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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

OCTOBER 15, 2020

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OF
NORTH CAROLINA

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SUPREME COURT OF NORTH CAROLINA

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FILED 14 AUGUST 2020

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CRIMINAL LAW

DISCOVERY

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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

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

RAYMOND A. DA SILVA, EXECUTOR OF THE ESTATE OF DOLORES J. PIERCE
v.
WAKEMED, WAKEMED D/B/A WAKEMED CARY HOSPITAL, AND
WAKEMED FACULTY PRACTICE PLAN

No. 326PA18

Filed 14 August 2020

1. Medical Malpractice—Rule 702—specialist expert—qualifications—similar specialty to defendants—active clinical practice

The trial court erred as a matter of law by disqualifying plaintiff's expert from testifying as to the standard of care in a suit against three hospitalists (for prescribing an antibiotic in conjunction with a corticosteroid) where sufficient evidence was presented as to each requirement in Evidence Rule 702 for qualifying a specialist expert. The proffered expert was board certified in internal medicine and therefore had a similar specialty as the defendant-hospitalists, and his specialty included the performance of the procedure that was the subject of the lawsuit. Further, during the year immediately preceding plaintiff's hospitalization, the proffered expert devoted the majority of his professional time to clinical practice as an internist, including two months full time in a hospital.

2. Medical Malpractice—proximate cause—forecast of evidence—sufficiency

The trial court erred by granting summary judgment to defendants (three hospitalists) where plaintiff presented sufficient evidence, through a proffered expert who was erroneously disqualified

from testifying about the standard of care, that the actions of defendants in continuing to prescribe a particular antibiotic to treat decedent's infection—even though she was also taking a corticosteroid—proximately caused decedent to suffer a ruptured tendon.

Justice DAVIS concurring in part and dissenting in part.

Justice NEWBY dissenting.

Justice MORGAN joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 817 S.E.2d 628, 2018 WL 3978021 (N.C. Ct. App. 2018), reversing an order entered on 13 February 2017 and an order entered on 20 February 2017 and vacating an order entered on 13 February 2017 by Judge Robert H. Hobgood in Superior Court, Wake County. Heard in the Supreme Court on 15 June 2020.

Law Offices of Gregory M. Kash, by Gregory M. Kash, for plaintiff-appellee.

Fox Rothschild LLP, by Matthew Nis Leerberg; and Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by John D. Madden and Robert E. Desmond, for defendant-appellants.

Stephen J. Gugenheim and Anna Kalarites for North Carolina Advocates for Justice, amicus curiae.

HUDSON, Justice.

Here, we must determine whether an internist proffered by plaintiff to provide standard of care expert testimony against three hospitalists is properly qualified under Rule 702(b) of the North Carolina Rules of Evidence. We conclude that plaintiff's expert is qualified and affirm the decision of the Court of Appeals. We also must decide whether there is sufficient evidence in the record to raise a genuine issue of material fact that the hospitalists proximately caused plaintiff's injury. We conclude that the record evidence here was sufficient and thus also affirm the decision of the Court of Appeals as to this issue.

I. Factual & Procedural History

This case began when a 76-year-old woman, Dolores Pierce, was hospitalized at WakeMed Cary Hospital from 30 October 2012 to 5 November 2012. Mrs. Pierce had been taking a daily dose of prednisone—a corticosteroid used to treat an inflammatory disorder—for years before being hospitalized. At the WakeMed Cary emergency room, she presented with fever, altered mental status, and weakness; she was presumed to have a urinary tract infection. Concerned that an infection had induced sepsis, emergency room personnel collected urine and blood cultures and a physician ordered the antibiotic Levaquin to be administered intravenously.

Levaquin is an antibiotic commonly used to treat infection. Levaquin has a "black box" warning,[1] the strongest warning required by the Food and Drug Administration (FDA). The "black box" on Levaquin warns of an increased risk of tendon ruptures in patients over sixty years old and in patients who are concomitantly taking a corticosteroid. The most prevalent tendon rupture attributable to Levaquin use is the rupture of the Achilles tendon.

Within hours of arriving at the emergency room, Mrs. Pierce was admitted to a telemetry-intermediate care floor and came under the care of physicians at WakeMed Cary Hospital, three of whom are relevant here: Dr. Jenkins, Dr. Daud, and Dr. Afridi (the hospitalists). All three of these doctors are board certified in internal medicine, and they all identify themselves as hospitalists—physicians who specialize in internal medicine in a hospital setting and care for hospitalized patients.

During Mrs. Pierce's stay, each of these hospitalists prescribed her Levaquin and continued her on a daily dose of prednisone. All three doctors testified that they were familiar with Levaquin and its "black box" warning at the time they prescribed the medication. They also testified that they were aware Mrs. Pierce was over the age of sixty and was taking a corticosteroid.

When Mrs. Pierce was ultimately discharged to a rehabilitation facility, Dr. Afridi's discharge orders included orders to continue Mrs. Pierce on Levaquin and prednisone. Per those orders, both drugs were administered through 9 November 2012 at the rehabilitation facility. Mrs. Pierce was discharged within the next few days. Roughly a week after her discharge, Mrs. Pierce's Achilles tendon ruptured, and she had to undergo

1. 21 C.F.R. § 201.57(c)(1) (2015).

tendon repair surgery. She never fully recovered and ultimately died from pneumonia and debility on 7 September 2013.

