent yourself, you can proceed without the assistance of a standby attorney or with the assistance of a standby attorney. If you proceed with the assistance of a standby attorney—if you decide that later in the proceedings you wish to have the assistance of counsel, the standby attorney can step in for you on your behalf.
>
> [Defendant]: Okay. You never answered my question.
>
> The Court: Sir, this is—this is going to be your second and final warning. You're speaking out of order. You are

> free to make motions to the Court. You are not free to challenge the Court with extraneous statements. If you wish to address the Court, you need to make a motion by standing up and making a motion. This is the final warning you're going to get.
>
> [Defendant]: What does extraneous mean?
>
> The Court: Sir, I – I can't explain vocabulary to you.

The trial court then found that, "based on the prior proceedings, the waiver of counsel form, dated August 16, which indicates that defendant refused to sign a waiver of counsel upon request by the Court, signed by Judge Tucker," defendant had waived his right to counsel. The trial court then appointed standby counsel for defendant.

As the preliminary trial matters proceeded, defendant continued to question the court about various matters. Defendant then stated that he had been trying to enter a negotiated plea but wanted "evidence of jurisdiction." After conferring with standby counsel and deciding he did not want to enter a negotiated plea, defendant waived his right to, and released, standby counsel.

Throughout his trial, defendant repeatedly questioned the law enforcement witness about the State's authority and questioned the court about its authority. At the end of the trial, the jury convicted defendant of resisting a public officer and failing to exhibit/surrender his license.

Reviewed as a whole, it is clear that defendant would not accept the court's authority or the legitimacy of the court proceedings. He continued to pose questions to, and refused to answer questions from, multiple trial courts. Only the trial courts could evaluate defendant's tone of voice, emotions, body language, and other non-verbal communication cues accompanying his words to assess his sincerity in continuously refusing to answer the courts' questions. The trial court could truly understand defendant's actions to know when to protect the court proceedings from undue disruption and delay. Defendant's refusal to acknowledge the trial court's authority here and his repeated failure to respond to the various trial courts' inquiries disrupted the trial process and resulted in the forfeiture of his right to counsel.

While a criminal defendant's right to be represented by counsel is well-established, *State v. Bullock*, 316 N.C. 180, 185, 340 S.E.2d 106, 108 (1986), a defendant may relinquish the right to counsel in certain situations, *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66,

68–69 (2000).[1] One way a defendant may relinquish his right to be represented by counsel is through forfeiture. *State v. Quick*, 179 N.C. App. 647, 649–50, 634 S.E.2d 915, 917 (2006). A defendant may forfeit his right to counsel "when [he or she] engages in . . . serious misconduct." *State v. Blakeney*, 245 N.C. App. 452, 460, 782 S.E.2d 88, 93 (2016). Courts have recognized forfeiture by misconduct when a defendant (1) engages in "flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys;" (2) employs "offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court;" or (3) "refus[es] to acknowledge the trial court's jurisdiction or participate in the judicial process, or insist[s] on nonsensical and nonexistent legal 'rights.' " *Id.* at 461–62, 782 S.E.2d at 94.

Though a defendant's right to representation is well-established, a trial court has a "legitimate interest in guarding against manipulation and delay" in its proceedings. *United States v. Goldberg*, 67 F.3d 1092, 1098 (3d Cir. 1995). "The trial court understands courtroom dynamics in ways that cannot be gleaned from the cold transcript . . . ." *See United States v. Birchette*, 908 F.3d 50, 58 (4th Cir. 2018) (discussing the trial court's discretion in the context of juror interviews), *cert. denied*, 140 S. Ct. 162, 205 L. Ed. 2d 51 (2019). Thus, as this Court has noted in numerous contexts, some decisions are best made by the trial court. *See, e.g.*, *State v. Taylor*, 362 N.C. 514, 527–28, 669 S.E.2d 239, 254 (2008) (noting that trial courts have the ability to observe a prosecutor's demeanor and questioning of prospective jurors firsthand before ruling on a *Batson* challenge); *State v. Hill*, 347 N.C. 275, 297, 493 S.E.2d 264, 276 (1997) (noting that a trial court "is in the best position to determine whether the degree of influence on the jury was irreparable" in order to determine whether a mistrial is warranted); *State v. Wilson*, 322 N.C. 117, 127, 367 S.E.2d 589, 595 (1988) (stating that the trial court is in the best position to

1. Though inapplicable here, one way a defendant may relinquish his right to counsel is by waiving this right. *State v. Thomas*, 331 N.C. 671, 673–74, 417 S.E.2d 473, 475–76 (1992). If a defendant chooses to waive his right to counsel, the trial court "must determine whether the defendant knowingly, intelligently, and voluntarily waives the right." *Id.* at 674, 417 S.E.2d at 476. If a defendant chooses to waive his right to counsel, the trial court may determine whether defendant's waiver is knowingly, intelligently, and voluntarily made by asking whether the defendant (1) "[h]as been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;" (2) "[u]nderstands and appreciates the consequences of this decision;" and (3) "[c]omprehends the nature of the charges and proceedings and the range of permissible punishments." N.C.G.S. § 15A-1242 (2019). Waiver by express oral or written consent, however, cannot be the only method of relinquishing one's right to counsel. Having only one method of relinquishing one's right to counsel would halt proceedings where a defendant refuses to answer the trial court's inquiries despite its diligent effort to obtain specific responses from the defendant.

determine whether to sequester because only the trial court can "determine the climate surrounding a trial and it is [the trial court that] is in the best position to determine if a shield is necessary to protect jurors, and thus the defendant, from extraneous influences"). Because of the institutional advantage afforded to trial courts, such as the ability to observe a defendant's behavior, evaluate his tone of voice, and assess the sincerity of his conduct, trial courts should be allowed the authority to maintain reasonable control over their courtrooms.

Though not binding on this Court, the decision of the Court of Appeals in *State v. Leyshon*, 211 N.C. App. 511, 710 S.E.2d 282, *appeal dismissed*, 365 N.C. 338, 717 S.E.2d 566 (2011), is instructive. There the defendant refused to respond to the trial court's inquiry as to whether defendant wished to waive his right to counsel. *Id.* at 512–13, 710 S.E.2d at 285. At a second hearing, the defendant again refused to answer the trial court and instead challenged the court's jurisdiction. *Id.* at 513, 710 S.E.2d at 285. The Court of Appeals determined that the defendant's refusal to answer and his contradictory statements were insufficient to waive defendant's right to counsel. *Id.* at 517, 710 S.E.2d at 287. Nonetheless, the court noted that defendant refused to "respond to the court's inquiry regarding whether he wanted an attorney," refused to respond to the trial court's inquiry at a later hearing, and "continued to challenge the court's jurisdiction." *Id.* at 518–19, 710 S.E.2d at 288. The Court of Appeals thus concluded that the defendant, through his conduct, had forfeited his right to counsel. *Id.* at 519, 710 S.E.2d at 288–89.

Similar to *Leyshon*, defendant's continuous behavior here shows that he forfeited his right to counsel. At each stage of the proceeding, defendant has shown his unwillingness to acknowledge the authority of various trial courts in conducting their respective proceedings. When Officer Middlebrook initially stopped defendant, defendant refused to comply with the officer's requests, and he continuously questioned the authority of the officer. Though there is no transcript of the district court proceedings, there are two notations in the record that defendant waived counsel because of his refusal to respond to the district court's inquiries. Once defendant's case came for trial in superior court, defendant expressed his unwillingness to participate in the proceedings by continuously questioning that court's authority. The superior court attempted to determine whether defendant was waiving his right to counsel. Instead of answering the superior court's inquiry, however, defendant questioned the court, said he would like standby counsel but then questioned standby counsel's licensure, asked the trial court how to appeal his case, and asked to be informed "of the cause of the nature

of these proceedings." Notably, defendant expressly waived his right to standby counsel shortly after standby counsel's appointment.

Moreover, despite defendant's desire to have an attorney "not paid for by the plaintiff," defendant failed to retain an attorney in the more than eight months between the district court and superior court proceedings. Defendant had attended a hearing earlier in the week and knew at a minimum that he would need to be in Court on 7 June 2017. This instance was not defendant's first interaction with the legal system; defendant had four prior distinct encounters with the legal system resulting in convictions in North Carolina between 2014 and 2016. Additionally, defendant had three prior convictions in South Carolina. Here defendant had already been tried in district court for resisting a public officer and failing to carry a registration card. Given defendant's repeated refusal to participate in the trial court proceedings below, and in light of the misdemeanor charges for which defendant was tried, the trial court could appropriately determine that defendant's conduct was intended to disrupt the court's legitimate processes.

While "[a]n appellate court reviews conclusions of law pertaining to a constitutional matter de novo," *State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010) (citing *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008)), each case presents unique facts which must be assessed by the trial court. An appellate court does not find facts; the authority to find facts resides with the trial court which has face-to-face interaction with the parties. Here the majority assumes itself to be the finder of fact, views a cold written record without having been present for any of the trial court proceedings, and finds that there is no suggestion that defendant was "rude or disrespectful" during the proceedings. Only trial courts can observe a defendant's demeanor and interpret the non-verbal communication cues accompanying his words, which might not seem rude or disrespectful from a written transcript in a cold record on appeal. In simply reading the record, appellate courts lack the necessary context accompanying a defendant's words and thus are not designated as finders of fact. Employing the proper standard of review in this case and looking at defendant's conduct as a whole, the trial court's determination that defendant should proceed without an attorney is supported by competent evidence in the record.[2] The trial court was in the best position to make such a determination given defendant's continual

2. While the trial court concluded that defendant "waived" his right to counsel, the record here shows, as the State argued, that defendant actually forfeited his right to counsel.

refusal to recognize the legitimacy of the legal process throughout multiple stages in the court proceedings.

Trial courts have a "legitimate interest in guarding against manipulation and delay." *Goldberg*, 67 F.3d at 1098. Given this legitimate interest, a trial court must be afforded discretion to ensure that legal proceedings are respected by all, which in turn enables the court to provide orderly and just proceedings for all. Because defendant forfeited his right to counsel by his own conduct, I respectfully dissent.

Justice MORGAN joins in this dissenting opinion.

VIZANT TECHNOLOGIES, LLC
v.
YRC WORLDWIDE, INC.

No. 160A19

Filed 28 February 2020

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) from an order and opinion on defendant's cross-motion for summary judgment entered on 15 November 2018 by Judge Louis A. Bledsoe III, Chief Special Superior Court Judge for Complex Business Cases, in Superior Court, Mecklenburg County, after the case was designated a complex business case by the Chief Justice pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts. Heard in the Supreme Court on 22 November 2019 in session in the Johnston County Courthouse in the City of Smithfield pursuant to section 18B.8 of Chapter 57 of the 2017 North Carolina Session Laws.

Lincoln Derr PLLC, by Sara R. Lincoln, for plaintiff-appellant.

Strauch Green & Mistretta, P.C., by Jack M. Strauch and Jessie C. Fontenot Jr., for defendant-appellee.

PER CURIAM.

AFFIRMED.

VIZANT TECHS., LLC v. YRC WORLDWIDE, INC.

[373 N.C. 549 (2020)]

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
MECKLENBURG COUNTY	SUPERIOR COURT DIVISION 15 CVS 20654
VIZANT TECHNOLOGIES, LLC, Petitioner,	
v.	**FURTHER ORDER AND OPINION ON DEFENDANT YRC WORLDWIDE INC.'S CROSS MOTION FOR SUMMARY JUDGMENT**[1]
YRC WORLDWIDE INC., Respondent.	

1. **THIS MATTER** is before the Court upon Defendant YRC Worldwide Inc.'s ("YRC") Cross Motion for Summary Judgment (the "Summary Judgment Motion") in the above-captioned case.

2. Having considered the Summary Judgment Motion, the original briefs in support of and in opposition to the motion, the arguments of counsel at the May 23, 2018 hearing on the motion, the supplemental briefs submitted by the parties in support of and in opposition to the motion, and other appropriate matters of record, the Court hereby concludes that YRC's Summary Judgment Motion should be **GRANTED in part** and **DENIED in part** as set forth herein.

Lincoln Derr PLLC, by Sara R. Lincoln and Kevin L. Pratt, for Plaintiff Vizant Technologies, LLC.

Strauch Green & Mistretta, P.C., by Jack M. Strauch and Jessie Charles Fontenot, for Defendant YRC Worldwide Inc.

Bledsoe, Chief Judge.

1. Recognizing that this Order and Opinion cites and discusses the subject matter of documents that the Court has previously allowed to remain filed under seal in this case, the Court elected to file this Further Order and Opinion on Defendant YRC Worldwide Inc.'s Cross Motion for Summary Judgment under seal on November 15, 2018. The Court permitted the parties an opportunity to advise whether the Order and Opinion contained confidential information that either side contended should be redacted from a public version of this document. On November 15, 2018, both Plaintiff and Defendant advised the Court that no redactions are necessary. Accordingly, the Court removes the "filed under seal" designation and files this Order and Opinion, without redactions, as a matter of public record.

I.

BACKGROUND

3. The Court has previously discussed the factual and procedural history of this action in its June 26, 2018 Order and Opinion, as reported at *Vizant Technologies, LLC v. YRC Worldwide Inc.*, 2018 NCBC LEXIS 65 (N.C. Super. Ct. June 26, 2018). Consequently, this Order and Opinion revisits only those facts that are relevant to the Court's decision herein. The details recited are not findings of fact but a summary "of material facts which . . . are not at issue[.]" *Hyde Ins. Agency, Inc. v. Dixie Leasing Corp.*, 26 N.C. App. 138, 142, 215 S.E.2d 162, 165 (1975).

A. Factual Summary

4. This action arises out of an alleged breach of a Professional Services Agreement (the "PSA") between Plaintiff Vizant Technologies, LLC ("Vizant") and YRC. (*See* Pl.'s Mem. L. Supp. Mot. Summ. J. Ex. 2, at 5 [hereinafter "PSA"], ECF No. 84.3.)

5. YRC—the parent entity of several freight companies that operate throughout North America—has a large number of customers who pay for shipping services by credit card. (Def.'s Br. Supp. Mot. Summ. J. 3, ECF No. 88.) When one of its customers pays using a credit card, YRC pays a credit card processing fee. (Def.'s Br. Supp. Mot. Summ. J. 3.) YRC incurs substantial costs in credit card fees each year due to the number of customers that it serves and the number of orders that it fills. (Def.'s Br. Supp. Mot. Summ. J. 3.) At all times relevant to this lawsuit, YRC has sought to reduce these costs. (Whitsel Dep. 29:8–23, ECF No. 96.)

6. Vizant holds itself out as a consultant that can help clients reduce costs associated with financial payments. (*See* Br. Supp. Def.'s Mot. Summ. J. Ex. X, ECF No. 133.) Vizant approached YRC in mid-2014 to offer its services, and after a series of negotiations, the two entities executed the PSA. (PSA 5.) By the terms of the PSA, Vizant agreed to "perform an evaluation, assessment and customized analytical review" of the "Financial Payments" YRC received and "identify, indicate and quantify specific and actionable strategies and solutions" that would reduce YRC's costs associated with those payments. (PSA § 2.) In return, YRC agreed to pay Vizant a percentage of YRC's savings resulting from the strategies and solutions identified by Vizant. (PSA § 10.)

7. Under the terms of the PSA, Vizant's fee was calculated by comparing YRC's "Pre-Agreement Financial Payment Costs" with YRC's "Post-Agreement Financial Payment Costs." (PSA § 8.) If the post-agreement costs were less than the pre-agreement costs, YRC would pay

Vizant a percentage of the difference. (PSA § 8.) The PSA defined "Post-Agreement Financial Payment Costs" as the Financial Payment Costs YRC incurred "as a result of the strategies and solutions that [were] identified and recommended by Vizant in performance of its professional services[.]" (PSA § 6.)

8. On July 9, 2015, after completing an initial assessment of YRC, Vizant personnel attempted to present an in-person report on Vizant's initial recommendations to YRC management. *Vizant Techs., LLC*, 2018 NCBC LEXIS 65, at *6. Two of these recommendations included charging an account management fee for credit card transactions and convincing customers to switch from paying by credit card to paying by Automated Clearing House ("ACH") batch payments. *Id.* at *6, *23.

9. Minutes into the presentation, YRC's management stopped Vizant's employees and reminded them that YRC was already considering some of the proposed measures for lowering credit card costs. (Lopez Aff. ¶ 7, ECF No. 101.) When YRC asked if Vizant believed it was entitled to a fee for savings resulting from these measures, one of Vizant's representatives responded, "Yes." (Wilson Dep. 83:5–16, ECF No. 95; Lopez Aff. ¶ 7.) YRC then ended the meeting. (Wilson Dep. 271:11–16.) Soon thereafter, Vizant sent hard-copy and electronic versions of its Report to YRC. (Christiansen Dep. 30:1–31:25, ECF No. 122.) YRC sent Vizant a written notice of termination two months later. (Pl.'s Mem. L. Supp. Mot. Summ. J. Ex. 28, at 1, ECF No. 84.29.)

B. Procedural History

10. Vizant seeks declaratory and injunctive relief against YRC as well as damages for breach of the PSA. As part of its claimed damages, Vizant contends that it is owed outstanding fees for savings that YRC allegedly realized through successful efforts to convince customers to pay using ACH rather than credit cards (Vizant's "ACH Damages"). *Vizant Techs., LLC*, 2018 NCBC LEXIS 65, at *23.

11. On January 18, 2018, Vizant filed a motion for summary judgment. On January 19, 2018, YRC filed its cross motion for summary judgment, requesting that the Court grant summary judgment "as to [P]laintiff's claims for breach of contract." (Def.'s Mot. Summ. J. 1, ECF No. 87.) In briefing and at oral argument, each side presented the Court with its proposed interpretation of the PSA's provisions, each contending that its respective interpretation required summary judgment in its favor.

12. Vizant contended that the PSA requires YRC to pay a fee to Vizant because YRC has realized savings as a result of the strategies and

solutions identified in Vizant's report. *Vizant Techs., LLC*, 2018 NCBC LEXIS 65, at *9. Under Vizant's reading of the PSA, it does not matter whether Vizant's services actually caused YRC to implement cost-saving measures or whether YRC implemented those measures of its own accord—if Vizant identified one of the solutions that proved beneficial to YRC, Vizant argues it is owed a fee. *Id.*

13. YRC, on the other hand, asserted that the PSA only requires YRC to pay Vizant if Vizant's suggestions actually caused YRC to change business practices and realize savings. *Id.* at *10. YRC denied that it implemented any strategies based on the information in Vizant's report or presentation and thus argued that it does not owe Vizant any fee. *Id.*

14. YRC also argued that Vizant was unable to provide sufficient evidence to support its claim for ACH damages. (Def.'s Br. Supp. Mot. Summ. J. 32–33.) In particular, YRC attacked the opinions offered by one of Vizant's experts, Scott Emmanuel ("Emmanuel"), who calculated Vizant's claimed damages. *Vizant Techs., LLC*, 2018 NCBC LEXIS 65, at *23. By way of a post-discovery motion to strike, YRC asked the Court to strike Emmanuel's opinions on Vizant's claimed ACH Damages, contending that those opinions were speculative and unreliable. *Id.* In connection with its Summary Judgment Motion, YRC argued that Vizant's failure to put forward reliable evidence of ACH Damages required an entry of "judgment, as a matter of law, in YRC's favor." (Def.'s Br. Supp. Mot. Summ. J. 33.)

15. In an Opinion dated June 26, 2018, the Court made several conclusions as to the parties' summary judgment motions. First, the Court concluded that a genuine issue of material fact remained as to the interpretation of the PSA's fees provision that precluded the Court from entering summary judgment on that issue. *Vizant Techs., LLC*, 2018 NCBC LEXIS 65, at *18. Second, the Court concluded that even if YRC's interpretation of the PSA was required as a matter of law, Vizant had presented circumstantial evidence sufficient to create a question of fact as to whether YRC implemented the strategies found in Vizant's report, i.e., evidence of a sharper decline in credit card payments in the year following Vizant's report which might support Vizant's contention that YRC used the suggestions in the report. *Id.* at *19. Third, the Court concluded that questions of fact remained as to YRC's obligations to provide Vizant with certain financial data under the PSA. *Id.* at *21–22. In connection with YRC's motion to strike, the Court also concluded that Emmanuel's opinions were speculative and unreliable. *Id.* at *30. The Court then denied both sides' summary judgment motions and struck Emmanuel's opinions as to Vizant's ACH Damages. *Id.* at

*30–31. The Court did not address YRC's argument that summary judgment should be granted in its favor due to Vizant's inability to present reliable evidence of ACH Damages and made no conclusions as to the sufficiency of Vizant's evidence concerning those damages.

16. On August 6, 2018, YRC filed a motion under Rule 54(b) of the North Carolina Rules of Civil Procedure asking the Court to reconsider its June 26 Opinion. YRC asserted that the Court did not consider YRC's request for partial summary judgment as to ACH Damages and argued that the Court's decision to strike Emmanuel's opinions as to ACH Damages and Vizant's failure to offer other reliable evidence of such damages required that summary judgment be entered in YRC's favor as to that aspect of Vizant's claim.

17. Vizant argued against further consideration of its claimed ACH Damages at summary judgment. Both sides submitted briefs on YRC's motion for reconsideration, and the Court held a hearing on the matter on August 30, 2018.

18. On September 6, 2018, the Court entered an order on YRC's motion for reconsideration. The Court concluded that it was "clear that the issue of summary judgment as to Vizant's ACH Damages was properly raised and before the Court" at summary judgment and that "the Court did not address the sufficiency of Vizant's evidence as to the ACH Damages portion of Vizant's breach of contract claim or expressly consider YRC's request for summary judgment on that issue." (Order Def.'s Mot. Reconsideration ¶ 9, ECF No. 205.) Consequently, the Court concluded that YRC's motion was not a motion for reconsideration but a request that the Court decide an issue raised under Rule 56 but left unaddressed by the Court's prior decision. (Order Def.'s Mot. Reconsideration ¶ 9.)

19. Further, to the extent the Court's previous blanket denial of YRC's Summary Judgment Motion "with regard to Plaintiff's breach of contract claim," *Vizant Techs., LLC*, 2018 NCBC LEXIS 65, at *31, could be read as a ruling on YRC's request for summary judgment on the ACH Damages issue, the Court noted that North Carolina case law clearly "indicates that a trial court judge has the authority to reconsider his or her own summary judgment ruling," (Order Def.'s Mot. Reconsideration ¶ 10); *Levin v. Jacobson*, 2016 NCBC LEXIS 66, at *5 (N.C. Super. Ct. Aug. 25, 2016); *see Miller v. Miller*, 34 N.C. App. 209, 212, 237 S.E.2d 552, 555 (1977) ("An order denying summary judgment is not *res judicata* and a judge is clearly within his rights in vacating such denial."); *see also Carr v. Great Lakes Carbon Corp.*, 49 N.C. App. 631, 635, 272

S.E.2d 374, 377 (1980) ("*Miller* presented the question whether a judge who rules on a motion for summary judgment may thereafter strike the order, rehear the motion for summary judgment, and allow the motion. Such procedure does not involve one judge overruling another, and is proper under Rule 60."). The Court therefore vacated its previous denial of YRC's Summary Judgment Motion to the extent the Court's decision could be read as denying YRC's request for summary judgment as to ACH Damages. (Order Def.'s Mot. Reconsideration ¶ 10.)

20. The Court allowed Vizant a period to supplement the record before the Court and provide additional briefing as to the sufficiency of Vizant's ACH Damages at summary judgment. YRC was given an opportunity to respond to Vizant's supplemental filings. The Court reserved its right to decide whether to hold a further hearing on YRC's Summary Judgment Motion.

21. Vizant and YRC both submitted supplemental briefs and exhibits to the Court concerning Vizant's ACH Damages. The issue is ripe for resolution, and the Court elects, under the discretion afforded to it by Rule 7.4 of the General Rules of Practice and Procedure for the North Carolina Business Court, to decide this matter without a hearing.

II.

LEGAL STANDARD

22. Under Rule 56 of the North Carolina Rules of Civil Procedure, summary judgment is appropriate where there is "no genuine issue as to any material fact and . . . any party is entitled to . . . judgment as a matter of law." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 353 (2009) (quoting N.C. R. Civ. P. 56(c)). A fact is material if it "would constitute or would irrevocably establish any material element of a claim or defense." *Abner Corp. v. City Roofing & Sheetmetal Co.*, 73 N.C. App. 470, 472, 326 S.E.2d 632, 633 (1985). "[A] genuine issue is one which can be maintained by substantial evidence." *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and means more than a scintilla or a permissible inference." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (internal citations omitted).

23. "The party moving for summary judgment has the burden of showing that there is no triable issue of material fact." *Nicholson v. Am. Safety Util. Corp.*, 346 N.C. 767, 774, 488 S.E.2d 240, 244 (1997). That burden may be met "by proving that an essential element of the

opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim[.]" *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). If the moving party makes this required showing, "the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784–85, 534 S.E.2d 660, 664 (2000). All evidence is viewed in the light most favorable to the nonmoving party. *DeWitt*, 355 N.C. at 682, 565 S.E.2d at 146.

III.

ANALYSIS

24. In light of the Court's decision to strike Vizant's expert's opinions on ACH Damages, YRC contends that Vizant is unable to forecast evidence from which a factfinder could calculate Vizant's ACH Damages with reasonable certainty. Because Vizant cannot produce evidence to support this element of its breach of contract claim, YRC argues that the Court should grant partial summary judgment in YRC's favor on the issue of ACH Damages.

25. As a preliminary issue, the Court first addresses what choice of law applies to Vizant's claim. As a general rule, North Carolina courts will give a contractual choice of law provision "effect unless the chosen state has no substantial connection to the transaction and there is no other reasonable basis for the parties' choice, or the law of the chosen state violates a fundamental public policy of North Carolina." *Recurrent Energy Dev. Holdings, LLC v. SunEnergy1, LLC*, 2017 NCBC LEXIS 18, at *21–22 (N.C. Super. Ct. Mar. 7, 2017) (citing *Cable Tel Servs., Inc. v. Overland Contracting, Inc.*, 154 N.C. App. 639, 642–43, 574 S.E.2d 31, 33–34 (2002)). The parties here have expressly agreed—and neither has since disputed—that Kansas law shall control "any controversy, dispute, or claim arising out of or related to" the PSA. (PSA § 19.) Thus, Kansas law governs Vizant's breach of contract claim. *See Bayer CropScience LP v. Chemtura Corp.*, 2012 NCBC LEXIS 43, at *16 (N.C. Super. Ct. July 13, 2012).

26. In Kansas, the elements of a breach of contract claim are "(1) the existence of a contract between the parties; (2) sufficient consideration to support the contract; (3) the plaintiff's performance or willingness to perform in compliance with the contract; (4) the defendant's breach of the contract; and (5) damages to the plaintiff caused by the breach." *Stechschulte v. Jennings*, 298 P.3d 1083, 1098 (Kan. 2013). To satisfy the

damages element of the claim, a party "must not only show the injury sustained, but must also show with reasonable certainty the amount of damage suffered as a result of the injury or breach." *Venable v. Imp. Volkswagen, Inc.*, 519 P.2d 667, 674 (Kan. 1974). "A party is not entitled to recover damages not the proximate result of the breach of contract and those which are remote, contingent, and speculative in character." *State ex rel. Stovall v. Reliance Ins. Co.*, 107 P.3d 1219, 1228 (Kan. 2005) (internal quotation marks omitted). Consequently, the Supreme Court of Kansas has stated that "[i]n order for the evidence to be sufficient to warrant recovery of damages [for breach of contract] there must be some reasonable basis for computation which will enable the jury to arrive at an approximate estimate thereof." *Venable*, 519 P.2d at 674.

27. Vizant presents three arguments in opposition to YRC's request for partial summary judgment. First, Vizant argues that it has presented sufficient evidence to raise a genuine issue of material fact as to whether YRC implemented a strategy of switching customers from credit card to ACH and achieved savings as a result of that strategy. Second, Vizant argues that, even in the absence of expert testimony on the subject, it has provided sufficient evidence from which a jury could arrive at an approximate estimate of the claimed ACH Damages. Third, Vizant contends that, at the very least, it has provided the best evidence it could under the circumstances and that it should not be penalized for evidentiary deficiencies caused by YRC. The Court will address YRC's request for partial summary judgment by addressing each of these counterarguments in turn.

A. Vizant's Evidence that YRC Implemented Identified Strategies

28. Vizant's first argument in its supplemental opposition brief effectively revisits the Court's previous decision. There, the Court determined that Vizant's forecast evidence, "[w]hile circumstantial," created an issue of fact as to whether YRC implemented the strategies identified in Vizant's report and achieved savings as a result. *Vizant Techs., LLC*, 2018 NCBC LEXIS 65, at *19. Thus, in contending that it has presented enough evidence to raise a genuine issue of material fact as to whether YRC encouraged customers to switch to ACH, Vizant argues an already decided issue that YRC's request for partial summary judgment does not seek to revisit.

29. Instead, YRC's request for partial summary judgment challenges the adequacy of the evidence Vizant has put forward to show the amount of ACH Damages Vizant claims. The issue before the Court now is thus not whether Vizant can prove savings were achieved, or

even whether Vizant can prove how the savings were achieved, but rather whether Vizant can sufficiently show the amount of savings YRC achieved by convincing customers to switch to ACH. In short, the Court must decide whether Vizant's evidence provides a reasonable basis for a factfinder to arrive at an approximation of Vizant's ACH damages. *See Venable*, 519 P.2d at 674. The Court thus turns to address that issue.

B. Vizant's Evidence of ACH Damages

30. As to its ACH Damages evidence, Vizant argues that "an issue of material fact remains as to whether YRC's cost reductions must be causally linked to Vizant's recommendations in order for Vizant to recoup its fee under the PSA." (Pl.'s Supplemental Br. Opp'n YRC's Mot. Summ. J. 11 [hereinafter "Pl.'s Supplemental Br."], ECF No. 209.) "Thus," Vizant continues, "all Vizant has to show is that it did not get paid under . . . the still-to-be-interpreted terms of the PSA to demonstrate damages for purposes of summary judgment." (Pl.'s Supplemental Br. 11.) This assertion does not align with the Court's previous ruling or the law applicable to Vizant's claim.

1. The Required Causal Connection Between YRC's ACH Savings and Vizant's ACH Damages

31. In its June 26 Opinion, the Court held that an issue of fact remained as to whether Vizant's right to a fee under the PSA was contingent upon Vizant's report or recommendations causing YRC to implement the alleged program of encouraging customers to switch from credit card payments to ACH. *See Vizant Techs., LLC*, 2018 NCBC LEXIS 65, at *18. In essence, the Court found the evidence in dispute as to whether (i) the parties intended Vizant to recoup a fee for simply identifying and recommending strategies that led to savings, including strategies YRC decided to implement independently or had already implemented, or (ii) the parties intended Vizant to recoup a fee only in the event Vizant identified and recommended a new strategy to YRC and YRC ended up implementing that strategy because of Vizant's recommendation. *Id.* at *17–18. The Court concluded that the PSA was ambiguous on this issue and that evidence in the record pointed to both interpretations being reasonable. *Id.* at *14–15, *17–18.

32. In either event, the Court also determined that the PSA required a causal connection between a strategy of convincing customers to switch to ACH and YRC's savings that would be used to calculate Vizant's fee. *Id.* at *26. The Court noted that Vizant's fee was not meant to be based on any "broad, kitchen-sink savings realized after the execution of the PSA," but only on those savings YRC achieved as the result of a strategy

identified by Vizant. *Id.* Thus, Vizant may be entitled to a fee based on savings resulting from customers switching from credit card to ACH at YRC's prompting, but Vizant is not entitled to a fee simply because YRC had fewer credit-card-related costs after the PSA was executed. *See id.*

33. In sum, contrary to Vizant's current argument, Vizant must do more than show it was not paid under the PSA to recover ACH Damages. Vizant must also (i) prove that YRC achieved savings by convincing its customers to switch from credit card to ACH, *id.*, and (ii) show "with reasonable certainty the amount of damage[s]" caused by any outstanding fee linked to those savings, *Venable*, 519 P.2d at 674. The Court has concluded that Vizant has forecast adequate evidence to survive summary judgment on the first of these points, *see Vizant Techs., LLC*, 2018 NCBC LEXIS 65, at *19, but must now determine whether the same is true of the second.

2. The Sufficiency of Vizant's Forecast ACH Damages Evidence

34. YRC asserts that Vizant has not presented evidence showing the amount of cost savings YRC achieved as the result of any "switch-to-ACH" strategy. Because the source of Vizant's ACH Damages is the alleged unpaid fee tied to such savings, YRC argues Vizant cannot prove its claimed ACH Damages with any reasonable certainty. While YRC does not appear to contest that some evidence in the record shows YRC experienced a decline in the number of customers paying with credit cards following the PSA's execution, YRC contends that Vizant has failed to forecast any evidence that would allow a reasonable fact-finder to determine what portion of that overall decline resulted from YRC's efforts to cause customers to switch to ACH. YRC also argues that Vizant's evidence of general shifts in payment methods cannot account for any incentives YRC paid customers to encourage their switch to ACH, another factor YRC asserts is critical in determining the amount of money, if any, YRC actually saved from customers switching.

35. Before post-discovery dispositive motions practice in this case, Vizant's most succinct evidence addressing its claimed ACH Damages was Emmanuel's expert opinions. The Court struck Emmanuel's opinions related to ACH Damages after concluding that they were based on insufficient data, were not the product of a reliable method, and were not the product of a method that was reliably applied to the facts of the case. *Id.* at *30. The Court's conclusions were based, in part, on Emmanuel's own deposition testimony, wherein he admitted several ways his calculations could not accurately show the amount YRC saved by customers moving from credit card to ACH:

> Q: In order to calculate how much YRC saved by customers moving from credit card to ACH, you certainly ought to account for the amount that YRC paid its customers in incentives to make that move from credit card to ACH, right?
>
> A: Correct.
>
> Q: And you have not done that, have you?
>
> A: Correct.

(Emmanuel Dep. 123:24–124:6, ECF No. 90.10.)

> Q: And you have no idea whether or not what you say was a drop in Visa, MasterCard or Discover payments had anything to do with YRC encouraging a customer to pay by ACH instead of using one of those credit cards, right?
>
> A: Correct.
>
> Q: You have no idea whether those were the simple result of market forces where customers change their own . . . payment type or leave and go to a different trucking company, right?
>
> . . . .
>
> A: Correct.
>
> . . . .
>
> Q: And you don't know whether that reduction was caused by YRC implementing some recommendation that Vizant put in its report, right?
>
> A: Correct.
>
> Q: All you know is that your math tells you that there was some reduction, and who in the world knows why it happened, right?
>
> A: Correct.

(Emmanuel Dep. 111:14–112:1, 137:1–11.)

36. In short, Emmanuel did not attempt to discern what portion of the decrease in YRC's credit-card-related costs was due to customers switching to ACH; he simply assumed that each dollar saved should be attributed to a customer switching. The Court therefore concluded that

Emmanuel's opinions on ACH Damages were unreliable under North Carolina Rule of Evidence 702(a) and should be struck:

> Under Emmanuel's calculation, as described by his own testimony, true savings caused by YRC's customers switching to ACH payments and other factors leading to a reduction in customers paying with credit cards—for example, a reduction in credit card payments due to lost business—would all have been counted as savings for which YRC owed Vizant a fee. . . . This calculation (i) does not abide by the formula in the PSA, which requires a comparison of pre-agreement costs to post-agreement costs resulting from strategies identified by Vizant, (ii) rests on unjustifiable assumptions, and (iii) could mislead a jury into awarding Vizant damages for what was in reality a loss in YRC's business.

Vizant Techs., LLC, 2018 NCBC LEXIS 65, at *29.

37. The Court's previous analysis of Emmanuel's ACH Damages opinions is pertinent to the matter *sub judice* because Vizant's remaining evidence of ACH Damages suffers from the same flaws. All of Vizant's evidence shows nothing more than a net decrease in credit-card-related costs in the months and years following the PSA and a net trend towards increasing ACH payments. Simply put, Vizant has no evidence that can reasonably approximate what, if any, reduction in YRC's credit card costs is attributable to encouraging customers to switch to ACH.

38. For example, the previously presented chart appearing at the top of page seven of Vizant's supplemental brief (the contents of which remain under seal) shows a general shift towards a greater number of ACH payments and fewer credit card payments during the years 2014–2017, but the total number of each kind of transaction oscillates considerably over that time-span. (Pl.'s Supplemental Br. 7.) The chart provides a factfinder with nothing more than Emmanuel's previously stricken opinions and invites jurors to engage in the same speculative analysis by attempting to discern, without any identifiable framework, what percentage of the shown changes occurred due to YRC encouraging customers to switch payment methods.

39. Vizant's supplementation of the record provides no additional evidence to remedy this problem. Along with its supplemental brief, Vizant submitted twelve YRC-produced spreadsheets in pdf and Excel format ("Exhibits 1–12"). Vizant gives little explanation to assist the

Court in navigating these spreadsheets, but contends that Exhibits 1 and 5 represent "the monetary impact of YRC's 2015 ACH initiative within each of YRC's operating companies," (Pl.'s Supplemental Br. 12), and that Exhibits 4 and 5 show YRC's subsidiaries' revenues by payment type, (Pl.'s Supplemental Br. 14). Vizant asserts that it "can argue that YRC's own evidence [shows] the monetary impact of its ACH initiative . . . within the company" and that this "is a reasonable basis on which to calculate the [ACH Damages] figure." (Pl.'s Supplemental Br. 12.) The Court has reviewed each spreadsheet and disagrees.