Raymond Da Silva, the executor of Mrs. Pierce's estate, brought this medical malpractice action seeking recovery for the tendon rupture and Mrs. Pierce's resulting injury and death. The only claims remaining arise from the hospitalists' alleged medical negligence. Mr. Da Silva is thus the plaintiff in this capacity.

During discovery, plaintiff identified experts and provided the deposition of Dr. Paul Genecin as expert testimony on the standard of care in compliance with Rule 26(b)(4) of the North Carolina Rules of Civil Procedure. Defendant moved to disqualify Dr. Genecin and moved for summary judgment on the issue of proximate cause. The trial court concluded that Dr. Genecin did not qualify as an expert. Because Dr. Genecin was plaintiff's only "standard of care" expert, the trial court granted summary judgment for defendant based on plaintiff's failure to provide any evidence proving a violation of the standard of care. The trial court also granted summary judgment for defendant on the issue of proximate cause.

Plaintiff appealed. The Court of Appeals unanimously concluded that Dr. Genecin was competent to testify as to the standard of care and that his testimony sufficiently forecasted proximate cause. *Da Silva v. WakeMed*, 817 S.E.2d 628, 2018 WL 3978021, at *9, *11 (N.C. Ct. App. 2018). As a result, the Court of Appeals reversed the trial court's order disqualifying Dr. Genecin as an expert witness, vacated the trial court's order granting summary judgment due to lack of expert testimony, and reversed the trial court's order granting summary judgment due to lack of evidence of proximate cause. *Id.* at *11. Defendant filed a petition for discretionary review, which we allowed. We now affirm the decision of the Court of Appeals.

II. Rule 702(b)

A. Standard of Review

[1] Generally, the trial court's decision to allow or disqualify an expert "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)). "The standard of review remains the same whether the trial court has admitted or excluded the testimony—even when the exclusion of expert testimony results in summary judgment and thereby becomes

'outcome determinative.' " *Id.* at 893, 787 S.E.2d at 11 (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142–43 (1997)).

However, when the pertinent inquiry on appeal is based on a question of law—such as whether the trial court properly interpreted and applied the language of a statute—we conduct de novo review.[2] Here, plaintiff argues that the trial court erred as a matter of law by misinterpreting and misapplying Rule 702 and disqualifying Dr. Genecin as an expert. Consequently, we review this issue de novo. *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 155, 712 S.E.2d 868, 871 (2011) ("Reviewing courts apply de novo review to alleged errors of law[.]").

B. Rule 702(b)

Rule 702(b) of the North Carolina Rules of Evidence provides:

> (b) In a medical malpractice action as defined in G.S. 90-21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in G.S. 90-21.12 unless the person is a licensed health care provider in this State or another state and meets the following criteria:
>
> > (1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:
> >
> > > a. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or
> > >
> > > b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.
> >
> > (2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority

2. Additionally, an error of law is an abuse of discretion. *See Koon v. United States*, 518 U.S. 81, 100 (1996) ("A [trial] court by definition abuses its discretion when it makes an error of law."); *see also Matter of A.U.D.*, 373 N.C. 3, 13, 832 S.E.2d 698, 704 (2019) (Newby, J., dissenting) ("A trial court's misapplication of the law is an abuse of discretion.").

> of his or her professional time to either or both of the following:
>
> > a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or
> >
> > b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

N.C. R. Evid. 702(b) (2019). From the language of this rule, we discern the following three requirements that Dr. Genecin must fulfill in order to provide expert testimony against the hospitalists, who hold themselves out as specialists[3]:

(1) Dr. Genecin must be a licensed health care provider in North Carolina or another state;

(2) Dr. Genecin must have the same specialty as the hospitalists or have a similar specialty; if Dr. Genecin has a similar specialty, his specialty must include the performance of the procedure that is the subject of the complaint and he must have prior experience treating patients similar to plaintiff; and

(3) Dr. Genecin must have devoted the majority of his professional time to either the active clinical practice of the same or similar specialty as the hospitalists and/or the instruction of students in the same specialty during the year immediately preceding plaintiff's hospitalization.

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3. *See FormyDuval v. Bunn*, 138 N.C. App. 381, 388, 530 S.E.2d 96, 101 (2000) ("We thus hold that a doctor who is either board certified in a specialty or who holds himself out to be a specialist or limits his practice to a specific field of medicine is properly deemed a "specialist" for purposes of Rule 702.").

We examine the record for evidence of each of these three requirements.

C. Dr. Genecin's Qualifications

First, we note that Dr. Genecin testified in his video deposition that he is a licensed health care provider in Connecticut. Defendant lodged no objection to this testimony.