40. Exhibits 2 and 3 showcase information on YRC's subsidiaries' top credit card accounts for May 2016 (*See* Pl.'s Supplemental Br. Exs. 2–3, ECF No. 209.1.) These exhibits do not present any information that would aid a jury in determining whether customers switched from credit card to ACH or, if so, why they switched. Exhibits 4 and 5 summarize YRC's revenue and deposits by month from 2013–2017. (*See* Pl.'s Supplemental Br. Exs. 4–5, ECF No. 209.1.) These spreadsheets track the change in deposits by payment type per month for YRC and its subsidiaries, but still provide no explanation for any changes. Exhibit 6 shows the percentage of YRC's total deposits that were attributable to credit cards from 2006–2011. (*See* Pl.'s Supplemental Br. Ex. 6, ECF No. 209.2.) This exhibit provides no explanation for changes in credit card deposits over time and is outside the time-period relevant for this case.

41. Exhibits 7 and 8 show YRC's credit card revenues broken down by major credit card company and report YRC's credit card fees for the years 2010–2014. (*See* Pl.'s Supplemental Br. Exs. 7–8, ECF No. 209.2.) Exhibit 9 reports credit card revenue per major credit card company for YRC's subsidiaries from October 2015–January 2016. (*See* Pl.'s Supplemental Br. Ex. 9, ECF No. 209.2.) Exhibits 10, 11, and 12 break down credit card revenue for YRC and its subsidiaries by month in 2014, 2016, and 2017 respectively. (*See* Pl.'s Supplemental Br. Exs. 10–12, ECF No. 209.3.) None of these spreadsheets illuminate whether customers switched from credit card payments to ACH or why they switched.

42. Vizant contends that Exhibit 1 to its supplemental brief, an Excel spreadsheet Vizant labeled "ACH Migration Program Impact Sheet," shows the monetary impact of YRC's 2015 "ACH initiative." (Pl.'s Supplemental Br. 12; Index Supp. Materials for Pl.'s Supplemental Br. 1, ECF No. 209.1; Pl.'s Supplemental Br. Ex. 1, ECF No. 209.1.) YRC, however, argues that this representation is false and based solely on Plaintiff's counsel's interpretation of Exhibit 1. According to YRC, Exhibit 1 is actually an unused template created by Abraham Bailin

("Bailin"), the finance manager of one of YRC's subsidiaries. (Bailin Aff. ¶¶ 2, 4, 6, ECF No. 213.2.)

43. In an affidavit submitted to the Court with YRC's supplemental brief, Bailin states that he never labeled Exhibit 1 "ACH Migration Program Impact Spreadsheet" and that Vizant created that title. (Bailin Aff. ¶ 4.) Bailin also states that Vizant's characterization of Exhibit 1 is incorrect. (Bailin Aff. ¶ 5.) Bailin testifies that he created Exhibit 1 in mid-2016 upon YRC's request and that Exhibit 1 "does not provide any information about any actual results of any effort to convince customers to pay by ACH instead of by credit card." (Bailin Aff. ¶ 6.) Instead, according to Bailin's understanding, Exhibit 1 was meant to forecast the financial impact of a scenario in which YRC "essentially mandate[d] that customers . . . stop paying by credit card." (Bailin Aff. ¶ 11.) Bailin states that upper management rejected that strategy and that, to the best of his knowledge, Exhibit 1 was never used to forecast the financial impact of any program that was actually implemented. (Bailin Aff. ¶ 11.)

44. According to Bailin—with the exception of the revenue and accounts receivable figures from May 2015–April 2016; the April and May 2016 top credit card account figures; credit card revenue figures from January 2015–June 2016; and the payment terms YRC had with certain third-party logistics companies—the entirety of the figures contained in Exhibit 1 are forecast numbers, placeholder variables Bailin created to build the model, or figures the model generated by processing actual figures and placeholder variables. (Bailin Aff. ¶¶ 7, 8 14.) If YRC actually used Exhibit 1, Bailin states, "it would have been up to the user" to input new figures based on known or assumed statistics. (Bailin Aff. ¶¶ 14–16.)

45. The Court has reviewed Exhibit 1's contents and concludes that they corroborate Bailin's affidavit testimony. First of all, Exhibit 1 makes the assumption that 100% of the operating revenue eligible to move from credit card payments to some other form of payment would do so, (Pl.'s Supplemental Br. Ex. 1), an assumption that would not conceivably play out in the real world. Further, while the Court must view the facts on YRC's Summary Judgment Motion in the light most favorable to Vizant, the Court cannot ignore the disparity between YRC's characterization of Exhibit 1, which is supported by an affidavit, and Vizant's description of Exhibit 1, which is supported by nothing more than counsel's argument in Vizant's supplemental brief. In light of this lack of evidentiary support for Vizant's interpretation of Exhibit 1, the Court concludes that Exhibit 1 does not provide any information from which a factfinder

could reasonably approximate Vizant's ACH Damages. *See Cone v. Cone*, 50 N.C. App. 343, 347, 274 S.E.2d 341, 343–44 (1981) ("When a party, in a motion for summary judgment, presents an argument or defense supported by facts which would entitle him to judgment as a matter of law, the party opposing the motion 'must present a forecast of the evidence which will be available for presentation at trial and which will tend to support his claim for relief.' " (quoting *Best v. Perry*, 41 N.C. App. 107, 110, 254 S.E.2d 281, 284 (1979))); *Huss v. Huss*, 31 N.C. App. 463, 466, 230 S.E.2d 159, 161–62 (1976) ("On a motion for summary judgment[,] the court may consider evidence consisting of affidavits, depositions, answers to interrogatories, admissions, documentary materials, facts which are subject to judicial notice, and any other materials which would be admissible in evidence at trial."); *see also Ronald G. Hinson Elec., Inc. v. Union Cty. Bd. of Educ.*, 125 N.C. App. 373, 379, 481 S.E.2d 326, 330 (1997) (noting that unsworn statements by a party's attorney are not considered evidence at trial).

46. The testimony of Patrick Moran ("Moran"), another of Vizant's designated experts, does nothing to remedy the problems with Vizant's evidence. Moran testified that YRC's increase in ACH payments and decrease in credit card payments went against industry trends because market data showed credit card usage increasing. (Moran Dep. 153:1–21, ECF No. 209.5.) Moran also testified that he believed a loss in business could not account for the total decrease in credit card payments YRC experienced. (Moran Dep. 153:22–154:19.) This evidence goes to whether YRC was encouraging customers to switch to ACH but provides nothing from which a reasonable factfinder could begin to approximate what part of YRC's savings resulted from any such effort.

47. Further, YRC is correct that none of the above-mentioned evidence would allow a jury to "account for the amount that YRC paid its customers in incentives to make that move from credit card to ACH," a consideration that Vizant's own expert agrees is necessary to calculate YRC's savings. (Emmanuel Dep. 123:24–124:6.) None of Vizant's evidence, with the exception of Exhibit 1's placeholder variables, addresses any financial incentives, real or forecast, associated with YRC encouraging customers to switch to ACH. While this aspect of the ACH Damages calculation may be more nuanced than those issues already discussed, it showcases yet another way Vizant's proffered evidence provides no details about what savings YRC actually realized or may have realized as a result of switching customers to ACH.

3. Vizant's Contentions of the "Best Evidence Available"

48. Vizant's third and final argument asserts that "[a]ny difficulties in calculating damages from [the submitted] data is a result of the manner [in which] YRC itself maintains the data, not Vizant's failure to bring forth sufficient evidence" and that YRC's inability to track shifts from credit card payments to ACH payments "cannot serve as a basis for granting YRC summary judgment." (Pl.'s Supplemental Br. 15.) To support this assertion that it "should not be penalized" for YRC's failure to "keep necessary records," (Pl.'s Supplemental Br. 13), Vizant cites *New Dimensions Products, Inc. v. Flambeau Corp.*, 844 P.2d 768 (Kan. Ct. App. 1993). That case, however, is inapposite.

49. In *New Dimensions*, a defendant with "exclusive control over all the records" useful in calculating damages "consistently denied" that such records existed until the first day of a bench trial. *Id.* at 771, 774. The trial court ordered the records to be produced, allowed the plaintiff to introduce the evidence, and sanctioned the defendant. *Id.* at 771. The evidence finally admitted was imperfect, and the trial court made certain inferences and assumptions in calculating parts of the plaintiff's damages for which no evidence existed. *See id.* at 771–72, 774. The trial court's award was affirmed as an exercise of its equitable power to make the plaintiff whole by resolving the question of damages "on the best evidence available." *Id.* at 771–73; *see also Gillespie v. Seymour*, 823 P.2d 782, 797 (Kan. 1991) ("In assessing damages it is within the discretion of the trial court to apply equitable standards in order that the plaintiff may be made whole.")

50. In contrast to *New Dimensions*, here there is no evidence YRC failed to keep necessary records or wrongfully refused to produce records to Vizant. YRC's inability to track figures that would easily show Vizant's ACH Damages did not emerge suddenly when the possibility of litigation seemed imminent. Indeed, Vizant's supplemental evidence reveals a conversation taking place months before the companies' relationship fell apart in which YRC personnel discuss their inability to track per-customer credit-card-to-ACH changes. (Pl.'s Supplemental Br. Ex. 24, at 1, ECF No. 209.4.) The Court will not relieve Vizant of its burden to prove its case simply because YRC did not keep records that may be convenient to proving that case. *Belot v. Unified Sch. Dist. No. 497*, 4 P.3d 626, 629 (Kan. Ct. App. 2000) ("The burden of proving the damages rests on the plaintiff.").

51. Furthermore, YRC is not the only entity with access to data that would have been useful to Vizant in making its damages case. During

discovery, YRC produced multiple documents to Vizant listing YRC's top credit card customer accounts at various points in time. (*See* Pl.'s Supplemental Br. Exs. 2, 9.) Each of these customers likely would have possessed data on their methods of paying YRC and would have been the best source for evidence tending to show *why* customers switched from credit card to ACH, i.e., whether they did so because of a YRC strategy or because of convenience, market forces, changes in credit card benefits, or other factors. Despite this, the record before the Court does not show any attempt by Vizant to obtain discovery from these nonparties. The Court does not believe Vizant is entitled to an equitable easing of its burden of proof in such circumstances. *See New Dimensions*, 884 P.2d at 774 (stating that evidence is sufficient where it "shows the extent of the damages as a matter of just and reasonable inference," but reaffirming that "damages may not be determined by mere speculation or guess" (quoting *Vanguard Ins. Co. v. Connett*, 270 F.2d 868, 870 (10th Cir. 1959))).

52. In sum, none of the evidence Vizant presents to the Court would "enable the jury to arrive at an approximate estimate" of Vizant's ACH Damages. *See Venable*, 519 P.2d at 674. At most, the forecast evidence shows that YRC's credit card revenue and credit-card-related costs decreased in the months following the execution of the PSA and that YRC's ACH revenue increased. While Vizant argues that "these records are sufficient to allow a jury to arrive at a reasonable calculation of Vizant's damages, including the ACH subcategory," (Pl.'s Supplemental Br. 15), without any evidence allowing a factfinder to even begin to discern what portion of YRC's reduced credit card costs may have been tied to YRC's efforts to switch customers to paying by ACH, presenting the current record to a jury and asking it to approximate the claimed ACH Damages would be asking jurors to engage in the same speculation that formed the basis for Emmanuel's unreliable opinions. Kansas law does not allow for Vizant to recover damages on such evidence. *See Reliance Ins. Co.*, 107 P.3d at 1228 ("A party is not entitled to recover damages not the proximate result of the breach of contract and those which are remote, contingent, and speculative in character." (internal quotation marks omitted)).[2]

---

2. The Court notes that its conclusion herein would be identical under North Carolina law, which provides that "the party seeking damages must show that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty." *Olivetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 547–48, 356 S.E.2d 578, 586 (1987).

53. In light of the above, the Court concludes that YRC has met its burden on summary judgment by showing that Vizant cannot produce evidence to support its claimed ACH Damages. Vizant has failed to respond with a forecast of evidence demonstrating specific facts to prove this element of its breach of contract claim at trial. The Court therefore concludes that summary judgment should be granted in YRC's favor as to Vizant's claimed ACH Damages. *See Gaunt*, 139 N.C. App. at 784–85, 534 S.E.2d at 664.

IV.

CONCLUSION

54. **WHEREFORE**, the Court hereby **AMENDS** its June 26, 2018 Order and Opinion on Cross Motions for Summary Judgment and Defendant's Motion to Strike and **ORDERS** as follows:

a. YRC's Cross Motion for Summary Judgment is **GRANTED in part**. Vizant shall not recover damages relating to savings YRC purportedly achieved as a result of any strategy aimed at causing customers to switch from credit card payments to ACH payments.

b. YRC's Cross Motion for Summary Judgment is otherwise **DENIED** with regard to Vizant's breach of contract claim.

c. Except as otherwise stated herein, the Court's decisions in its June 26, 2018 Order and Opinion are unaffected by this ruling.

SO ORDERED, this the 15th day of November, 2018.[3]

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge

3. This Order and Opinion was originally filed under seal on November 15, 2018. This public version of the Order and Opinion is being filed on November 19, 2018. Because this public version of the Order and Opinion does not contain any substantive changes from the version filed under seal as to constitute an amendment, and to avoid confusion in the event of an appeal, the Court has elected to state the filing date of the public version of the Order and Opinion as November 15, 2018.

IN RE C.N.

[373 N.C. 568 (2020)]

IN THE MATTER OF C.N., A.N.	)	From New Hanover County

No. 381P19

ORDER

Upon consideration, petitioners New Hanover County Department of Social Services and Guardian *ad Litem*'s "Petition for Writ of Certiorari" is allowed for the limited purpose of remanding to the Court of Appeals to reconsider its holding in light of *In re B.O.A.*, 831 S.E.2d 305, 311–12 (N.C. 2019) (stating that our termination of parental rights statutes contemplate the trial court's ability to evaluate and remediate "direct and indirect underlying causes of the juvenile's removal from the parental home"). *See also In re D.W.P. and B.A.L.P.*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2020) (No. 140A19) (discussing the need for a court to be able to review all applicable evidence, including historical facts and evidence of changed conditions, to evaluate the probability of future neglect).

By Order of the Court in Conference, this 26th day of February, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of February 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

IN RE R.A.B.

[373 N.C. 569 (2020)]

IN THE MATTER OF R.A.B.	)	From Moore County

No. 402A19

ORDER

On 11 July 2019, the District Court, Moore County terminated respondent-father's paternal rights, and respondent gave notice of appeal on 31 July 2019. In his notice of appeal, respondent designated the Court of Appeals as the reviewing court rather than this Court. This Court allows respondent's petition for writ of certiorari that recognizes this Court is now statutorily designated to hear the appeal. This Court denies petitioners' motion to dismiss the appeal. Because counsel for respondent has filed a no-merit brief with this Court, this Court allows respondent-father to file a pro se appellant brief with this Court due on 20 January 2020. Should respondent choose to file pro se appellant brief, petitioners' appellee brief will be due on 19 February 2020. Should respondent wish to file a reply brief, the reply brief will be due on 5 March 2020.

By order of the Court in Conference, this 20th day of December, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 20 day of December, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

IN RE S.D.C.

[373 N.C. 570 (2020)]

IN THE MATTER OF S.D.C.	)	Guilford County

No. 229A19

ORDER

The Court, acting on its own motion, amends the record on appeal that was filed in this case by including page 3 of the Juvenile Petition (Abuse/Neglect/Dependency) filed on 15 December 2016, which is the first page of Exhibit A to the Juvenile Petition. This page appears to have been inadvertently omitted from the version of the record on appeal that was submitted for the Court's consideration in this case.

By order of the Court in Conference, this 10th day of January, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of January, 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

STATE v. BETTS

[373 N.C. 571 (2020)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Forsyth County
	)	
ERVAN L. BETTS	)	

No. 376A19

ORDER

Defendant's petition for discretionary review as to additional issues is decided as follows: defendant's petition is allowed with respect to Issue Nos. 1a and 1b. Except as otherwise allowed, defendant's petition is denied.

By order of the Court in conference, this the 26th day of February 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of February 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~M.C. Hackney~~

~~Assistant~~ Clerk, Supreme Court of North Carolina

STATE v. CAREY

[373 N.C. 572 (2020)]

STATE OF NORTH CAROLINA	)	1. DEFENDANT'S MOTION TO STRIKE THE ADDENDUM TO THE NEW BRIEF FOR THE STATE
v.	)	
ADAM RICHARD CAREY	)	2. STATE'S REQUEST FOR COURT TO TAKE JUDICIAL NOTICE
	)	3. STATE'S ALTERNATIVE REQUEST FOR REMAND

No. 293A19

SPECIAL ORDER

Defendant's motion to strike the addendum to the new brief for the State is granted as to all portions of the addendum except the unpublished opinion. Inclusion of that material is permitted by Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure. The State's request for the Court to take judicial notice is denied. The State's alternative request for remand is not ruled on at this time.

By order of the Court in Conference, this the 12th day of December, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 12th day of December, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. CLEGG

[373 N.C. 573 (2020)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Wake County
	)	
CHRISTOPHER ANTHONY CLEGG	)	

No. 101PA15-3

ORDER

Defendant's supplemental petition for discretionary review is decided as follows: defendant's supplemental petition is allowed for the purpose of affording plenary review of the issues raised in that petition. Defendant's request for summary reversal is denied.

By order of the Court in conference, this the 26th day of February 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of February 2020.

AMY FUNDERBURK
Clerk, Supreme Court
of North Carolina

s/Amy Funderburk
~~M.C. Hackney~~

~~Assistant~~ Clerk, Supreme Court of
North Carolina

STATE v. GROOMS

[373 N.C. 574 (2020)]

STATE OF NORTH CAROLINA	)	1. DEFENDANT'S PETITION FOR
	)	*WRIT OF CERTIORARI* TO
v.	)	REVIEW ORDER OF
	)	SUPERIOR COURT,
TIMMY EUVONNE GROOMS	)	SCOTLAND COUNTY
	)	
	)	2. DEFENDANT'S MOTION
	)	FOR LEAVE TO FILE REPLY
	)	IN SUPPORT OF PETITION
	)	FOR *WRIT OF CERTIORARI*
	)	**Allowed 2/3/2020**
	)	
	)	3. DEFENDANT'S MOTION TO
	)	ALLOW COUNSEL TO
	)	WITHDRAW AND AUTHORIZE
	)	IDS TO APPOINT
	)	SUBSTITUTE COUNSEL
	)	**Allowed 2/3/2020**

No. 39A99-2

SPECIAL ORDER

Defendant's petition for writ of certiorari to review the order of the Superior Court, Scotland County, is allowed. The 31 October 2018 order of the Superior Court denying defendant's motion for appropriate relief is hereby vacated and the case is remanded to the Superior Court for consideration of the claims in defendant's motion for appropriate relief consistent with N.C.G.S. § 15A-1420. On remand, the Superior Court is instructed to conduct an evidentiary hearing for all claims which would entitle the defendant to relief if the assertions of fact presented are assumed to be true. *See State v. McHone*, 348 N.C. 254, 258, 499 S.E.2d 761, 763 (1998).

By order of the Court in Conference, this the 26th day of February, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of February, 2020.

AMY FUNDERBURK
Clerk, Supreme Court
of North Carolina

s/Amy Funderburk
~~Assistant~~ Clerk

STATE v. WALTON

[373 N.C. 576 (2020)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Chowan County
	)	
SHAKITA NECOLE WALTON	)	

No. 311PA18

ORDER

Defendant's Motion to Dismiss State's Appeal as Moot is decided as follows:

Defendant's motion to dismiss the State's appeal is allowed, the State's appeal is dismissed as moot, and the opinion filed by the Court of Appeals in this case on 4 September 2018 reversing and remanding the trial court's order revoking defendant's probation and activating defendant's suspended sentences is vacated.

By order of the Court in conference, this the 5th day of February 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of February 2020.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

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

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

28 FEBRUARY 2020

1P20	State v. Lamerick Blackwell	Def's Pro Se Motion for Petition to Be Removed from the Sex Offender Registry	Dismissed
2P20	State v. James Robert Graham	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court (COAP19-829)	Dismissed
3A20	State v. Bryan Xavier Johnson	1. Def's Motion for Temporary Stay (COA19-96) 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Dissent	1. Allowed **01/07/2020** 2. 3.
4P20-1	Desmond Gayle and Georgeann Gayle v. Desmond Gayle, Jr. and Siamiramys J. Gayle	1. Plts' Pro Se Motion to Stay Order Dismissing Appeal and Denial (COA19-464) 2. Plts' Pro Se Motion to Stay Order Granting Child Custody 3. Plts' Pro Se Petition for Writ of Supersedeas	1. Denied **01/08/2020** 2. Denied **01/08/2020** 3. Dismissed **01/08/2020**
4P20-2	Desmond Gayle and Georgeann Gayle v. Desmond Gayle, Jr. and Siamiramys J. Gayle	1. Plts' Pro Se Motion to Reconsider Motion to Stay Order Dismissing Appeal and Denial 2. Plts' Pro Se Motion to Reconsider Motion to Stay Order Granting Child Custody 3. Plts' Pro Se Motion to Reconsider Petition for Writ of Supersedeas 4. Plts' Pro Se Notice of Appeal Based Upon a Constitutional Question 5. Plts' Pro Se Motion to Stay the Order Dismissing Appeal and Denial 6. Plts' Pro Se Motion to Stay the Order Granting Child Custody 7. Plts' Pro Se Petition for Writ of Certiorari to Review Order of the COA	1. Dismissed **01/17/2020** 2. Dismissed **01/17/2020** 3. Dismissed **01/17/2020** 4. Dismissed *ex mero motu* **01/17/2020** 5. Dismissed 01/17/2020 6. Dismissed **01/17/2020** 7. Denied **01/17/2020**
6A19	State v. Patrick Mylett	Amicus Curiae's (Pennsylvania Center for the First Amendment) Motion for Leave to Participate in Oral Argument	Allowed **12/16/2019**

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8A20	State v. Harley Aaron Allen	1. State's Motion for Temporary Stay (COA18-1150) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **01/07/2020** 2. Allowed **01/24/2020** 3. ---
9P20	State v. Ronald Bruce Frazier, Jr.	Def's Pro Se Motion for Pretrial Release	Dismissed **01/13/2020**
10A20	In the Matter of S.E.T.	Respondent-Father's Petition for Writ of Certiorari to Review Order of District Court, Henderson County	Allowed **02/20/2020**
13P20	State v. James Alton Willis, Jr.	Def's Petition for Writ of Mandamus (COA18-507)	Denied **01/17/2020**
26P20	State v. Michael T. Sutton	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP19-815)	Denied **01/17/2020**
39A99-2	State v. Timmy Euvonne Grooms	1. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Scotland County 2. Def's Motion for Leave to File Reply in Support of Petition for Writ of Certiorari 3. Def's Motion to Allow Counsel to Withdraw and Authorize IDS to Appoint Substitute Counsel	1. Special Order 2. Allowed **02/03/2020** 3. Allowed **02/03/2020**
40P20	State v. Leonard Paul Schalow	1. State's Motion for Temporary Stay (COA19-215) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/27/2020** 2. 3. **Davis, J., recused**
42P20	In re Robert T. Sigler	Petitioner's Pro Se Petition for Writ of Mandamus (COAP20-37)	Denied **02/06/2020**
45P07-5	State v. Terry Gilmore	1. Def's Pro Se Motion for PDR Under N.C.G.S. § 7A-31 (COA07-600; COAP09-294; COAP19-110) 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot **Ervin, J., recused**

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46A20	In the Matter of O.K.W.	1. Respondent-Mother's Motion to Withdraw Appeal 2. Respondent-Mother's Motion to Waive Costs	1. Allowed **02/12/2020** 2. Allowed **02/12/2020**
48P20	State v. Lyneil Antonio Washington, Jr.	1. Def's Motion for Temporary Stay (COA19-547) 2. Def's Petition for Writ of Supersedeas	1. Allowed **02/06/2020** 2.
49A20	State v. Faye Larkin Meader	1. Def's Motion for Temporary Stay (COA19-554) 2. Def's Petition for Writ of Supersedeas	1. Allowed **02/07/2020** 2.
51P20	Sarah E. Riopelle (Cooper), Plaintiff v. Jason B. Riopelle, Defendant v. Lindsey and Avery Fuller, Intervenors	1. Def's Pro Se Motion for Temporary Stay (COA19-241) 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA	1. Denied **02/10/2020** 2. 3.
55P19-2	Ashley D. Carney v. Wake County Sheriff's Office	Plt's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-1299)	Denied
59P19	State v. Flora Riano Gonzalez	Def's PDR Under N.C.G.S. § 7A-31 (COA18-228)	Denied
70P17-2	Francisco Fagundes and Desiree Fagundes v. Ammons Development Group, Inc.; East Coast Drilling & Blasting, Inc.; Scott Carle; and Juan Albino	Def's (Ammons Development Group, Inc.) PDR Under N.C.G.S. § 7A-31 (COA17-1427)	Denied **Davis, J., recused**
70P20	Kanish, Inc. v. Kay F. Fox Taylor and Calvin Taylor	1. Plt's Motion for Temporary Stay (COA19-482) 2. Plt's Petition for Writ of Supersedeas 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/20/2020** 2. 3.
71A20	State v. Brandon Scott Goins	1. State's Motion for Temporary Stay (COA19-288) 2. State's Petition for Writ of Supersedeas	1. Allowed **02/20/2020** 2.

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73A20	State v. Molly Martens Corbett and Thomas Michael Martens	1. State's Motion for Temporary Stay (COA18-714) 2. State's Petition for Writ of Supersedeas	1. Allowed **02/24/2020** 2. **Davis, J., recused**
76P10-2	State v. Roderick Demain Gatling	1. Def's Pro Se Motion for Release from Unlawful Incarceration (COA09-735) 2. Def's Pro Se Motion for Avernment of Jurisdiction and Federal-Question Jurisdiction	1. Denied **12/11/2019** 2. Denied **12/11/2019**
79P19-2	William James v. Rumana Rabbani	1. Plt's Pro Se Petition for Writ of Prohibition (COAP19-156) 2. Plt's Pro Se Petition for Writ of Mandamus	1. Dismissed **01/28/2020** 2. Dismissed **01/28/2020**
91P14-7	State v. Salim Abdu Gould	Def's Pro Se Motion for Stay (COA18-425)	Dismissed **12/20/2019** **Davis, J., recused**
101PA15-3	State v. Christopher Anthony Clegg	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-76) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. Motion for Leave to File Supplemental PDR 5. Def's Supplemental PDR	1. --- 2. Special Order **08/14/2018** 3. Allowed **08/14/2018** 4. Special Order **09/25/2019** 5. Special Order
115A04-3	State v. Scott David Allen	Def's Motion for Extension of Time to File Brief	Allowed **01/17/2020**
115A04-3	State v. Scott David Allen	Def's Motion to File Under Seal	Allowed **01/21/2020**
120P19	Sandra J. Donnell-Smith and Husband, Langston Smith v. Russell E. McLean, Unmarried, et al.	Respondent's PDR Under N.C.G.S. § 7A-31 (COA18-613)	Denied

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163A15-2	Ivan McLaughlin and Timothy Stanley v. Daniel Bailey, in his individual and official capacity as Sheriff of Mecklenburg County, and Ohio Casualty Insurance Company	1. Plt's (Timothy Stanley) Notice of Appeal Based Upon a Constitutional Question (COA18-665) 2. Plt's (Timothy Stanley) PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal 4. North Carolina and Southern States Police Benevolent Associations' Motion for Leave to File Amicus Brief in Support of PDR	1. --- 2. Denied 3. Allowed 4. Denied **Ervin, J., recused**
168A19	Cardiorentis AG v. IQVIA Ltd. and IQVIA RDS, Inc.	Plt's Petition in the Alternative for Writ of Certiorari to Review Order of Business Court	Dismissed as moot
181PA15-2	Justin Lloyd v. Daniel Bailey, in his individual and official capacity as Sheriff of Mecklenburg County, and Ohio Casualty Insurance Company	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA18-666) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal 4. North Carolina and Southern States Police Benevolent Associations' Motion for Leave to File Amicus Brief in Support of PDR	1. --- 2. Denied 3. Allowed 4. Denied
200P07-9	Kenneth Earl Robinson v. Hon. Charlton L. Allen, James C. Gillen, Kenneth L. Goodman	Petitioner's Pro Se Petition for Writ of Mandamus	Denied **01/30/2020**
208P19	State v. Bryant Lamont Brown	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA18-1044) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
228P07-2	State v. Raymond C. Marshall	Def's Pro Se Motion to Re-Hear	Dismissed **02/05/2020**
229A19	In the Matter of S.D.C.	Motion to Amend Record on Appeal	Special Order **01/10/2020**
233P14-3	State v. Domenico Alexander Lockhart	1. Def's Pro Se Motion for PDR Under N.C.G.S. § 7A-31 (COAP19-160) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed **Ervin, J., recused** **Davis, J., recused**

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251P16-2	Kimarlo Ragland v. Nash-Rocky Mount Board of Education	Petitioner's Pro Se Motion to Revive, Reinstate, and Reconsider (COA15-862)	Dismissed
252PA14-3	State v. Thomas Craig Campbell	Def's Motion to Vacate Restitution Order and Remand for Resentencing	Dismissed without prejudice **12/20/2019**
254P18-2	State v. Jimmy A. Sevilla-Briones	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County (COAP17-645) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel 4. Def's Pro Se Motion for PDR	1. Dismissed **01/15/2020** 2. Allowed **01/15/2020** 3. Dismissed as moot **01/15/2020** 4. Denied **01/15/2020**
256P16-4	State v. Jonathan James Newell	Def's Pro Se Motion for Notice of Appeal (COAP16-233)	Dismissed **12/09/2019**
267PA19	Winston Affordable Housing, L.L.C., d/b/a Winston Summit Apartments v. Deborah Roberts	1. North Carolina Justice Center, Yale Law School Housing Clinic, and Disability Rights North Carolina's Motion for Leave to File Amicus Brief (COA18-553) 2. Amicus Curiae's Motion to Admit J.L. Pottenger, Jr. Pro Hac Vice 3. Amicus Curiae's Amended Motion to Admit J.L. Pottenger, Jr. Pro Hac Vice	1. Allowed **12/20/2019** 2. Dismissed as moot **12/20/2019** 3. Allowed **12/20/2019** **Davis, J., recused**
271A18	State ex rel. Utilities Commission v. Attorney General	Parties' Joint Motion to Extend Time for Oral Argument	Allowed **02/11/2020**
274P11-3	Jorge Galeas-Menchu, Jr. v. Dennis M. Daniels, Warden Pasquotank Correctional	1. Petitioner's Pro Se Petition for Writ of Mandamus (COAP11-423) 2. Petitioner's Pro Se Petition for Writ of Habeas Corpus	1. Denied **02/20/2020** 2. Dismissed **02/20/2020**
277P18-7	State v. Gabriel Adrian Ferrari	1. Def's Pro Se Motion to Review Appeal Order to Dismiss (COA98-724) 2. Def's Pro Se Motion of Protest	1. Dismissed 2. Dismissed

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290PA15-2	State v. Jeffrey Tryon Collington	1. Def's Pro Se Motion for Notice and Petition by Debtor Requesting and Demanding an Order for Release from Prison and Discharge from Imprisonment	1. Dismissed **12/11/2019**
291P19	State v. Harvey Lee Stevens, Jr.	1. Def's Motion for Temporary Stay (COA17-584)	1. Allowed **08/01/2019** Dissolved **02/26/2020**
		2. Def's Petition for Writ of Supersedeas	2. Denied
		3. Def's PDR Under N.C.G.S. § 7A-31	3. Denied
293A19	State v. Adam Richard Carey	1. State's Motion for Temporary Stay (COA18-1233)	1. Allowed **08/05/2019**
		2. State's Petition for Writ of Supersedeas	2. Allowed **08/21/2019**
		3. State's Notice of Appeal Based Upon a Dissent	3. --- **09/25/2019**
		4. Def's Motion to Strike the Addendum to the New Brief for the State	4. Special Order **12/12/2019**
		5. State's Motion for Court to Take Judicial Notice	5. Special Order **12/12/2019**
		6. State's Motion in the Alternative for Remand	6. Dismissed as moot
299A19	In the Matter of S.M.M.	Respondent-Attorney's Motion to Withdraw as Appellate Counsel	Denied **02/20/2020**
303A19	In the Matter of N.G.	Respondent-Father's Petition for Writ of Certiorari to Review Order of District Court, New Hanover County	Denied **01/23/2020**
304P19	State v. Randy Steven Cagle	Def's PDR Under N.C.G.S. § 7A-31 (COA18-720)	Denied
309A19	In the Matter of J.L.	The Parties' Joint Motion to Dismiss Appeal	Special Order **01/23/2020**

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311PA18	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 4. Def's Motion to Allow Counsel to be Withdrawn and for Appellate Defender to Assign Additional Counsel 5. Def's Motion to Dismiss Appeal as Moot	1. Allowed **09/20/2018** 2. Allowed **01/30/2019** 3. Allowed **01/30/2019** 4. Allowed **02/04/2019** 5. Special Order **02/05/2020**
311A19	State v. Ricky Franklin Charles	1. Def's Motion to Waive Oral Argument (COA18-945) 2. Def's Motion in the Alternative for Court to Dispose of Case Pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure	1. Allowed **01/13/2020** 2. Dismissed as moot **01/13/2020**
315PA18-2	Roy A. Cooper, III, Individually and in his official capacity as Governor of the State of North Carolina v. Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives; Charlton L. Allen, in his official capacity as Chair of the North Carolina Industrial Commission; and Yolanda K. Stith, in her official capacity as Vice-Chair of the North Carolina Industrial Commission	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA18-943) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal	1. Retained 2. Allowed 3. Denied

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322P19	Thomas Raymond Walsh, M.D. and James Dasher, M.D. v. Cornerstone Health Care, P.A.	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA18-925) 2. Def's Motion to Dismiss PDR 3. Plts' Petition for Writ of Certiorari to Review Decision of the COA	1. Denied 2. Dismissed as moot 3. Dismissed as moot
325PA18	Albert S. Daughtridge, Jr. and Mary Margret Holloman Daughtridge v. Tanager Land, LLC	1. Def's Motion to Stay the Execution of the Opinion of the Court (COA17-554) 2. Def's Petition for Rehearing	1. Allowed **12/23/2019** Dissolved **01/09/2020** 2. Denied **01/09/2020**
326P19	Cheryl Lloyd Humphrey Land Investment Company, LLC v. Resco Products, Inc. and Piedmont Minerals Company, Inc.	1. Defs' Notice of Appeal Based Upon a Constitutional Question (COA19-76) 2. Defs' PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Allowed
327P19	State of North Carolina, on Relation of City of Albemarle v. Chucky L. Nance, Jennifer R. Nance, Charlene Smith (Manager), Nancy Dry, James A. Phillips, Jr. (Trustee), First Bank (Lender), and Kirsten Foyles (Trustee)	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA18-916) 2. North Carolina League of Municipalities' Motion for Leave to File Amicus Curiae Brief in Support of Plaintiff-Appellant's PDR	1. Denied 2. Dismissed as moot
333P19-3	Sunaina S. Glaize v. Samuel G. Glaize	1. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA19-292) 2. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA19-293)	1. Dismissed *ex mero motu* 2. Dismissed *ex mero motu*
339A19	In the Matter of D.M., M.M., D.M.	Respondent-Mother's Petition for Writ of Certiorari to Review Order of District Court, Durham County	Allowed **12/27/2019**

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340A19	State v. Shawn Patrick Ellis	1. American Civil Liberties Union of North Carolina Legal Foundation's Motion to File Amicus Brief 2. Amicus Curiae's (ACLU of NC Legal Foundation) Motion to Admit Joseph Myer Sanderson Pro Hac Vice 3. Amicus Curiae's (ACLU of NC Legal Foundation) Motion to Admit Stefan Atkinson Pro Hac Vice	1. Allowed **12/05/2019** 2. Allowed **12/05/2019** 3. Allowed **12/05/2019**
340A19	State v. Shawn Patrick Ellis	1. State's Motion to Hear Appeal Without Oral Argument Pursuant to Rule 30(f)(1) 2. State's Motion to Substitute Certificates of Service	Allowed **02/04/2020** Allowed **02/04/2020**
343A19	In the Matter of J.D.	1. Def's Motion to Dismiss Appeal (COA18-1036) 2. State's Motion in the Alternative to Vacate the Court of Appeals Opinion	1. Denied 2. Dismissed as moot
343A19	In the Matter of J.D.	Def's Motion to View Exhibit	Allowed **12/31/2019**
343A19	In the Matter of J.D.	State's Motion for Leave to View Exhibit Filed Under Seal	Allowed **01/08/2020**
345P15-3	State v. Jonathon Lavon Friend	Def's Pro Se Motion for Relief from the Judgment (COAP15-693)	Dismissed
345P19	Crazie Overstock Promotions, LLC v. State of North Carolina; and Mark J. Senter, in his official capacity as Branch Head of the Alcohol Law Enforcement Division	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA18-1034) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed
355PA14-3	Terri Young v. Daniel Bailey, in his official capacity as Sheriff of Mecklenburg County, and Ohio Casualty Insurance Company	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA18-664) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal 4. North Carolina and Southern States Police Benevolent Associations' Motion for Leave to File Amicus Brief in Support of PDR	1. --- 2. Denied 3. Allowed 4. Denied
356A19	In the Matter of K.M.W. and K.L.W.	Guardian *ad Litem*'s Motion to Strike and File Amended Brief	Allowed **12/20/2019**