Second, we must determine whether Dr. Genecin has the same or similar specialty as the hospitalists. The record shows that Dr. Genecin is board certified in internal medicine, meaning that he specializes in and is known as an internist. As noted above, defendant's physicians hold themselves out as hospitalists, meaning that they specialize in internal medicine in a hospital setting and care for hospitalized patients. Like, Dr. Genecin, the hospitalists are all board certified in internal medicine. The hospitalists and Dr. Genecin also have similar education, training, and experience. Though Dr. Genecin's practice is broader in scope, it includes the scope of the hospitalists' practice. Dr. Genecin testified that "[a] hospitalist is a job title that an internal medicine doctor can assume by going to work full time for a hospital. The work that a hospitalist does is the same work as any internist who cares for hospitalized patients." The record reveals no evidence to the contrary. Based on the evidence here that Dr. Genecin and the hospitalists all practice within the same scope of internal medicine, we conclude that the evidence shows that here, internist and hospitalist are similar specialties.[4]

Next, we examine the record to see whether Dr. Genecin's work as an internist includes the performance of the procedure that was the subject of the complaint. The complaint provides a description of the procedures at issue here and alleges the following ways in which the hospitalists deviated from the standard of care: (1) they administered Levaquin even when contraindicated by boxed warnings and when other antibiotics were available; (2) they administered a corticosteroid while plaintiff was also taking Levaquin; (3) they failed to properly identify and assess whether plaintiff was a proper candidate for the medications administered; (4) they failed to ensure proper medication reconciliation; (5) they ordered incorrect medications in excessive dosages; and (6) they discharged and transferred plaintiff with orders to continue Levaquin. These allegations all pertain to the selection and

4. We express no opinion here as to whether internist and hospitalist are the *same* specialty.

prescription of medication and a physician's responsibility to recognize potential drug interactions.

In the complaint, plaintiff also alleged other deviations from the standard of care by the hospitalists: (1) they failed to assess, obtain, and document accurate information in the medical records regarding plaintiff's medical record and medication history, (2) they discharged plaintiff without appropriately reviewing her medical chart, and (3) they failed to communicate with one another. These allegations all involve the overall care and management of a patient.

Thus, for purposes of our decision, the procedure that is the subject of the complaint includes the selection, prescription, and management of medication in the overall care of a patient. This includes, of course, a physician's responsibility to recognize drug warnings and interactions.

Defendant argues that this characterization of the procedure is too broad because "just about every physician prescribes medications and makes referrals." However, if the physician is a specialist, Rule 702(b) also requires that the procedure be part of a similar specialty. Thus, not every physician who selects, prescribes, and reconciles medications in the overall care and management of a patient would be qualified to testify here. Pursuant to Rule 702(b), the physician must do these things within the context of a similar specialty *and* have experience treating patients similar to the plaintiff.

It is clear from Dr. Genecin's testimony that his practice as an internist includes the procedures alleged here. He testified that he has experience reading and understanding the labeling of drugs, selecting and prescribing drugs, and recognizing potential reactions between drugs. He has also prescribed Levaquin to patients in the past. When working at the Yale Health Center, he does "all of the direct patient-care activities involved in internal medicine practice." This includes making referrals, reading results, and writing prescriptions. Dr. Genecin also works as an attending physician in a hospital two months out of the year, where his primary duty is patient care. This includes admitting patients, assessing patient history and clinical findings, reading test results, assessing patient problems, recommending treatment appropriate to patient needs, and planning for the discharge and appropriate transition of patients. Dr. Genecin also testified that as an internist in the hospital his "role is identical [to that of the hospitalists] with respect to the care provided to the patients." Again, the record contains no evidence to the contrary. We conclude that this testimony is sufficient to satisfy the requirement that Dr. Genecin's practice as an internist includes the procedures alleged in the complaint.

Next, we review the record to determine whether Dr. Genecin has prior experience treating patients similar to Mrs. Pierce. When asked about this in his deposition, he responded with the following:

> I see patients of Mrs. Pierce's demographic, elderly female patients in their 70s, many dozen per year in the hospital setting, admitted through the hospital with serious infections of one sort or another including, frequently, with infection arising in the urinary tract including the kidney. . . .

Later in the same deposition, he explained Mrs. Pierce's condition: "[S]he was an elderly patient with sepsis, urosepsis, needing I.V. antibiotics and inpatient care." Dr. Genecin was then asked if he had seen patients like her in the emergency room when he was acting as an attending physician and he responded, "yes, all the time." This evidence showed without equivocation that Dr. Genecin had prior experience with patients similar to Mrs. Pierce.

Third and finally, in order to qualify to testify against the hospitalists, Dr. Genecin must have spent the majority of his professional time the year prior to Mrs. Pierce's hospitalization in active clinical practice as an internist or hospitalist or instructing students in the hospitalist specialty. Clinical practice is the active practice of seeing patients in a clinical setting. *See FormyDuval v. Bunn*, 138 N.C. App. 381, 391, 530 S.E.2d 96, 103 (2000) ("Clinical is defined as 'based on or pertaining to actual experience in the observation and treatment of patients.' " (citation omitted)).