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357P19	State v. Dejuan Antonio Yourse	Def's PDR Under N.C.G.S. § 7A-31 (COA18-776)	Denied
362P17-4	State v. James Cornell Howard	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wayne County (COA17-77)	Dismissed **Davis, J., recused**
363A14-4	Sandhill Amusements, Inc. and Gift Surplus, LLC v. State of North Carolina, ex rel. Roy Cooper, Governor, in his official capacity, Branch Head of the Alcohol Law Enforcement Branch of the State Bureau of Investigation, Mark Senter, in his official capacity, Secretary of the North Carolina Department of Public Safety, Erik Hooks, in his official capacity, and the Director of the North Carolina State Bureau of Investigation, Bob Schurmeier, in his official capacity	1. Plts' Motion for Temporary Stay (COA18-1140) 2. Plts' Petition for Writ of Supersedeas 3. Plts' Notice of Appeal Based Upon a Constitutional Question 4. Plts' PDR Under N.C.G.S. § 7A-31 5. Defs' Motion to Dismiss Appeal 6. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **11/19/2019** 2. Allowed 3. --- 4. Allowed 5. Allowed 6. Allowed **Ervin, J., recused** **Davis, J., recused**
366A19	In the Matter of H.A.L., N.A.L., M.C.L., and N.L.	Respondent-Mother's Motion to Dismiss Appeal	Allowed **12/18/2019**
368A19	Billie Cress Sherrill Brawley, as Executrix of the Estate of Zoie S. Deaton a/k/a Zoie Lee Spears Deaton v. Bobby Vance Sherrill, Bradley Brawley, and Rebecca Brawley Thompson	1. Def's (Bobby Vance Sherill) Notice of Appeal Based Upon a Dissent (COA18-1043) 2. Def's (Rebecca Brawley Thompson) PDR Under N.C.G.S. § 7A-31 3. Def's (Bobby Vance Sherill) Conditional PDR Under N.C.G.S. § 7A-31 4. Plt and Defs' Joint Motion to Dismiss Appeal and to Dismiss PDR 5. Plt and Defs' Amended Joint Motion to Dismiss Appeal and to Dismiss PDR	1. --- 2. Dismissed **12/16/2019** 3. Dismissed as moot **12/16/2019** 4. Dismissed as moot **12/16/2019** 5. Allowed **12/16/2019**

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373P19	State v. William Allan Miles	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-1274) 2. Def's Motion for Temporary Stay 3. Def's Petition for Writ of Supersedeas 4. Def's Motion to Amend PDR	1. Denied 2. Denied **10/02/2019** 3. Denied 4. Allowed
375P19	Bethesda Road Partners, LLC, Plaintiff v. Stephen M. Strachan and Wife, Debora L. Strachan, Defendants Stephen M. Strachan and Debora L. Strachan, Third-Party Plaintiffs v. George C. McKee, Jr. and Wife, Adrianne S. McKee, Third-Party Defendants	Def and Third-Party Plts' (Stephen M. Strachan) PDR Under N.C.G.S. § 7A-31 (COA18-1170)	Denied
376A19	State v. Ervan L. Betts	1. Def's Notice of Appeal Based Upon a Dissent (COA18-963) 2. Def's PDR Under N.C.G.S. § 7A-31 as to Additional Issues	1. --- 2. Special Order
381P19	In the Matter of C.N., A.N.	1. Petitioner and Guardian *ad Litem*'s Motion for Temporary Stay (COA18-1031) 2. Petitioner and Guardian *ad Litem*'s Petition for Writ of Supersedeas 3. Petitioner and Guardian *ad Litem*'s Petition for Writ of Certiorari to Review Decision of the COA	1. Allowed **10/02/2019** Dissolved **02/26/2020** 2. Dismissed as moot 3. Special Order
388P19-2	Tori J. Neal v. Erik A. Hooks, et al.	Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP18-164)	Denied
390A19	In the Matter of L.E.W.	1. Petitioner and Guardian *ad Litem*'s Motion to Dismiss Appeal 2. Respondent-Mother's Petition for Writ of Certiorari to Review Order of District Court, Alleghany County 3. Respondent-Mother's Motion to Amend Record on Appeal	1. Allowed **01/09/2020** 2. Allowed **01/09/2020** 3. Allowed

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393P19	Veda Woodard v. NC Department of Commerce, Division of Employment Security, and Zebulon Chamber of Commerce, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA19-135)	Denied
394P19	Allison Ann Loyd (now Koch) v. Eric Carl Loyd	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-641)	Denied
397A19	In the Matter of O.W.D.A.	Respondent-Father's Motion to Amend Record on Appeal	Allowed **02/14/2020**
402A19	In the Matter of R.A.B.	1. Respondent-Father's Petition for Writ of Certiorari to Review Order of District Court, Moore County 2. Petitioners' Motion to Dismiss Appeal	1. Special Order **12/20/2019** 2. Denied **12/20/2019**
403P19	State Farm Mutual Automobile Insurance Company v. Don's Trash Company, Inc., Don's Harnett Trash Co., Inc., and DJ's Trash Company, Inc., Rachel Bull, as Administrator of the Estate of Walter L. Bull, III, Carey Dean Likens, Louis Horton, and Don L. Horton	Def's (Estate of Walter L. Bull, III) PDR Under N.C.G.S. § 7A-31 (COA18-735)	Denied
405P19	State v. George Ammons, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA18-1293)	Denied
406A19	Chisum v. Campagna, et al.	1. Defs' Motion to Deem Record Timely Filed 2. Defs' Motion to File Documents Under Seal 3. Defs' Motion for Leave to Amend Record on Appeal and Rule 9(d) Documentary Exhibits 4. Defs' Motion for Leave to Amend Record on Appeal and Rule 9(d) Documentary Exhibits (Under Seal version)	1. Allowed **12/12/2019** 2. Allowed **12/12/2019** 3. Allowed **12/12/2019** 4. Allowed
413A19	In the Matter of E.C., C.C., N.C.	Respondent-Mother's Motion to Deem Brief Timely Filed	Allowed **02/04/2020**

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416P19	State v. Rodney McDonald Williams, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA19-24)	Denied
417P14-2	State v. Melvin Lee Luckey	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court (COA14-12) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed **Ervin, J., recused**
420P19	State v. Shelton Andrea Kimble	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA18-1090) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
425A18	Hamlet H.M.A., LLC d/b/a Sandhills Regional Medical Center v. Pedro Hernandez, M.D.	Plt's Petition for Rehearing (COA17-744)	Denied **01/23/2020** **Davis, J., recused**
426P19	John McLean, Employee v. Baker Sand and Gravel, Employer, and NC Farm Bureau Mutual Insurance, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-1377)	Denied
428P19	State v. James Ray Arnold	1. Defs' Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Ashe County (COAP19-486) 2. Defs' Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
429A19	In the Matter of E.B.	1. Respondent-Father's Notice of Appeal Based Upon a Dissent (COA19-158) 2. Respondent-Father's Motion to Amend Brief	1. 2. Allowed **01/23/2020**
431A19	In the Matter of W.I.M.	1. Petitioner and Guardian *ad Litem*'s Motion to Dismiss Appeal 2. Respondent-Father's Motion to Supplement the Record 3. Respondent-Father's Petition for Writ of Certiorari to Review Order of the District Court, Haywood County 4. Petitioner's Motion to Supplement the Record on Appeal	1. Allowed 2. Allowed 3. Allowed 4. Allowed
432P19	State v. Edwin Franklin Thorne, Jr.	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA19-159)	Denied

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

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433P19	State v. Eric Lamont Graham	Def's PDR Under N.C.G.S. § 7A-31 (COA18-1186)	Denied
436P13-4	I. Beverly Lake, John B. Lewis, Jr., Everette M. Latta, Porter L. Mcateer, Elizabeth S. Mcateer, Robert C. Hanes, Blair J. Carpenter, Marilyn L. Futrelle, Franklin E. Davis, James D. Wilson, Benjamin E. Fountain, Jr., Faye Iris Y. Fisher, Steve Fred Blanton, Herbert W. Cooper, Robert C. Hayes, Jr., Stephen B. Jones, Marcellus Buchanan, David B. Barnes, Barbara J. Currie, Connie Savell, Robert B. Kaiser, Joan Atwell, Alice P. Nobles, Bruce B. Jarvis, Roxanna J. Evans, Jean C. Narron, and All Others Similarly Situated v. State Health Plan for Teachers and State Employees, a Corporation, Formerly Known as the North Carolina Teachers and State Employees' Comprehensive Major Medical Plan, Teachers and State Employees' Retirement System of North Carolina, a Corporation, Board of Trustees of the Teachers and State Employees' Retirement System of North Carolina, a Body Politic and Corporate, Janet Cowell, in her official capacity as Treasurer of the State of North Carolina, and the State of North Carolina	1. Plts' Notice of Appeal Based Upon a Constitutional Question (COA13-1006; 17-1280) 2. Plts' PDR Under N.C.G.S. § 7A-31 3. Plts' Petition for Writ of Certiorari to Review Decision of the COA 4. Defs' Motion to Dismiss Appeal	1. --- 2. Allowed 3. Dismissed as moot 4. Allowed **Newby, J., recused** **Ervin, J., recused**

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

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437A19	Dieter Crago v. Candice Crago	1. Def's Pro Se Notice of Appeal Based Upon a Dissent (COA18-1304) 2. Def's Pro Se PDR as to Additional Issues 3. Def's Pro Se Motion to Deem PDR Timely Filed 4. Plt's Motion to Dismiss Appeal 5. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. --- 2. Denied 3. Allowed **12/20/2019** 4. Allowed 5. Denied
439P19	State v. Marcus Locklear	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
440P19	State v. Harold Lee Williams, Jr.	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA19-359)	Denied
447A19	State v. Ryan Kirk Fuller	1. Def's Motion for Temporary Stay (COA19-243) 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Dissent	1. Allowed **11/22/2019** 2. Allowed **12/12/2019** 3. ---
448P19	State v. Christopher Chad Frank	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA19-373)	Denied
449P11-23	Charles Everette Hinton v. State of North Carolina, et al.	1. Plt's Pro Se Motion for Demand Judgment on the Pleadings (COAP11-256) 2. Plt's Pro Se Motion for Propound Petition for Writ of Certiorari 3. Plt's Pro Se Motion to Assign the Supreme Court as Trustee Successor to Appoint a Guardian or Guardian *ad Litem* 4. Plt's Pro Se Motion for Suit in Civil-Action Special Proceeding	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed **Ervin, J., recused**
449P19	State v. Scellarneize Glenn Holloman	Def's Pro Se Motion for Order of Relief	Dismissed
450P19	State v. Harold Clyde Griffin, Jr.	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-1164)	Denied

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452A19	In the Matter of A.J.P.	Respondent-Father's Motion to Amend the Record on Appeal to Include a Narrative for Untranscribed Portion of the Hearing	Allowed
453P19	State v. Robert Lee Jackson	Def's PDR Under N.C.G.S. § 7A-31 (COA19-46)	Denied
454P19	Marquis Jarvis Whitmore v. Dennis M. Daniels Administrator Pasquotank Correctional Institution	1. Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP19-656) 2. Petitioner's Pro Se Amended Petition for Writ of Certiorari to Review Order of the COA	1. Denied 2. Denied
455P19	State v. Esau Ricardo Diaz Moreno	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Guilford County (COAP19-756) 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
456P19	State v. Mareese Antwyne Lindsey	Def's Pro Se Motion for Complaint to the Supreme Court	Dismissed
459A19	In the Matter of J.H., P.H., N.H.	1. Respondent-Mother's Motion to Withdraw Appeal 2. Respondent-Mother's Motion to Waive Any Costs Associated Due to Indigent Status	1. Allowed **01/06/2020** 2. Allowed **01/06/2020**
460A19	Guy Unger v. Heather Unger	1. Plt's Motion for Extension of Time to Deem Notice of Appeal Timely (COA18-1234) 2. Def's Motion to Dismiss Appeal	1. Denied **02/24/2020** 2. Allowed **02/24/2020**
463A19	Sea Watch at Kure Beach Homeowners' Association, Inc. v. Thomas Fiorentino and Wife, Leah Fiorentino	1. Defs' Notice of Appeal Based Upon a Dissent (COA19-64) 2. Defs' PDR as to Additional Issues 3. Plt's Motion to Dismiss Appeal 4. Defs' Motion for Extension of Time to Respond to Motion to Dismiss Appeal	1. --- 2. 3. 4. Allowed up to and including 9 January 2020 **01/02/2020**

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466P19	Jorge Macias, Employee v. BSI Associates, Inc. d/b/a Carolina Chimney, Employer, Travelers Insurance Company, Carrier	1. Defs' Motion for Temporary Stay (COA19-299) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **12/10/2019** 2. 3. **Davis, J., recused**
467P19	State v. Roderick Reco Wyche	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA19-201) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
475A19	In the Matter of Q.P.W.	Respondent-Appellant Father's Motion to Withdraw Appeal	Allowed **01/22/2020**
478A19	In the Matter of David Eldridge, Contemnor	1. Def's Notice of Appeal Based Upon a Dissent (COA19-370) 2. Def's PDR as to Additional Issues	1. --- 2. Denied
479P19	State v. David Lee Kluttz	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Davie County (COAP19-777) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed **Davis, J., recused**
480P19	Adam L. Perry v. James Dever	1. Petitioner's Pro Se Motion for Interlocutory Appeal 2. Petitioner's Pro Se Motion for Preliminary or Permanent Injunction 3. Petitioner's Pro Se Motion for Demand for Trial 4. Petitioner's Pro Se Motion for Contempt of Court and/or Default Judgment	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed
481P19	State v. Michael Nieves	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Guilford County (COAP19-266)	Denied **Ervin, J., recused**
482P19	Kimarlo Antonio Ragland v. N.C. Department of Public Instruction	1. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA19-235) 2. Petitioner's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied

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484A19	State v. David William Warden II	1. State's Motion for Temporary Stay (COA19-335) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **12/20/2019** 2. Allowed **01/09/2020** 3. ---
485A19	State v. Cashaun K. Harvin	1. State's Motion for Temporary Stay (COA18-1240) 2. State's Petition for Writ of Supersedeas 3. Def's Motion to Lift the Stay 4. State's Motion to Maintain the Stay 5. State's Petition for Writ of Certiorari to Review Decision of the COA	1. Allowed **12/20/2019** 2. 3. 4. 5.
486P19	State v. Jamell Cha Melvin and Javeal Aaron Baker	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA18-843) 2. State's Motion to Amend Response to PDR	1. Allowed 2. Allowed
487P19	In the Matter of T.G.H., Y.G.L., S.N.L.	1. Respondent's Motion for Temporary Stay (COA18-1314) 2. Respondent's Petition for Writ of Supersedeas 3. Respondent's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/27/2019** 2. 3.
489P19	Nicholas A. Ochsner v. N.C. Department of Revenue	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-1126)	Denied
490P19	Morguard Lodge Apartments, LLC d/b/a The Lodge at Crossroads v. Warren Follum	1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA18-1014) 2. Def's Pro Se PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Dismiss Appeal 4. Def's Pro Se Motion for Extension of Time to File Response to Motion to Dismiss PDR and Appeal	1. 2. 3. 4. Allowed **01/24/2020** **Davis, J., recused**
491A19	In the Matter of K.S.D-F., K.N.D-F.	Guardian *ad Litem*'s Motion to Withdraw and Substitute Counsel	Allowed **01/23/2020**

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492P08-2	State v. Anderson Sheldon Hazelwood	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA19-121)	Denied **02/24/2020** **Davis, J., recused**
495P13-2	State v. Terry L. Long	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP17-261) 2. Def's Pro Se Motion to Amend Petition/Request for Certiorari or Review	1. Denied 2. Allowed
523P10-2	State v. Gregory Ellis Davis	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP19-96) 2. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Forsyth County	1. Dismissed 2. Dismissed

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ELECTION, SUCCESSION AND DUTIES OF OFFICERS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 26, 2019.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning election, succession and duties of officers as particularly set forth in 27 N.C.A.C. 1A, Section .0400, be amended as follows (unless a new rule is indicated, additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0400, Election Succession, and Duties of Officers

.0409 President

The president shall preside over meetings of the North Carolina State Bar and the council. The president shall sign all resolutions and orders of the council in the capacity of president. The president shall execute, along with the secretary, all contracts ordered by the council. Pursuant to Rule .0412, the president is authorized to act in the name of the State Bar under emergent circumstances. The president will perform all other duties prescribed for the office by the council.

.0412 Emergency Authority [NEW RULE]

When prompt action is required due to emergent circumstances and it is not practicable or reasonable to assemble a quorum of the council, the president, in consultation with the officers and counsel, is authorized to act in the name of the State Bar to the extent necessary to carry out the functions of the State Bar until the next meeting of the council. Action taken pursuant to this rule shall be presented to the council for ratification at the next council meeting.

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 April 26, 2019.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of August, 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 25th day of September, 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 25th day of September, 2019.

s/Mark A. Davis
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING STANDING COMMITTEES AND BOARDS OF THE STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 26, 2019.

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

27 N.C.A.C. 1A, Section .0700, Standing Committees and Boards of the State Bar

.0701 Standing Committees and Boards

(a) Standing Committees…

(1) Executive Committee…

(2)…

(3) Grievance Committee. It shall be the duty of the Grievance Committee to exercise the disciplinary and disability functions and responsibilities set forth in Section .0100 of Subchapter 1B of these rules and to make recommendations to the council for such amendments to that section as the committee deems necessary or appropriate. The Grievance Committee shall sit in subcommittees as assigned by the president…. One subcommittee shall oversee the Attorney Client Assistance Program. It shall be the duty of the Attorney Client Assistance subcommittee to develop and oversee policies and programs to help clients and lawyers resolve difficulties or disputes, including fee disputes, using means other than the formal grievance or civil litigation processes; ~~to establish and implement a disaster response plan, in accordance with the provisions of Section .0300 of Subchapter 1D of these rules, to assist victims of disasters in obtaining legal representation and to prevent the improper solicitation of victims by lawyers;~~ and to perform such other duties and consider such other matters as the council or the president may designate…

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 April 26, 2019.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of August, 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 25th day of September, 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 25th day of September, 2019.

s/Mark A. Davis
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MODEL BYLAWS FOR JUDICIAL DISTRICT BARS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 26, 2019.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning model bylaws for judicial district bars, as particularly set forth in 27 N.C.A.C. 1A, Section .1000, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .1000, Model Bylaws for Use by Judicial District Bars

.1010 Committees

(a) Standing committee(s): The standing committees shall be the Nominating Committee, Pro Bono Committee, ~~Fee Dispute Resolution Committee~~, Grievance Committee, and Professionalism Committee provided that, with respect to ~~the Fee Dispute Resolution Committee and~~ the Grievance Committee, the district meets the State Bar guidelines relating thereto.

~~(b) Fee Dispute Resolution Committee:~~

> ~~(1) The Fee Dispute Resolution Committee shall consist of at least six but not more than eighteen persons appointed by the president to staggered three-year terms as provided in the district bar's Fee Dispute Resolution Plan.~~
>
> ~~(2) The Fee Dispute Resolution Committee shall be responsible for implementing a Fee Dispute Resolution Plan approved by the Council of the North Carolina State Bar to resolve fee disputes efficiently, economically, and expeditiously without litigation.~~

~~(c)~~ (b) Grievance Committee: …

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 April 26, 2019.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of August, 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 25th day of September, 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 25th day of September, 2019.

s/Mark A. Davis
For the Court

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

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 26, 2019.

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

.0106 Grievance Committee: Powers and Duties

The Grievance Committee will have the power and duty

(1) to direct the counsel to investigate any alleged misconduct or disability of a member of the North Carolina State Bar coming to its attention;

(2) …

(14) to operate the Attorney Client Assistance Program (ACAP). Functions of ACAP can include without limitation:

(a) assisting clients and attorneys in resolving issues arising in the client/attorney relationship that might be resolved without the need to open grievance files; and

(b) operating the Fee Dispute Resolution Program.

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 April 26, 2019.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of August, 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 25th day of September, 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 25th day of September, 2019.

s/Mark A. Davis
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR GOVERNING JUDICIAL DISTRICT GRIEVANCE COMMITTEES

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 26, 2019.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar governing judicial district grievance committees, as particularly set forth in 27 N.C.A.C. 1B, Section .0200, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1B, Section .0200, Rules Governing Judicial District Grievance Committees

.0202 Jurisdiction and Authority of District Grievance Committees

(a) District Grievance Committees are Subject to the Rules of the North Carolina State Bar …

(b) …

(d) Grievances Involving Fee Disputes

(1) Notice to Complainant of Fee Dispute Resolution Program …

(2) Handling Claims Not Involving Fee Dispute …

(3) Handling Claims Not Submitted to Fee Dispute Resolution by Complainant …

(4) Referral to Fee Dispute Resolution Program - Where a complainant timely elects to participate in fee dispute resolution, ~~and the judicial district in which the respondent attorney maintains his or her principal office has a fee dispute resolution committee, the chairperson of the district grievance committee shall refer the portion of the grievance involving a fee dispute to the judicial district fee dispute resolution committee. If the judicial district in which the respondent attorney maintains his or her principal office does not have a fee arbitration committee,~~ the chairperson of the district grievance committee shall refer the portion of the grievance involving a fee dispute to the State Bar Fee Dispute Resolution Program for resolution. If the grievance consists entirely of a fee dispute, and the complainant timely elects to participate in fee dispute resolution, no grievance file will be established.

(e) Authority of District Grievance Committees …

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 April 26, 2019.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of August, 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 25th day of September, 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 25th day of September, 2019.

s/Mark A. Davis
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR GOVERNING THE PRACTICAL TRAINING OF LAW STUDENTS

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 July 19, 2019.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar governing the practical training of law students, as particularly set forth in 27 N.C.A.C. 1C, Section .0200, be amended as follows (unless a new rule is indicated, additions are underlined, deletions are interlined):

27 N.C.A.C. 1C, Section .0200, Rules Governing the Practical Training of Law Students

.0201 Purpose

The ~~following~~ rules in this subchapter are adopted for the following purposes: to ~~encourage~~ support the development of clinical legal education programs at North Carolina's law schools ~~to~~ in order that the law schools may provide their students with supervised practical training of varying kinds during the period of their formal legal education; ~~and~~ to enable law students to obtain supervised practical training while serving as legal interns for government agencies; and to assist law schools in providing substantial opportunities for student participation in *pro bono* service.

.0202 Definitions

The following definitions shall apply to the terms used in this section:

(a) Clinical legal education program – Experiential educational program that engages students in "real world" legal matters through supervised practice experience. Under the supervision of a faculty member or site supervisor who is accountable to the law school, students assume the role of a lawyer either as a protégé, lead counsel, or a member of a lawyer team.

~~(1)~~ (b) Eligible persons - Persons who are unable financially to pay for ~~the~~ legal advice or services ~~of an attorney,~~ as determined by a standard established by a judge of the General Court of Justice, a legal services ~~corporation~~ organization, government entity, or a ~~law school~~ clinical legal ~~aid clinic providing representation.~~ education program. "Eligible persons" ~~includes~~ may include minors who are not financially independent; students enrolled in secondary and higher education

schools who are not financially independent; non-profit organizations serving low-income communities; and other organizations financially unable to pay for legal advice or services.

(c) Field placement – Practical training opportunities within a law school's clinical legal education program that place students in legal practice settings external to the law school. Students in a field placement represent clients or perform other lawyering roles under the supervision of practicing lawyers or other qualified legal professionals. Faculty have overall responsibility for assuring the educational value of the learning in the field. Supervising attorneys provide direct feedback and guidance to the students. Site supervisors have administrative responsibility for the legal intern program at the field placement. Such practical training opportunities may be referred to as "externships."

~~(2)~~(d) Government agencies - The federal or state government, any local government, or any agency, department, unit, or other entity of federal, state, or local government, specifically including a public defender's office or a district attorney's office.

~~(3)~~(e) Law school - An ABA accredited law school or a law school actively seeking accreditation from the ABA and licensed by the Board of Governors of the University of North Carolina. If ABA accreditation is not obtained by a law school so licensed within three years of the commencement of classes, legal interns may not practice, pursuant to these rules, with any ~~legal aid~~ clinic of the law school.

~~(4) Legal aid clinic - A department, division, program, or course in a law school that operates under the supervision of an active member of the State Bar and renders legal services to eligible persons.~~

(f) Law school clinic - Courses within a law school's clinical legal education program that place students in a legal practice setting operated by the law school. Students in a law school clinic assume the role of a lawyer representing actual clients or performing other lawyering roles. Supervision of students is provided by faculty employed by the law school (full-time, part-time, adjunct) who are active members of the North Carolina State Bar or another bar as appropriate for the legal matters undertaken.

~~(5)~~(g) Legal intern - A law student who is certified to provide supervised representation to clients under the provisions of the rules of this ~~Subchapter~~ subchapter.

~~(6)~~(h) Legal services ~~corporation~~ organization - A nonprofit North Carolina ~~corporation organized exclusively to provide representation to~~

~~eligible persons~~ organization organized to operate in accordance with N.C. Gen. Stat. §84-5.1.

(i) *Pro bono* activity – An opportunity while in law school for students to provide legal services to those unable to pay, or otherwise under a disability or disadvantage, consistent with the objectives of Rule 6.1 of the Rules of Professional Conduct.

(j) Rules of Professional Conduct – The Rules of Professional Conduct adopted by the Council of the North Carolina State Bar, approved by the North Carolina Supreme Court, and in effect at the time of application of the rules in this subchapter.

(k) Site supervisor – The attorney at a field placement who assumes administrative responsibility for the legal intern program at the field placement and provides the notices to the State Bar required by Rule .0205(b) of this subchapter. A site supervisor may also be a supervising attorney at a field placement.

~~(7)~~(l) Supervising attorney - An active member of the North Carolina State Bar ~~who satisfies the requirements of Rule .0205 of this Subchapter~~, or an attorney who is licensed in another jurisdiction as appropriate for the legal work to be undertaken, who has practiced law as a full-time occupation for at least two years, and who supervises one or more legal interns pursuant to the requirements of the rules in this subchapter.

.0203 Eligibility

To engage in activities permitted by these rules, a law student must satisfy the following requirements:

~~(1)~~(a) be enrolled as a J.D. or LL.M. student in a law school approved by the Council of the North Carolina State Bar;

~~(2) have completed at least three semesters of the requirements for a professional degree in law (J.D. or its equivalent);~~

~~(3)~~ (b) be certified in writing by a representative of his or her law school, authorized by the dean of the law school to provide such certification, as being of good character with requisite legal ability and ~~training~~ legal education to perform as a legal intern, which education shall include satisfaction of the prerequisites for participation in the clinic or field placement;

~~(4)~~(c) be introduced by an attorney admitted to practice in the tribunal or agency to every judicial official who will preside over a matter in which the student will appear, ~~to the court in which he or she is~~

~~appearing by an attorney admitted to practice in that court~~ and, pursuant to Rule .0206(c) of this subchapter, obtain the tribunal's or agency's consent to appear subject to any limitations imposed by the presiding judicial official; such introductions do not have to occur in open court and the consent of the judicial official may be oral or written;

~~(5)~~(d) neither ask for nor receive any compensation or remuneration of any kind from any ~~client~~ eligible person ~~for~~ to whom he or she renders services, but this shall not prevent an attorney, legal services ~~corporation~~ organization, law school, or government agency from paying compensation to the law student or charging or collecting a fee for legal services performed by such law student; and

~~(6)~~(e) certify in writing that he or she has read ~~and is familiar with~~ the North Carolina ~~Revised~~ Rules of Professional Conduct and is familiar with the opinions interpretive thereof.

.0204 ~~Certification as Legal Intern~~ Form and Duration of Certification

Upon receipt of the written materials required by Rule .0203~~(3)~~(b) and ~~(6)~~(e) and Rule .0205~~(6)~~(b), the North Carolina State Bar shall certify that the law student may serve as a legal intern. The certification shall be subject to the following limitations:

(a) Duration. The certification shall be effective for 18 months or until the announcement of the results of the first bar examination following the legal intern's graduation whichever is earlier. If the legal intern passes the bar examination, the certification shall remain in effect until the legal intern is sworn-in by a court and admitted to the bar.

(b) Withdrawal of Certification. The certification shall be withdrawn by the State Bar, without hearing or a showing of cause, upon receipt of

(1) notice from a representative of the legal intern's law school, authorized to act by the dean of the law school, that the legal intern has not graduated but is no longer enrolled;

(2) notice from a representative of the legal intern's law school, authorized to act by the dean of the law school, that the legal intern is no longer in good standing at the law school;

(3) notice from a supervising attorney that the supervising attorney is no longer supervising the legal intern and that no other qualified attorney has assumed the supervision of the legal intern; or

(4) notice from a judge before whom the legal intern has appeared that the certification should be withdrawn.

.0205 Supervision

(a) Supervision Requirements. A supervising attorney shall

(1) ~~be an active member of the North Carolina State Bar who has practiced law as a full-time occupation for at least two years;~~

~~(2)~~ for a law school clinic, concurrently supervise ~~no more than two legal interns concurrently, provided, however, there is no limit on the number of~~ an unlimited number of legal interns ~~who may be supervised concurrently by an~~ if the supervising attorney ~~who~~ is a full-time, ~~or~~ part-time, or adjunct member of a law school's faculty or staff whose primary responsibility ~~as a faculty member~~ is supervising legal interns in a ~~legal aid~~ law school clinic and, further provided, the number of legal interns concurrently supervised is not so large as to compromise the effective and beneficial practical training ~~supervision~~ of the legal interns or the competent representation of clients ~~that an attorney who supervises legal interns through an externship or out-placement program of a law school legal aid clinic may supervise up to five legal interns~~;

(2) for a field placement, concurrently supervise no more than two legal interns; however, a greater number of legal interns may be concurrently supervised by a single supervising attorney if the appropriate faculty supervisor determines, in his or her reasoned discretion, that the effective and beneficial practical training of the legal interns and the competent representation of clients will not be compromised;

(3) assume personal professional responsibility for any work undertaken by a legal intern while under his or her supervision;

(4) assist and counsel with a legal intern in the activities permitted by these rules and review such activities with the legal intern, all to the extent required for the proper practical training of the legal intern and the ~~protection~~ competent representation of the client; and

(5) read, approve and personally sign any pleadings or other papers prepared by a legal intern prior to the filing thereof, and read and approve any documents prepared by a legal intern for execution by a client or third party prior to the execution thereof.~~;~~

~~(6) prior to commencing the supervision, assume responsibility for supervising a legal intern by filing with the North Carolina State Bar a signed notice setting forth the period during which supervising attorney expects to supervise the activities of an identified legal intern, and that the supervising attorney will adequately supervise the legal intern in accordance with these rules; and~~

~~(7) notify the North Carolina State Bar in writing promptly whenever the supervision of a legal intern ceases.~~

(b) Filing Requirements.

(1) Prior to commencing supervision, a supervising attorney in a law school clinic shall provide a signed statement to the North Carolina State Bar (i) assuming responsibility for the supervision of identified legal interns, (ii) stating the period during which the supervising attorney expects to supervise the activities of the identified legal interns, and (iii) certifying that the supervising attorney will adequately supervise the legal interns in accordance with these rules.

(2) Prior to the commencement of a field placement for a legal intern(s), the site supervisor shall provide a signed statement to the North Carolina State Bar (i) assuming responsibility for the administration of the field placement in compliance with these rules, (ii) identifying the participating legal intern(s) and stating the period during which the legal intern(s) is expected to participate in the program at the field placement, (iii) identifying the supervising attorney(s) at the field placement, and (iv) certifying that the supervising attorney(s) will adequately supervise the legal intern(s) in accordance with these rules.

(3) A supervising attorney in a law school clinic and a site supervisor for a legal intern program at a field placement shall notify the North Carolina State Bar in writing promptly whenever the supervision of a legal intern concludes prior to the designated period of supervision.

(c) Responsibilities of Law School Clinic in Absence of Legal Intern. During any period when a legal intern is not available to provide representation due to law school seasonal breaks, graduation, or other reason, the supervising attorney shall maintain the status quo of a client matter and shall take action as necessary to protect the interests of the client until the legal intern is available or a new legal intern is assigned to the matter. During law school seasonal breaks, or other periods when a legal

intern is not available, if a law school clinic or a supervising attorney is presented with an inquiry from an eligible person or a legal matter that may be appropriate for representation by a legal intern, the representation may be undertaken by a supervising attorney to preserve the matter for subsequent representation by a legal intern. Communications by a supervising attorney with a prospective client to determine whether the prospective client is eligible for clinic representation may include providing immediate legal advice or information even if it is subsequently determined that the matter is not appropriate for clinic representation.

(d) Independent Legal Practice. Nothing in these rules prohibits a supervising attorney in a law school clinic from providing legal services to third parties outside of the scope of the supervising attorney's employment by the law school operating the clinic.

.0208 Field Placements [NEW RULE]

(a) A law student enrolled in a field placement at an organization, entity, agency, or law firm shall be certified as a legal intern if the law student will (i) provide legal advice or services in matters governed by North Carolina law to eligible persons or government agencies outside the organization, entity, agency, or law firm or (ii) appear before any North Carolina tribunal or agency on behalf of an eligible person or a government agency.

(b) Supervision of a legal intern enrolled in a field placement may be shared by two or more attorneys employed by the organization, entity, agency, or law firm, provided one attorney acts as site supervisor, assuming administrative responsibility for the legal intern program at the field placement and providing the notices to the State Bar required by Rule .0205(b) of this subchapter. All supervising attorneys at a field placement shall comply with the requirements of Rule .0205(a).

.0209 Relationship of Law School and Clinics; Responsibility Upon Departure of Supervising Attorney or Closure of Clinic [NEW RULE]

(a) Relationship to Other Clinics. The clinics that are a part of a clinical legal education program at a law school may each operate as an independent entity (the "independent clinic model") or they may operate collectively as one entity with each clinic acting as a department or division of the entity (the "unified clinic model"). In the independent clinic model, clinics function independently of each other, including the maintenance of separate offices and separate conflicts-checking and case management systems. In the unified clinic model, clinics may share offices as well as conflicts-checking and case management systems.

(b) Application of the Rules of Professional Conduct. For the purposes of applying the Rules of Professional Conduct, each law school clinic operated pursuant to the independent clinic model shall be considered one law firm and clinics operated pursuant to the unified clinic model shall collectively be considered one law firm.

(c) Relationship with Law School. The relationship between law school clinics and the law school in which they operate shall be managed in a manner consistent with the requirements of the Rules of Professional Conduct. Procedures shall be established by both the clinics and the law school that are reasonably adequate to protect confidential client information from disclosure including disclosure to the law school administration, non-participating law school faculty and staff, and non-participating students of the law school. The rule of imputed disqualification, as stated in Rule 1.10(a) of the Rules of Professional Conduct, shall not apply to the law school administrators, non-participating law school faculty and staff, and non-participating law school students if reasonable efforts are made to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of clients. See Rule 1.6(c) of the Rules of Professional Conduct.

(d) Responsibility for Maintenance of Client Files. Client files shall be maintained and safeguarded by a law school clinic in accordance with the Rules of Professional Conduct and the ethics opinions interpretative thereof. Closed client files shall be returned to the client or shall be safeguarded and maintained by a law school clinic until disposal is permitted under the Rules of Professional Conduct. See RPC 209.

(e) Engagement Letter. In addition to the consent agreement required by Rule .0206(d) of this section for any representation of an individual client in a matter before a tribunal, a written engagement letter or memorandum of understanding with each client is recommended. The writing should state the general nature of the legal services to be provided and explain the roles and responsibilities of the clinic, the supervising attorney, and the legal intern. See Rule 1.5, cmt. [2] of the Rules of Professional Conduct ("A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.")

(f) Responsibility upon Departure of Supervising Attorney. Upon the departure of a supervising attorney from a law school clinic, the administration of the law school and of the clinic shall promptly identify a replacement supervising attorney for any active case in which no other supervising attorney is participating. In such cases, the departing attorney and the clinic administration shall protect the interests of

all affected clients by taking appropriate steps to preserve the status quo of the legal matters of affected clients, consistent with the Rules of Professional Conduct and the ethics opinions interpretative thereof. If the departing attorney will not continue the representation after departure from the clinic, the attorney shall comply with Rule 1.16 of the Rules of Professional Conduct and all court rules for withdrawal from representation. Affected clients shall be notified and advised that (i) they have the right to counsel of choice (which may include the departing attorney if the departing attorney intends to engage in legal practice outside of the law school clinic); (ii) their file will be transferred to the new supervising attorney in the absence of other instructions from the client; and (iii) they may instruct the clinic to mail or deliver the file to the client or to transfer the file to legal counsel outside of the clinic. If instructed by a client, a file shall be promptly returned to the client or transferred to authorized legal counsel outside of the clinic.