Dr. Genecin testified without objection that in the year prior to Mrs. Pierce's hospitalization he spent 55%–60% of his overall professional time in clinical practice as an internist, including two months of the year in which he practiced internal medicine in a hospital full time. As explained above, there is evidence in the record that Dr. Genecin's clinical practice included the performance of the procedure that is the subject of the complaint and that he had experience treating patients similar to plaintiff. Thus, we conclude that the evidence shows without contradiction that Dr. Genecin spent the majority of his professional time the year prior to Mrs. Pierce's hospitalization in the active clinical practice of a qualifying specialty similar to the hospitalists.

The record contains undisputed evidence that Dr. Genecin meets each of the applicable requirements of Rule 702(b). Therefore, we conclude that Dr. Genecin may properly offer expert testimony on the standard of care against the hospitalists. We conclude that the trial court

erred as a matter of law and affirm the decision of the Court of Appeals on this issue.

III. Proximate Cause

[2] We review de novo a trial court's order granting summary judgment. *Sykes v. Health Network Solutions, Inc.*, 372 N.C. 326, 332, 828 S.E.2d 467, 471 (2019). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2019). We review the evidence in the light most favorable to the non-moving party. *McCutchen v. McCutchen*, 360 N.C. 280, 286, 624 S.E.2d 620, 625 (2006).

"Proximate cause is ordinarily a jury question." *Turner v. Duke Univ.*, 325 N.C. 152, 162, 381 S.E.2d 706, 712 (1989) (citing *Conley v. Pearce-Young-Angel Co.*, 224 N.C. 211, 29 S.E.2d 740 (1944)). In a case like this one where the allegations in the complaint and the evidence in the record indicate that there may be multiple proximate causes of the plaintiff's injury, a genuine issue of material fact remains, and summary judgment is not proper. *See King v. Allred*, 309 N.C. 113, 118, 305 S.E.2d 554, 558 (1983) (holding that where the facts did not preclude a finding by the jury that defendant's negligence "was *a* proximate cause or *the* proximate cause" of the injury, the court could not conclude as a matter of law that the negligence of the defendant was the sole proximate cause of plaintiff's injury and summary judgment was not proper).

During his deposition, Dr. Genecin stated repeatedly that the prescription of Levaquin caused plaintiff's injury. He testified that:

> Levaquin was the cause of the tendon rupture that Mrs. Pierce had within the classic time frame, less than 30 days of therapy; in the classic location, the Achilles tendon; under the circumstances that are described in the black box warning, an elderly woman treated with Levaquin while on prednisone.

He went on to reiterate:

> Q: . . . In addition to your opinions on standard of care, . . . do you have an opinion, Doctor, to a reasonable degree of medical certainty . . . as to whether or not Ms. Pierce suffered any injury that was proximately caused by being prescribed Levaquin when she's over the age of 60 and concomitantly taking a corticosteroid?

. . .

A: I do have an opinion.

Q: And that is?

. . .

A: That she suffered a tendon rupture as a consequence of unsafe use of Levaquin because of her age and corticosteroid use.

In the light most favorable to the plaintiff, a jury could reasonably find that "unsafe use of Levaquin" refers to the unsafe prescription of Levaquin by *any* of the doctors treating Mrs. Pierce, including the hospitalists.

Defendant asks us to find that the following exchange during cross-examination negates these affirmative statements of causation:

> Q: . . . Would you agree with me that all you can say, with respect to any connection between the Levaquin and the resulting injury to Ms. Pierce, is that if the Levaquin had been stopped by [any of the hospitalists] that all that would have done would have been to reduce the risk or, say it another way, improve her chances of avoiding an Achilles tendon rupture?
>
> A: That's true. . . . the shorter the duration, the less the risk. . . . It's best not to start it if you can avoid it in a situation like this. But the shorter course is safer than the long course.

This exchange during cross examination does not negate Dr. Genecin's consistently expressed opinion that Levaquin caused the injury. Though the evidence shows that Mrs. Pierce had already been prescribed Levaquin by the emergency room physician when she was formally admitted into the care of the hospitalists, plaintiff is not required to prove that the hospitalists' prescription of Levaquin was the sole or exclusive cause of her injury, only that it was a proximate cause. *See Turner*, 325 N.C. at 162, 381 S.E.2d at 712 ("When a defendant moves for a directed verdict in a medical malpractice case, the question raised is whether the plaintiff has offered evidence of each of the following elements of his claim for relief: (1) the standard of care, (2) breach of the standard of care, (3) *proximate causation*, and (4) damages." (emphasis added)).

Here, Dr. Genecin's testimony during direct examination is not negated by, and is not even necessarily inconsistent with, the quoted

excerpt from the cross-examination. Taken in the light most favorable to plaintiff, a jury could find that the prescription of Levaquin was a cause of Mrs. Pierce's injuries and that the hospitalists' continued prescription of Levaquin was or was not a contributing cause. That is for the jury to decide.[5]

We conclude that plaintiff presented sufficient evidence of proximate cause such that summary judgment is inappropriate. We affirm the decision of the Court of Appeals as to this issue.

IV. Conclusion

We conclude that Dr. Genecin was qualified to testify to the standard of care and that his testimony sufficiently forecasted proximate cause. As a result, we affirm the decision of the Court of Appeals to reverse the trial court's order disqualifying Dr. Genecin as an expert witness, and we affirm the decision of the Court of Appeals to vacate the trial court's order allowing summary judgment due to lack of expert testimony. We also affirm the decision of the Court of Appeals to reverse the trial court's order granting summary judgment due to lack of evidence of proximate cause.

AFFIRMED.

Justice DAVIS concurring in part and dissenting in part.

I concur with the portion of the majority's opinion holding that Dr. Genecin was qualified to testify as an expert witness and offer an opinion at trial. However, for the reasons stated in Justice Newby's dissent, I respectfully dissent from the portion of the majority's opinion holding that plaintiff presented sufficient evidence on the issue of proximate cause through Dr. Genecin's testimony to overcome defendants' motion for summary judgment. Accordingly, I would hold that the Court of Appeals erred in reversing the trial court's entry of summary judgment in favor of defendants.

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5. We note that, to the extent that the parties argued it, we do not rely on *Gower v. Davidian*, 212 N.C. 172, 193 S.E. 28 (1937), or the loss of chance doctrine in support of our holding.

Justice NEWBY dissenting.

To succeed in this medical malpractice case, plaintiff must show that defendants violated the applicable standard of care by continuing the administration of Levaquin in a hospital setting to a patient who is suffering from a life-threatening infection. Further, plaintiff must demonstrate that a violation of the standard of care proximately caused Pierce's injury. Plaintiff has only one expert witness to establish the standard of care, breach of that standard by defendants, and whether the breach proximately caused the injury: Doctor Genecin. Dr. Genecin testified via a trial deposition. In properly applying the statutory and case law, the trial court determined Dr. Genecin did not meet the statutory requirements to render an expert opinion critical of defendants. In addition, after carefully evaluating Dr. Genecin's testimony, the only evidence of proximate causation, the trial court found the evidence inadequate to establish proximate causation. The trial court was correct. Dr. Genecin, an internal medicine physician, does not qualify to testify about the standard of care of hospitalists. Similarly, Dr. Genecin's testimony does not establish that the actions of the hospitalists caused plaintiff's injuries.

In its decision reversing the trial court, the majority undermines the General Assembly's carefully crafted statutory scheme designed to ensure that only colorable medical malpractice claims are presented to juries. The majority asks the wrong questions and therefore gets the wrong answers. First, considering whether Dr. Genecin is qualified to testify against defendants, the majority asks the broad question of whether the general medical work involved in this case is the sort of work that Dr. Genecin often performs. It instead should have asked whether Dr. Genecin's specialty often requires him to perform the actual care at issue; whether he frequently must decide whether to continue a patient with a life-threatening condition on a medication that had been prescribed by someone else and that appears to be helping the patient recover. To reach its result, the majority undermines the longstanding deferential standard of review, which recognizes the factual nature of the inquiry into an expert witness's qualifications. It now designates this inquiry to be a legal issue. Second, the majority asks whether Dr. Genecin testified that the relevant medication, Levaquin, proximately caused the tendon rupture. It instead should have asked whether Dr. Genecin testified that the *procedure at issue*, the hospitalists' continued administration of Levaquin that had already been prescribed, proximately caused the rupture. Regardless, Dr. Genecin's testimony was only that Levaquin increased the risk of the injury. Because the trial court correctly answered the right questions, I respectfully dissent.

Seventy-six-year-old Dolores Pierce arrived at WakeMed Cary Hospital on 30 October 2012, with severe confusion, a fever, and weakness. Upon initial examination, the emergency room physician[1] thought that Pierce had a serious infection that was inducing sepsis, and prescribed her Levaquin, a common antibiotic, to be administered intravenously. Levaquin is associated with an increased risk of tendon injury, but, for those with risk factors similar to those of Pierce, the antibiotic only presents about a three percent chance of such an injury.[2] The emergency room physician admitted Pierce to the hospital, and she was transferred to the hospitalists' care. The hospitalists diagnosed her with sepsis and identified her as "critically ill." But they noticed that the Levaquin appeared to be helping fight her infection. They continued the Levaquin prescription to treat Pierce's infection. Pierce remained in the hospital until 5 November 2012 when she had substantially recovered from her infection and was ready to be discharged. At that time, she was transferred to a rehabilitation facility and was instructed to continue Levaquin, along with her daily Prednisone, for four more days. On 19 November 2012, ten days after Pierce stopped taking Levaquin, she experienced a left Achilles tendon rupture.

Plaintiff sued the hospital and the hospitalists for negligence. Plaintiff identified Dr. Genecin as an expert witness. Dr. Genecin specializes in internal medicine, but, by his own admission, is not a hospitalist. For only two months of the year, less than seventeen percent of his professional time, Dr. Genecin treats hospitalized patients as an attending physician. Most of his professional time he oversees outpatient care at a clinic. Dr. Genecin testified that working in such an office practice is different than caring for patients in a hospital setting as an attending physician. Nevertheless, plaintiff sought to introduce Dr. Genecin's testimony that in his professional opinion the hospitalists' continued administration of Levaquin to Pierce represented conduct that fell below the applicable standard of medical care.