(g) Responsibility upon Closure of a Law School Clinic. If a law school clinic is closed for any reason, the supervising attorney, with support from the law school, shall take appropriate steps to preserve the status quo of the legal matters of clients, consistent with the Rules of Professional Conduct and the ethics opinions interpretative thereof. The administration of the law school and of the clinic shall promptly notify all affected clients that (i) they have the right to counsel of choice (which may include the supervising attorney if the supervising attorney will engage in legal practice after closure of the clinic); (ii) the file will be mailed to or delivered to the client and the supervising attorney will withdraw from representation in the absence of other instructions from the client; and (iii) they may instruct the clinic to transfer the file to authorized legal counsel outside of the clinic (which may include the supervising attorney). If the supervising attorney will not continue the representation after closure of the clinic, the attorney shall comply with Rule 1.16 of the Rules of Professional Conduct and all court rules for withdrawal from representation.

.0210 *Pro Bono* Activities [NEW RULE]

(a) *Pro Bono* Activities for Law Students. *Pro bono* activities for law students may be facilitated by a law school acting under the auspices of a clinical legal education program or another program or department of the law school. As used in this rule, "auspices" means administrative or programmatic support or supervision.

(b) Student Certification Not Required. Regardless of whether the *pro bono* activity is provided under the auspices of a clinical legal education program or another program or department of a law school, a law

student participating in a *pro bono* activity made available by a law school is not required to be certified as a legal intern if

(1) the law student will not perform any legal service; or

(2) all of the following conditions are satisfied: (i) the student will perform specifically delegated substantive legal services for third parties (clients) under the direct supervision of an attorney who is an active member of the North Carolina State Bar or licensed in another jurisdiction as appropriate to the legal services to be undertaken (the responsible attorney); (ii) the legal services shall not include representation of clients before a tribunal or agency; (iii) the responsible attorney is personally and professionally responsible for the representation of the clients and for the law student's work product; and (iv) the role of the law student as an assistant to the responsible attorney is clearly explained to each client in advance of the performance of any legal service for the client by the law student.

(c) Law School Faculty and Staff Providing *Pro Bono* Services Under Auspices of a Clinical Legal Education Program. Any member of the law school's faculty or staff who is an active member of the North Carolina State Bar or licensed in another jurisdiction as appropriate to the legal work to be undertaken may serve as the responsible attorney for a *pro bono* activity if the activity is provided to eligible persons under the auspices of the law school's clinical legal education program and the responsible attorney complies with the relevant supervision requirements set forth in Rule .0205(a)(2)-(5) of this subchapter.

(d) Responsibility for Client File. Unless otherwise specified in this rule, if a client file is generated by a *pro bono* activity, it shall be maintained and safeguarded by the responsible attorney in compliance with the Rules of Professional Conduct and the ethics opinions interpretative thereof. If the *pro bono* activity is provided under the auspices of a clinical legal education program and the responsible attorney is a member of the law school's faculty or staff, the client file shall be maintained and safeguarded by the clinical legal education program in compliance with the Rules of Professional Conduct and the Rule .0209(d). If the *pro bono* activity is sponsored by a legal services organization or government agency, the legal services organization or government agency shall maintain and safeguard the client file. If the *pro bono* activity is sponsored by more than one legal services organization or government agency, the co-sponsors shall determine which entity shall maintain and safeguard the client file and shall so inform the client.

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 July 19, 2019.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of August, 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 25th day of September, 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 25th day of September, 2019.

s/Mark A. Davis
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE FEE DISPUTE RESOLUTION PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 26, 2019.

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 fee dispute resolution program, as particularly set forth in 27 N.C.A.C. 1D, Section .0700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0700, Procedures for Fee Dispute Resolution

.0701 Purpose and Implementation

The purpose of the Fee Dispute Resolution Program is to help clients and lawyers settle disputes over fees. ~~In doing so, the~~ The Fee Dispute Resolution Program ~~shall~~ will attempt to assist ~~the~~ lawyers and clients in resolving disputes concerning ~~determining the appropriate fee for~~ legal fees and expenses. ~~services rendered.~~ The State Bar ~~shall~~ will implement the Fee Dispute Resolution Program under the auspices of the Grievance Committee (the committee) as part of the Attorney Client Assistance Program (ACAP). It will be offered to clients and ~~their~~ lawyers at no cost. ~~A person other than the client who pays the lawyer's legal fee or expenses may file a fee dispute. The person who paid the fees or expenses will not be permitted to participate in the fee dispute resolution process.~~

.0702 Jurisdiction

(a) The committee has jurisdiction over a disagreement arising out of a client-lawyer relationship concerning the fees and expenses charged or incurred for legal services provided by a lawyer licensed to practice law in North Carolina.

(b) The committee does not have jurisdiction over the following:

(1) a dispute concerning fees or expenses established by a court, federal or state administrative agency, ~~or~~ federal or state official, or private arbitrator or arbitrator panel;

~~(2) a dispute involving services that are the subject of a pending grievance complaint alleging violation of the Rules of Professional Conduct;~~

~~(3)~~(2) a dispute over fees or expenses that are or were the subject of litigation or arbitration unless

(i) a court, arbitrator, or arbitration panel directs the matter to the State Bar for resolution, ~~or~~

(ii) both parties to the dispute agree to dismiss the litigation or arbitration without prejudice and pursue resolution through the State Bar's Fee Dispute Resolution program~~;~~, or

(iii) litigation was commenced pursuant to 27 N.C. Admin. Code 1D § .0707(a);

~~(4)~~(3) a dispute between a lawyer and a service provider, such as a court reporter or an expert witness;

(4) a dispute over fees or expenses that are the subject of a pending Client Security Fund claim, or a Client Security Fund claim that has been fully paid.

(5) a dispute between a lawyer and a person or entity with whom the lawyer had no client-lawyer relationship~~, except that the committee has jurisdiction over a dispute between a lawyer and a third-party payor of legal fees or expenses~~; and

(6) a dispute concerning a fee charged for services provided by the lawyer that do not constitute the practice of law.

(c) The committee will encourage settlement of fee disputes falling within its jurisdiction ~~pursuant to Rule .0708 of this subchapter~~.

.0704 Confidentiality

The Fee Dispute Resolution Program is a subcommittee of the Grievance Committee, which maintains all information in the possession of the Fee Dispute Resolution Program. Pursuant to N.C. Gen. Stat. § 84-32.1, documents in the possession of the Fee Dispute Resolution Program are confidential and are not public records. ~~The existence of and content of any petition for resolution of a disputed fee and of any lawyer's response to a petition for resolution of a disputed fee are confidential.~~

.0706 Powers and Duties of the Vice-Chairperson

The vice-chairperson of the Grievance Subcommittee overseeing ACAP, or his ~~/~~ or her designee, who must be a councilor, will:

(a) approve or disapprove any recommendation that an impasse be declared in any fee dispute ~~petition for resolution of a disputed fee be dismissed~~; and

~~(b) call and preside over meetings of the committee; and~~

~~(c)~~(b) refer to the Grievance Committee all cases in which it appears ~~to the vice chairman~~ that

(i) a lawyer might have demanded, charged, contracted to receive or received an illegal or clearly excessive fee or a clearly excessive amount for expenses in violation of Rule 1.5 of the Rules of Professional Conduct; or

(ii) a lawyer might have failed to refund an unearned portion of a fee in violation of Rule 1.5 the Rules of Professional Conduct; or

(iii) a lawyer might have violated one or more Rules of Professional Conduct other than or in addition to Rule 1.5.

.0707 Processing Requests for Fee Dispute Resolution

(a) ~~Requests~~ A request for resolution of a disputed fee must be submitted in writing to the coordinator of the Fee Dispute Resolution Program addressed to the North Carolina State Bar, PO Box 25908, Raleigh, NC 27611. A lawyer is required by ~~Rule 1.5 of the~~ Rules of Professional Conduct 1.5 to notify in writing a client with whom the lawyer has a dispute over a fee (i) of the existence of the Fee Dispute Resolution Program and ~~to wait at least 30 days after the client receives such notification before filing a lawsuit to collect a disputed fee~~ (ii) that if the client does not file a petition for fee dispute resolution within 30 days after the client receives such notification, the lawyer will be permitted by Rule of Professional Conduct 1.5 to file a lawsuit to collect the disputed fee. …

(b) ~~All~~ A petitions for resolution of a disputed fee must be filed (i) before the expiration of the statute of limitation applicable in the General Court of Justice for collection of the funds in issue or (ii) within three years of the termination of the client-lawyer relationship, whichever is later.

(c) The State Bar will process fee disputes and grievances in the following order:

(1) If a client submits to the State Bar simultaneously a grievance and a request for resolution of disputed fee involving the same attorney-client relationship, the request for resolution of disputed fee will be processed first and the grievance will not be processed until the fee dispute resolution process is concluded.

(2) If a client submits a grievance to the State Bar and the State Bar determines it would be appropriate for the Fee Dispute Resolution Program to attempt to assist the client and the lawyer in settling a dispute over a legal fee, the attempt to resolve the fee dispute will occur first. If a grievance file has been opened, it will be stayed until the Fee Dispute Resolution Program has concluded its attempt to facilitate resolution of the disputed fee.

(3) If a client submits a request for resolution of a disputed fee to the State Bar while a grievance submitted by the same client and relating to the same attorney-client relationship is pending, the grievance will be stayed while the Fee Dispute Resolution Program attempts to facilitate resolution of the disputed fee.

(4) Notwithstanding the provisions of subsections (c)(1),(2), and (3) of this section, the State Bar will process a grievance before it processes a fee dispute or at the same time it processes a fee dispute whenever it determines that doing so is in the public interest.

~~(e)~~(d) The coordinator of the Fee Dispute Resolution Program or a facilitator will review ~~investigate~~ the petition to determine its suitability for fee dispute resolution. If it is determined that the dispute is not suitable for fee dispute resolution, the coordinator and/or the facilitator will prepare a ~~dismissal letter setting forth the reasons the petition is not suitable for fee dispute resolution facts and a recommendation for its dismissal~~ letter setting forth the reasons the petition is not suitable for fee dispute resolution and recommending that the petition be discontinued and that the file be closed. The coordinator and/or the facilitator will forward the ~~dismissal~~ letter to the vice-chairperson. If the vice chairperson agrees with the recommendation, the petition will be ~~dismissed~~ discontinued and the file will be closed. The coordinator and/or facilitator will notify the ~~party~~ parties in writing ~~of the dismissal~~ that the file was closed. Grounds for ~~dismissal~~ concluding that a petition is not suitable for fee dispute resolution or for closing a file include, but are not limited to, the following:

(1) the petition is frivolous or moot; or

(2) the committee lacks jurisdiction over one or more of the parties or over the subject matter of the dispute~~;~~.

~~(3) the fee has been earned; or~~

~~(4) the expenses were properly incurred.~~

~~(d)~~(e) If the vice-chairperson disagrees with the recommendation ~~for dismissal~~ to close the file, the coordinator will schedule a settlement conference.

.0708 Settlement Conference ~~Proceedings~~ Procedure

(a) The coordinator will assign the case to a facilitator.

(b) The ~~facilitator~~ State Bar will send a ~~Letter of Notice~~ letter of notice to the respondent lawyer by certified mail notifying the respondent that the petition was filed and notifying the respondent of the obligation to provide a written response to the letter of notice, signed by the respondent, within 15 days of service of the letter of notice upon the respondent, and enclosing copies of the petition and of any relevant materials provided by the petitioner.

(c) Within 15 days after the ~~Letter of Notice~~ letter of notice is served upon the ~~lawyer~~ respondent, the ~~lawyer~~ respondent must provide a written response to the petition signed by the respondent. The facilitator may ~~is authorized~~ to grant requests for extensions of time to respond. The ~~lawyer's~~ response must be a full and fair disclosure of all the facts and circumstances pertaining to the dispute. The response shall include all documents necessary to a full and fair understanding of the dispute. The response shall not include documents that are not necessary to a full and fair understanding of the dispute. The facilitator will provide a copy of the ~~lawyer's~~ response to the ~~client~~ petitioner unless the ~~lawyer~~ respondent objects in writing.

(d) The facilitator will conduct an investigation.

(e) The facilitator will conduct a telephone settlement conference. ~~between the parties.~~ The facilitator ~~is authorized to carry out~~ may conduct the settlement conference by ~~separate telephone calls with each of the parties or by conference calls~~ conference call or by telephone calls between the facilitator and one party at a time, depending upon which method the facilitator believes has the greater likelihood of success.

(f) The facilitator will ~~define and describe~~ explain the following to the parties:

…

(6) the circumstances under which the facilitator may communicate privately with any ~~of the parties~~ party or with any other person;

…

(g) ~~The facilitator has a duty~~ It is the duty of the facilitator to be impartial and to advise ~~all participants~~ the parties of any circumstance that might cause either party to conclude that the facilitator has a possible bias, prejudice, or partiality.

(h) It is the duty of the facilitator to timely determine when the dispute cannot be resolved by settlement and to declare that an impasse exists and that the settlement conference should end.

(i) Upon completion of the settlement conference, the facilitator will prepare a disposition letter to be sent to the parties ~~detailing~~ explaining:

(1) that the settlement conference resulted in a settlement and the terms of settlement; or

(2) that the settlement conference resulted in an impasse.

.0709 Record Keeping

The coordinator of fee dispute resolution will keep a record of each request for fee dispute resolution. The record must contain the following information:

(1) the ~~client's~~ petitioner's name;

(2) the date the petition was received;

(3) the ~~lawyer's~~ respondent's name;

(4) the district in which the ~~lawyer~~ respondent resides or maintains a place of business;

(5) what action was taken on the petition and, if applicable, how the dispute was resolved; and

(6) the date the file was closed.

.0710 District Bar Fee Dispute Resolution

Subject to the approval of the council, any judicial district bar may adopt a fee dispute resolution program for the purpose of resolving disputes involving lawyers residing or doing business in the district. The State Bar does not offer arbitration as a form of dispute resolution. The judicial district bar may offer arbitration to resolve a disputed fee. A judicial district bar fee dispute resolution program shall have jurisdiction over disputes that would otherwise be addressed by the State Bar's ACAP department. Such programs may be tailored to accommodate local conditions but they must be offered without cost and must comply with the jurisdictional restrictions set forth in Rule .0702 of this subchapter.

.0711 District Bar Settlement Conference Proceedings

(a) The chairperson of the judicial district bar fee dispute committee will assign the case to a facilitator who will conduct a settlement conference. The facilitator is responsible for arranging the settlement conference at a time and place convenient to all parties.

(b) The lawyer who is named in the petition must attend the settlement conference in person and may not send a representative in his or her place. If a party fails to attend a settlement conference without good cause, the facilitator may either reschedule the settlement conference or recommend dismissal of the petition.

(c) The facilitator must at all times be in control of the settlement conference and the procedures to be followed. The facilitator may communicate privately with any participant prior to and during the settlement conference. Any private communication with a participant will be disclosed to all other participants at the beginning of the settlement conference or, if the private communication occurs during the settlement conference, immediately after the private communication occurs. The facilitator will explain the following at the beginning of the settlement conference:

(1) the procedure that will be followed;

(2) the differences between a facilitated settlement conference and other forms of conflict resolution;

(3) that the settlement conference is not a trial;

(4) that the facilitator is not a judge;

~~(5) that participation in the settlement conference does not deprive the parties of any right they would otherwise have to pursue resolution of the dispute through the court system if they do not reach a settlement;~~

~~(6) the circumstances under which the facilitator may meet and communicate privately with any of the parties or with any other person;~~

~~(7) whether and under what conditions communications with the facilitator will be held in confidence during the settlement conference;~~

~~(8) that any agreement reached will be reached by mutual consent; and~~

~~(9) that, if the parties reach an agreement, that agreement will be reduced to writing and signed by the parties and their counsel, if any, before the parties leave the settlement conference.~~

~~(d) The facilitator has a duty to be impartial and to advise all participants of any circumstance that might cause either party to conclude that the facilitator has a possible bias, prejudice, or partiality.~~

~~(e) It is the duty of the facilitator to timely determine when the dispute cannot be resolved by settlement and to declare that an impasse exists and that the settlement conference should end.~~

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 April 26, 2019.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of August, 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 25th day of September, 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 25th day of September, 2019.

s/Mark A. Davis
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 26, 2019.

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

27 N.C.A.C. 1D, SECTION .1500, RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

.1501 Scope, Purpose, and Definitions

(a) Scope …

(c) Definitions

(1) …

(5) "Continuing legal education" or "CLE" is any legal, judicial or other educational ~~activity~~ program accredited by the board. Generally, CLE will include educational ~~activities~~ programs designed...

(6) …

(11) "On demand" program shall mean an accredited educational program accessed via the internet that is available at any time on a provider's website and does not include live programming.

(12) "Online" program shall mean an accredited educational program accessed through a computer or telecommunications system such as the internet and can include simultaneously broadcast and on demand programming.

(13)~~(11)~~ "Participatory CLE" shall mean ~~courses~~ programs or segments of ~~courses~~ programs that encourage…

(14)~~(12)~~ "Professional responsibility" shall mean those ~~courses~~ programs or segments of ~~courses~~ programs devoted to…

(15)~~(13)~~ "Professionalism" ~~courses~~ programs are ~~courses~~ programs or segments of ~~courses~~ programs devoted to the identification and examination of, and the encouragement of adherence to, nonmandatory aspirational standards of professional conduct which transcend the requirements of the Rules of Professional Conduct. Such ~~courses~~ programs address…

(16)~~(14)~~ "Registered sponsor" …

(17)~~(15)~~ "Rules" …

(18)~~(16)~~ "Sponsor" …

(19)~~(17)~~ "Technology training" shall mean a program, or a segment of a program, devoted to education on information technology (IT) or cybersecurity (see N.C. Gen. Stat. §143B1320(a)(11), or successor statutory provision, for a definition of "information technology"), including education on an information technology product, device, platform, application, or other tool, process, or methodology. To be eligible for CLE accreditation as a technology training program, the program must satisfy the accreditation standards in Rule .1519 and the course content requirements in Rule .1602(e) of this subchapter.~~: specifically, the primary objective of the program must be to increase the participant's professional competence and proficiency as a lawyer. Such programs include, but are not limited to, education on the following: a) an IT tool, process, or methodology designed to perform tasks that are specific or uniquely suited to the practice of law; b) using a generic IT tool process or methodology to increase the efficiency of performing tasks necessary to the practice of law; c) the investigation, collection, and introduction of social media evidence; d) e-discovery; e) electronic filing of legal documents; f) digital forensics for legal investigation or litigation; and g) practice management software. See Rule .1602 of this subchapter for additional information on accreditation of technology training programs.~~

(20)~~(18)~~ "Year" …

.1512 Source of Funds

(a) …

(1) …

(2) The board shall fix a reasonably comparable fee to be paid by individual attorneys who attend for CLE credit approved continuing legal education ~~activities~~ programs for which…

.1517 Exemptions

(a) …

(i) CLE Record During Exemption Period. During a calendar year in which the records of the board indicate a member is exempt… the board shall not maintain a record of such member's attendance at accredited continuing legal education ~~activities~~ programs. Upon the termination of the member's exemption, the member may request carry over credit up to a maximum of twelve (12) credits for any accredited continuing legal education ~~activity~~ program attended during the calendar year immediately preceding the year of the termination of the exemption. Appropriate documentation of attendance at such ~~activities~~ programs will be required by the board.