Dr. Genecin also offered plaintiff's only evidence on the issue of whether the hospitalists' administering of Levaquin proximately

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1. The emergency room physician who originally prescribed Levaquin is not a defendant in this case.

2. Dr. Genecin testified that around three out of every one thousand Levaquin takers suffers a tendon rupture, and that for those with certain risk factors like Pierce, the risk of such an injury is between three and ten times greater than that of the general population of Levaquin takers. Thus, even interpreting these numbers to indicate the greatest risk, Levaquin only poses about a thirty in one thousand, or three percent, risk of tendon rupture for those with risk factors like Pierce's.

caused Pierce's tendon rupture. He testified that many different factors can increase the risk of a tendon rupture, including a patient's age, a patient's taking of corticosteroids, a patient's history of having a kidney transplant, and a patient's taking of Levaquin. Focusing on the Levaquin risk factor, Dr. Genecin's testimony indicated that, for someone who possesses all the risk factors Pierce had, the chance of suffering a tendon injury from the Levaquin is only around three percent. Dr. Genecin nevertheless named Levaquin as the cause of Pierce's injury. But, on cross examination, he admitted that other factors likely contributed to the rupture, and that all he could say was that her chances of avoiding injury would have been better had the hospitalists not continued her Levaquin treatment as they did. He also admitted that he himself prescribed Levaquin to his patients and agreed that "the Levaquin effectively treated [Pierce's] infection and she survived that potentially life-threatening disease." Dr. Genecin's deposition testimony was the only evidence presented by plaintiff on the issues of defendants' standard of care and whether defendants' conduct proximately caused Pierce's tendon rupture.

Defendants moved to disqualify Dr. Genecin as an expert witness, and moved for summary judgment. The trial court reviewed the record evidence and granted both motions. The Court of Appeals reversed.

An appellate court should reverse a decision of the trial court that a witness does not qualify to testify as an expert under Rule 702 only if the trial court abused its discretion. *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016). A trial court abuses its discretion if "its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986). In recognition of the fact-intensive nature of the inquiry, trial courts are granted "wide latitude" in determining if an expert is qualified to testify under Rule 702. *Moore v. Proper*, 366 N.C. 25, 30, 726 S.E.2d 812, 817 (2012) (quoting *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984)). As this Court said in *McGrady*, "[t]he standard of review [of a trial court's decision under Rule 702] remains the same . . . even when the exclusion of expert testimony results in summary judgment and thereby becomes 'outcome determinative.' " 368 N.C. at 893, 787 S.E.2d at 11 (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142–43, 118 S. Ct. 512, 517 (1997)). However, a trial court's decision to grant summary judgment is reviewed de novo. *Sykes v. Health Network Sols., Inc.* 372 N.C. 326, 332, 828 S.E.2d 467, 471. (2019).

Here, while citing the correct deferential standard of review of the trial court's determination of the expert's qualifications, the majority

conducts a de novo review, stating that questions about the meaning of statutes like Rule 702 are questions of law to be reviewed de novo. Certainly a bona fide question of statutory interpretation should be reviewed de novo, but such a question is not at issue in this case. The question here simply concerns the rule's *application to the facts*, in other words, whether plaintiff's purported expert witness in fact has the requisite specialized training and experience qualifying him to testify against the hospitalists under Rule 702. How the nature of a witness's work and the length of time the witness spends performing that work is a question of law instead of fact, the majority does not say. As evidenced by its analysis, the majority simply reweighs the evidence to reach its result. It ignores the differing nature of the work of hospitalists and clinicians and decides, contrary to the trial court's decision, that Dr. Genecin's work is similar enough to the defendants' work to qualify him to testify. This approach contradicts our case law. In *McGrady*, we plainly said that a trial court's decision that a witness does not qualify to testify as an expert under Rule 702 is reviewed for an *abuse of discretion*. 368 N.C. at 893, 787 S.E.2d at 11.

Through Rule 702(b), the General Assembly has established strict criteria that must be met for someone to qualify as an expert witness competent to testify against a medical professional. Under the rule's first requirement, the proffered witness must either specialize in the same specialty as the party against whom the testimony is offered, or be of a similar specialty that includes the medical care at issue and have experience treating the same sort of patients. N.C.G.S. § 8C-1, Rule 702(b)(1) (2019). Under the rule's second requirement, the witness, in the year leading up to the occurrence that is the basis for the action, must

> have devoted a majority of his or her professional time to either . . . [t]he active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty *which includes within its specialty the performance of the procedure that is the subject of the complaint* and have prior experience treating similar patients; or [t]he instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

N.C.G.S. § 8C-1, Rule 702(b)(2) (emphasis added). The trial court reasonably found that Dr. Genecin does not satisfy these requirements.

Neither the trial court, nor the Court of Appeals, nor the majority of this Court assert that Dr. Genecin is of the same specialty as the hospitalists.[3] The majority instead holds that Dr. Genecin's practice is of a similar specialty to that of the hospitalists. Though all these doctors are trained in and practice internal medicine, the nature of a hospital practice and that of an outpatient clinic are vastly different. Yet, as the majority notes, it is not enough for the witness to work in a similar specialty. His specialty must also include the procedure at issue in the lawsuit, and he must have spent the majority of his professional time working in that similar specialty that includes the procedure at issue (or teaching in such a specialty). N.C.G.S. § 8C-1, Rule 702(b)(1)–(2).

Dr. Genecin's specialty as an internist at an outpatient clinic does not include the procedure at issue here. The majority states that the medical care at issue in this case is "the selection, prescription, and management of medication in the overall care of a patient." But that characterization is too broad.[4] The majority asks a general question about whether both Dr. Genecin and the hospitalists prescribe medications, when it should ask a more specific question tailored to the medical care actually at issue in this case. The procedure at issue is the hospitalists' overseeing of the *continued* administration of Levaquin to Pierce after an emergency room physician had already started her on the medication and after it appeared to be helping her recover from a potentially life-threatening infection. Defendants thus were called to provide patient care for Pierce in the midst of an ongoing medical emergency.

Dr. Genecin's clinical work does not, however, involve such emergency decisions and the precise cost-benefit analyses which they entail. Indeed, Dr. Genecin agreed that the administering of Levaquin appears to have helped Ms. Pierce recover from a potentially life-threatening infection. Patients at Dr. Genecin's clinic who appear to be in serious condition are referred from the clinic to the hospital for the hospital to administer emergency care. Dr. Genecin may be an expert in internal

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3. Though the majority does not do so, I would hold that Dr. Genecin and the hospitalists are not of the same specialty because of the hospitalists' unique form of care, which is administered in a hospital under more emergency circumstances than in a clinic.

4. Moreover, the majority's statement that the relevant care includes "selection" of medication is misleading. The hospitalists had no role in the original selection of Levaquin (or Prednisone). Instead, their role was to *continue* Pierce on Levaquin that was already being administered at the direction of a doctor who is not a party to this case.

medicine, and his clinical practice may call on him to understand how medications like Levaquin affect people with various risk factors. But his clinical practice does not call on him to exercise medical judgment about whether a person who is suffering from a life-threatening infection should continue taking a medication that has already been administered and which appears to be fighting the infection effectively, but may marginally inflate other risks. In his day-to-day work Dr. Genecin does not make such judgment calls, which require specialized medical training and expertise. Because the practice in which he spends the majority of his professional time does not include the medical care at issue in this case, the trial court properly disqualified him as an expert witness and did not allow him to testify regarding the hospitalists' medical care.

Dr. Genecin does have limited experience treating similar patients in a hospital setting, as he spends some time working at Yale New Haven Hospital as a hospital attending physician. But he does not spend the majority of his professional time in such a setting as required by the statute. Instead, by his own testimony, he spends only about two months out of the year at the hospital, roughly seventeen percent of his professional time.

The trial court did not abuse its discretion when it disqualified Dr. Genecin from testifying as an expert witness regarding whether the hospitalists' continued administration of Levaquin fell below the applicable standard of medical care. The majority's decision to the contrary inserts this Court into what is ultimately a factfinding role assigned to the trial court.[5]

The trial court's grant of summary judgment to defendants should be affirmed as well on the ground that plaintiff did not put forth sufficient evidence that defendants' actions were the proximate cause of Pierce's injury. In a medical malpractice case, "the plaintiff must establish proof of a causal connection between the negligence of the physician and the injury complained of by the testimony of medical experts." *McGill v. French*, 333 N.C. 209, 217, 424 S.E.2d 108, 113 (1993). Thus, to survive summary judgment, plaintiffs had to present evidence that it was probable, in other words, more likely than not, that defendants' purported negligence caused the injury. This Court has long held that it

5. The majority also notes that defendants raised "no objection to [Dr. Genecin's] testimony" in his video deposition. If the majority means to say Dr. Genecin's qualifications to testify as an expert are uncontested, it is obviously incorrect. From the beginning defendants have contested Dr. Genecin's qualifications to testify as an expert against them, and the trial court decided in defendants' favor on that point.

is not sufficient for a plaintiff to simply show that a different course of treatment by the defendant physician would have increased the plaintiff's chances of avoiding the injury. *See Gower v. Davidian*, 212 N.C. 172, 175–76, 193 S.E. 28, 30–31 (1937). So, unless the evidence, viewed in plaintiff's favor, shows that the hospitalists' conduct of continuing Pierce on Levaquin at the dosage and length of time they did probably caused her tendon rupture, the trial court's grant of summary judgment in defendants' favor should be affirmed.

The majority again frames the question too broadly. Instead of asking whether Dr. Genecin testified that the actual medical care of the hospitalists proximately caused the tendon rupture, the majority is content to fixate on his testimony that Levaquin in general was the cause, even though Dr. Genecin vacillated on even that statement.

Dr. Genecin never offered any testimony to the specific and central point that defendants' failure to discontinue Levaquin caused Pierce's Achilles tendon rupture. Rather, he testified that "*Levaquin* was the cause of the tendon rupture." (emphasis added). The Levaquin was not, however, prescribed only by the hospitalists. An emergency department physician originally began intravenous administration of the medication, and the hospitalists continued Pierce on that medication after diagnosing her with a dangerous infection and noting that Levaquin appeared to be effectively treating her infection. It is the conduct of the hospitalists that is at issue. But the relevant testimony from Dr. Genecin on proximate cause does not target that conduct.