(j) …

.1518 Continuing Legal Education Requirements ~~Program~~

(a) Annual Requirement. …

(c) Professionalism Requirement for New Members. …

(1) Content and Accreditation. The State Bar … To be approved as a PNA Program, the program must be provided by a sponsor registered under Rule .1603 of this subchapter and ~~the~~ a sponsor must satisfy the annual content requirements, and submit a detailed description of the program to the board for approval at least 45 days prior to the ~~presentation~~ program…

(2) …

(d) Exemptions from Professionalism Requirement for New Members...

.1519 Accreditation Standards

The board shall approve continuing legal education programs that meet the following standards and provisions.

(a) …

(c) Credit may be given for continuing legal education ~~activities~~ programs where live instruction is used or mechanically or electronically recorded or reproduced material is used, including videotape, ~~or~~ satellite transmitted, and online programs. ~~Subject to the limitations set forth in Rule .1604(e) of this subchapter, credit may also be given for continuing legal education activities on CD-ROM and on a computer website accessed via the Internet.~~

(d) Continuing legal education materials are to be prepared, and ~~activities~~ programs conducted, by an individual or group qualified by practical or academic experience. Credit shall not be given for any continuing legal education ~~activity~~ program taught or presented by a disbarred lawyer except a ~~course~~ program on professional responsibility (including a ~~course or~~ program on the effects of substance abuse and chemical dependency, or debilitating mental conditions on a lawyer's professional responsibilities) taught by a disbarred lawyer whose disbarment date is at least five years (60 months) prior to the date of the ~~activity~~ program. The advertising for the ~~activity~~ program shall disclose the lawyer's disbarment.

(e) Live ~~C~~continuing legal education ~~activities~~ programs shall be conducted in a setting physically suitable to the educational ~~activity~~ nature of the program and, when appropriate, equipped with suitable writing surfaces or sufficient space for taking notes.

(f) Thorough, high quality, and carefully prepared written materials should be distributed to all attendees at or before the time the ~~course~~ program is presented. These may include written materials printed from a website or computer presentation~~, computer website, or CD-ROM~~. A written agenda or outline for a ~~presentation~~ program satisfies this requirement when written materials are not suitable or readily available for a particular subject. The absence of written materials for distribution should, however, be the exception and not the rule.

(g) A sponsor of an approved program must remit fees as required and keep and maintain attendance records of each continuing legal education program sponsored by it, which shall be furnished to the board in accordance with regulations. Participation in an online program must be verified as provided in Rule .1601(d).

(h) Except as provided in Rules .1501 and~~.1604~~ .1602(h) of this subchapter, in-house continuing legal education and self-study shall not be approved or accredited for the purpose of complying with Rule .1518 of this subchapter.

(i) Programs that cross academic lines…may be considered for approval…However, the board must be satisfied that the content of the ~~activity~~ program would enhance legal skills or the ability to practice law.

.1520 Registration of Sponsors and Program Approval

(a) Registration of Sponsors. An organization desiring to be designated as a registered sponsor of programs~~, or other continuing legal education activities~~ may apply…

(1)

(b) …

.1521 Credit Hours

The board may designate by regulation the number of credit hours to be earned by participation, including, but not limited to, teaching, in continuing legal education ~~activities~~ programs approved by the board.

.1524 Reinstatement

(a) Reinstatement Within 30 Days of Service of Suspension Order …

(c) Reinstatement Petition

At any time more than 30 days after service of an order of suspension on a member, a member who has been suspended for noncompliance with the rules governing the continuing legal education program may seek reinstatement by filing a reinstatement petition with the secretary….. If not otherwise set forth in the petition, the member shall attach a statement to the petition in which the member shall state with particularity the accredited legal education ~~courses~~ programs that ~~which~~ the member has…

(d) …

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 April 26, 2019.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of August, 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 25th day of September, 2019.

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

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This the 25th day of September, 2019.

s/Mark A. Davis
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

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 July 19, 2019.

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

27 N.C.A.C. 1D, SECTION .1500, RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

.1518 Continuing Legal Education Program

(a) Annual Requirement.

…

(c) Professionalism Requirement for New Members.

(1) Content and Accreditation…

~~(2) Evaluation. To receive CLE credit for attending a PNA Program, the participant must complete a written evaluation of the program which shall contain questions specified by the State Bar. Sponsors shall collate the information on the completed evaluation forms and shall send a report showing the collated information, together with the original forms, to the State Bar when reporting attendance pursuant to Rule .1601(e)(1) of this subchapter.~~

~~(3)~~**(2)** Timetable and Partial Credit…

~~(4)~~**(3)** Online and Prerecorded Programs…

NORTH CAROLINA
WAKE COUNTY

CONTINUING LEGAL EDUCATION

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 July 19, 2019.

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s/Alice Neece Mine
Alice Neece Mine, Secretary

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

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The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 26, 2019.

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

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

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

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

(1) If advance approval is requested by a sponsor, the application and supporting documentation, including one substantially complete set of the written materials to be distributed at the ~~course or~~ program, shall be submitted at least 50 days prior to the date on which the ~~course or~~ program is scheduled…

(2) In all other cases, the application and supporting documentation shall be submitted by the sponsor not later than 50 days after the date the ~~course or~~ program was presented or prior to the end of the calendar year in which the ~~course or~~ program was presented, whichever is earlier. Active members requesting credit must submit the application and supporting documentation within 50 days after the date the ~~course or~~ program was presented or, if the 50 days have elapsed, as soon as practicable after receiving notice from the board that the ~~course~~ program accreditation request was not submitted by the sponsor.

(3) …

(5) The application shall be accompanied by a ~~course~~ program outline …

(b) Program Quality and Materials…Any sponsor, including a registered sponsor, that expects to conduct a CLE program for which suitable written materials will not be made available to all attendees may obtain approval for that program only by application to the board at least 50 days in advance of the ~~presentation~~ program showing why written materials are not suitable or readily available for such a program.

(c) Facilities …

(d) ~~Computer-Based CLE: Verification of Attendance~~ Online CLE. The sponsor of an on-line ~~course~~ program must have a reliable method for recording and verifying attendance. ~~The sponsor of a CD-ROM course must demonstrate that there is a reliable method for the user or the sponsor to record and verify participation in the course.~~ A participant may periodically log on and off of ~~a computer-based CLE course~~ an online program provided the total time spent participating in the ~~course~~ program is equal to or exceeds the credit hours assigned to the program. A copy of the record of attendance must be forwarded to the board within 30 days after a member completes his or her participation in the ~~course~~ program.

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

(1) …;

(2) remit to the board the appropriate sponsor fee; and, if payment is not received by the board within 30 days after the ~~course~~ program is concluded, interest at the legal rate shall be incurred…; and

(3) furnish to the board a complete set of all written materials distributed to attendees at the ~~course or~~ program.

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

This ~~[course, seminar, or~~ program~~]~~ has been approved by the Board of Continuing Legal Education of the North Carolina State Bar for continuing legal education credit in the amount of ____ hours, of which ____ hours will also apply in the area of professional responsibility.

(g) Notice. Sponsors not having advanced approval shall make no representation concerning the approval of the ~~course~~ program for CLE credit by the board. The board will mail a notice of its decision on CLE ~~activity~~ program approval requests within ~~(45)~~ 45 days of their receipt when the request for approval is submitted before the program and within ~~(45)~~ 45 days when the request is submitted after the program. …

.1602 Course Content Requirements

(a) Professional Responsibility ~~Courses~~ Programs on Stress, Substance Abuse, Chemical Dependency, and Debilitating Mental Conditions - Accredited professional responsibility ~~courses~~ programs on stress, substance abuse, chemical dependency, and debilitating mental conditions shall concentrate on the relationship between stress, substance abuse, chemical dependency, debilitating mental conditions, and a lawyer's professional responsibilities. Such ~~courses~~ programs may also include (1) education on the prevention, detection, treatment and etiology of stress, substance abuse, chemical dependency, and debilitating mental conditions, and (2) information about assistance for chemically dependent or mentally impaired lawyers available through lawyers' professional organizations. No more than three hours of continuing education credit will be granted to any one such ~~course~~ program or segment of a ~~course~~ program.

(b) Law School Courses - Courses offered by an ABA accredited law school with respect to which academic credit may be earned may be approved ~~activities~~ programs. …

(c) Law Practice Management Programs…

(e) Technology Training Programs – A technology training program must have the primary objective of ~~A program on the selection of an information technology (IT) product, device, platform, application, web-based technology, or other technology tool, process, or methodology; or the use of an IT tool, process, or methodology to enhance~~ enhancing a lawyer's proficiency as a lawyer or ~~to improve~~ improving law office management and must satisfy ~~may be accredited as technology training if~~ the requirements of paragraphs (c) and (d) of this rule ~~are satisfied~~ as applicable. Such programs include, but are not limited to, education on the following: a) an IT tool, process, or methodology designed to perform tasks that are specific or uniquely suited to the practice of law; b) using a generic IT tool, process, or methodology to increase the efficiency of performing tasks necessary to the practice of law; c) the investigation, collection, and introduction of social media evidence; d) e-discovery; e) electronic filing of legal documents; f) digital forensics

for legal investigation or litigation; g) practice management software; and h) a cybersecurity tool, process, or methodology specifically applied to the needs of the practice of law or law practice management. A program that provides general instruction on an IT tool, process, or methodology but does not include instruction on the practical application of the IT tool, process, or methodology to the practice of law shall not be accredited. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit: generic education on how to use a tablet computer, laptop computer, or smart phone; training ~~courses~~ programs on Microsoft Office, Excel, Access, Word, Adobe, etc.~~, programs~~; and instruction in the use of a particular desktop or mobile operating system. No credit will be given to a program that is sponsored by a manufacturer, distributor, broker, or merchandiser of an IT tool, process, or methodology unless the ~~course~~ program is solely about using the IT tool, process, or methodology to perform tasks necessary or uniquely suited to the practice of law and information about purchase arrangements is not included in the accredited segment of the program. A sponsor may not accept compensation from a manufacturer, distributor, broker, or merchandiser of an IT tool, process, or methodology in return for presenting a CLE program about the IT tool, process, or methodology.

(f) Activities That Shall Not Be Accredited – CLE credit will not be given for general and personal educational activities. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit:

(1) …;

(2) …;

(3) courses designed primarily to sell services or products or to generate greater revenue, such as marketing or advertising (as distinguished from ~~courses~~ programs dealing with development of law office procedures and management designed to raise the level of service provided to clients).

(g) Service to the Profession Training - A ~~course~~ program or segment of a ~~course~~ program presented by a bar organization may be granted up to three hours of credit if the bar organization's ~~course~~ program trains volunteer attorneys in service to the profession, and if such ~~course~~ program or ~~course~~ segment meets the requirements of Rule .1519(b)-(g)~~(2)-(7)~~ and Rule .1601(b), (c), and (g) of this subchapter; if appropriate, up to three hours of professional responsibility credit may be granted for such ~~course~~ program or ~~course~~ program segment.

(h) In-House CLE and Self-Study. No approval will be provided for in-house CLE or self-study by attorneys, except as follows:

(1) programs exempted by the board under Rule .1501(c)(10) of this subchapter; and

~~(2) as provided in Rule .1604(e) of this subchapter; and~~

(2)~~(3)~~ live programs on professional responsibility, professionalism, or professional negligence/malpractice presented by a person or organization that is not affiliated with the lawyers attending the program or their law firms and that has demonstrated qualification to present such programs through experience and knowledge.

(i) Bar Review/Refresher Course. ~~Courses~~ Programs designed to review or refresh recent law school graduates or attorneys in preparation for any bar exam shall not be approved for CLE credit.

.1603 Registered Sponsors

(a) Application for Registered Sponsor Status. To be designated as a registered sponsor of programs ~~or other continuing legal education activities~~ under Rule .1520(a) of this subchapter, a sponsor must satisfy the following requirements: …

(b) …

.1604 [Reserved] ~~Accreditation of Prerecorded, Simultaneous Broadcast, and ComputerBased Programs~~

~~(a) Presentation Including Prerecorded Material. An active member may receive credit for attendance at, or participation in, a presentation where prerecorded material is used. Prerecorded material may be either in a video or an audio format.~~

~~(b) Simultaneous Broadcast. An active member may receive credit for participation in a live presentation which is simultaneously broadcast by telephone, satellite, live web streaming (webcasting), or video conferencing equipment. The member may participate in the presentation by listening to or viewing the broadcast from a location that is remote from the origin of the broadcast. The broadcast may include prerecorded material provided it also includes a live question and answer session with the presenter.~~

~~(c) Accreditation Requirements. A member attending a prerecorded presentation is entitled to credit hours if~~

~~(1) the live presentation or the presentation from which the program is recorded would, if attended by an active member, be an accredited course; and~~

~~(2) all other conditions imposed by the rules in Section .1600 of this subchapter, or by the board in advance, are met.~~

~~(d) Minimum Registration and Verification of Attendance. A minimum of three active members must register for the presentation of a prerecorded program. This requirement does not apply to the presentation of a live broadcast by telephone, satellite, or video conferencing equipment. Attendance at a prerecorded or simultaneously broadcast (by telephone, satellite, or video conferencing) program must be verified by (1) the sponsor's report of attendance or (2) the execution of an affidavit of attendance by the participant.~~

~~(e) Computer-Based CLE. Effective January 1, 2014, a member may receive up to six hours of credit annually for participation in a course on CD-ROM or on-line. A CD-ROM course is an educational seminar on a compact disk that is accessed through the CD-ROM drive of the user's personal computer. An on-line course is an educational seminar available on a provider's website reached via the Internet.~~

~~(1) A member may apply up to six credit hours of computer-based CLE to a CLE deficit from a preceding calendar year. Any computer-based CLE credit hours applied to a deficit from a preceding year will be included in calculating the maximum of six hours of computer-based CLE allowed in the preceding calendar year. A member may carry over to the next calendar year no more than six credit hours of computer-based CLE pursuant to Rule .1518(b) of this subchapter. Any credit hours carried-over pursuant to Rule .1518(b) of this subchapter will be included in calculating the six hours of computer-based CLE allowed in any one calendar year.~~

~~(2) To be accredited, a computer-based CLE course must meet all of the conditions imposed by the rules in Section .1600 of this subchapter, or by the board in advance, except where otherwise noted, and be interactive, permitting the participant to communicate, via telephone, electronic mail or a website bulletin board, with the presenter and/or other participants.~~

.1605 Computation of Credit

(a) …

(c) Teaching - As a contribution to professionalism, credit may be earned for teaching in an approved continuing legal education ~~activity~~ program or a continuing paralegal education ~~activity~~ program held in North Carolina and approved pursuant to Section .0200 of Subchapter G of these rules. ~~Presentations~~ Programs accompanied by thorough, high quality, readable, and carefully prepared written materials will qualify for CLE credit on the basis of three hours of credit for each thirty minutes of presentation. Repeat ~~presentations~~ programs qualify for one-half of the credits available for the initial ~~presentation~~ program. For example, an initial presentation of 45 minutes would qualify for 4.5 hours of credit.

(d) Teaching Law Courses

(1) …

(4) Credit Hours. Credit for teaching activities described in Rule .1605(d)(1) – (3) above may be earned without regard to whether the course is taught online or in a classroom. Credit will be calculated according to the following formula: …

.1606 Fees

(a) Sponsor Fee - …The fee is computed as shown in the following formula and example which assumes a 6-hour ~~course~~ program attended by 100 North Carolina lawyers seeking CLE credit:

Fee: $3.50 x Total Approved CLE Hours (6) x Number of NC Attendees (100) = Total Sponsor Fee ($2100)

(b) Attendee Fee - …It is computed as shown in the following formula and example which assumes that the attorney attended ~~an activity~~ a program approved for 3 hours of CLE credit:

Fee: $3.50 x Total Approved CLE hours (3.0) = Total Attendee Fee ($10.50)

(c) …

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 April 26, 2019.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of August, 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 25th day of September, 2019.

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

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This the 25th day of September, 2019.

s/Mark A. Davis
For the Court

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

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 26, 2019.

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):

Rules of Professional Conduct

27 N.C.A.C. 2, Rule 1.5, Fees

Rule 1.5 Fees

(a) A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee or charge or collect a clearly excessive amount for expenses. The factors to be considered in determining whether a fee is clearly excessive include the following:…

(b) …

(f) Any lawyer having a dispute with a client regarding a fee for legal services must:

(1) at least 30 days prior to initiating legal proceedings to collect a disputed fee, notify his or her client in writing of the existence of the North Carolina State Bar's program of fee dispute resolution; the notice shall state that if the client does not file a petition for resolution of the disputed fee with the State Bar within 30 days of the lawyer's notification, the lawyer may initiate legal proceedings to collect the disputed fee ~~client of the existence of the North Carolina State Bar's program of fee dispute resolution at least 30 days prior to initiating legal proceedings to collect the disputed fee~~; and

(2) participate in good faith in the fee dispute resolution process if the client submits a proper request. Good faith participation requires the lawyer to respond timely to all requests for information from the fee dispute resolution facilitator.

Comment

Appropriate Fees and Expenses

[1] …

Disputes over Fees

[10] Participation in the fee dispute resolution program of the North Carolina State Bar is mandatory when a client requests resolution of a disputed fee. A lawyer's obligation to respond timely to all requests for information from the fee dispute resolution facilitator continues even if the lawyer and the client reach a resolution of the dispute while the fee dispute petition is pending. Before filing an action to collect a disputed fee, the client must be advised of the fee dispute resolution program. Notification must occur not only when there is a specific issue in dispute, but also when the client simply fails to pay. However, when the client expressly acknowledges liability for the specific amount of the bill and states that he or she cannot presently pay the bill, the fee is not disputed and notification of the client is not required. ~~In making reasonable efforts to advise the client of the existence of the fee dispute resolution program, it is preferable to address a written communication to the client at the client's last known address~~. If the address of the client is unknown, the lawyer ~~should~~ must use reasonable efforts to acquire the current address of the client. Notification is not required in those instances where the State Bar does not have jurisdiction over the fee dispute as set forth in 27 N.C.A.C. 1D, .0702.

[11] …

NORTH CAROLINA
WAKE COUNTY

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

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s/Mark A. Davis
For the Court

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