Moreover, Dr. Genecin later clarified and qualified his statement regarding Levaquin as the cause of injury by agreeing that "all [he could] say" was that the hospitalists discontinuing the Levaquin would have "reduce[d] the risk or . . . improve[d] [Pierce's] chances of avoiding an Achilles tendon rupture." This assertion is not enough to show proximate causation. Again, this Court's decision in *Gower* illustrates that a plaintiff cannot survive dismissal on the issue of causation simply by showing that another course of treatment would have reduced the risk of the injury. By qualifying his statements as he did, Dr. Genecin demonstrated that he was unable to say whether the administration of Levaquin was a substantial cause of the tendon rupture at all, not to mention whether the specific continuance decisions of the hospitalists proximately caused the injury. Instead, Dr. Genecin testified regarding a study that showed the risk of a tendon injury from taking Levaquin is only around three in one thousand, and that this risk is likely three to ten times higher for people with various risk factors. Thus, his testimony indicates at most around a thirty in one thousand, or *three percent*,

risk of a tendon injury for those with risk factors like Pierce who take Levaquin. This Court has held that when an expert testifies merely to a possible cause of the injury, that testimony is insufficient to create a material issue of fact about whether the subject of the testimony proximately caused the plaintiff's injury. *See Gillikin v. Burbage*, 263 N.C. 317, 324–25, 139 S.E.2d 753, 759–60 (1965). By holding otherwise, the majority quietly applies the "loss of chance" doctrine, nonexistent under North Carolina law, which changes the traditional requirement of proximate cause and allows a plaintiff to prevail if she demonstrates that the medical care affected her *chance* of good health, no matter how small the effect may be. Under existing North Carolina law regarding proximate cause, Dr. Genecin's testimony did not establish a material issue of fact regarding, or amount to sufficient evidence of, proximate cause, and the trial court's grant of summary judgment was appropriate.

Rule 702 helps ensure that reliable evidence is presented to support a plaintiff's medical malpractice claim. A jury may be substantially swayed by anyone with the title of "doctor," even if that doctor lacks the specialization and experience necessary to provide reliable testimony on the proper standard of professional medical care. Rule 702 thus limits expert testimony to those doctors who, through relevant training and experience, have significant information to contribute to the factfinder. Dr. Genecin undoubtedly possesses substantial knowledge and skill in internal medicine generally; but his practice does not require him to regularly make emergency decisions about a hospitalized patient's care, which hospitalists must routinely make. The majority, by framing the question of Dr. Genecin's specialization so broadly, misses this critical distinction. Moreover, the majority reweighs the evidence to reach its conclusion. The trial court did not abuse its discretion by disqualifying Dr. Genecin as an expert as to the hospitalists' medical care at issue in this case. Further, because Dr. Genecin did not, and could not, testify that the hospitalists' care caused Pierce's tendon rupture, plaintiff did not present sufficient evidence of proximate causation, and the trial court appropriately granted summary judgment in defendants' favor. The trial court's decision was correct, and the decision of the Court of Appeals should be reversed.

I respectfully dissent.

Justice MORGAN joins in this dissenting opinion.

BETH DESMOND
v.
THE NEWS AND OBSERVER PUBLISHING COMPANY,
McCLATCHY NEWSPAPERS, INC., AND MANDY LOCKE

No. 132PA18-2

Filed 14 August 2020

1. Libel and Slander—defamation—newspaper articles—public official—actual malice—forensic firearms examiner

In an action by a State Bureau of Investigation forensic firearms examiner (plaintiff) alleging that a newspaper publishing company and one of its reporters (defendants) defamed her in a series of news articles concerning her work in two related murder cases, plaintiff (who stipulated she was a public official and that the alleged defamation related to her official conduct) presented clear and convincing evidence that defendants acted with actual malice—that is, with knowledge that the alleged defamatory statements were false or with reckless disregard of whether they were false. Defendants published several statements claiming that independent firearms experts had asserted that plaintiff—either through extreme incompetence or deliberate fraud—had erred in her laboratory analysis and possibly caused the conviction of an innocent man; however, among other things, the purported expert sources testified that they did not make the statements attributed to them; the reporter made significant mischaracterizations and omissions in the articles; and defendants were aware that an independent examination of the ballistics evidence was planned, but they proceeded with publication without waiting for the results.

2. Libel and Slander—defamation—jury instructions—material falsity—attribution—opinion

In a defamation action, the trial court did not err by instructing the jury that a materially false attribution may constitute libel where defendant-newspaper reported that several firearms experts had expressed opinions that they did not actually express regarding the work of a State Bureau of Investigation forensic firearms examiner (plaintiff) in two related murder cases.

3. Libel and Slander—defamation—jury instructions—punitive damages—statutory aggravating factors

In a defamation action, the trial court erred by failing to instruct the jury that it was required to find one of the statutory aggravating

factors before awarding punitive damages pursuant to N.C.G.S. § 1D-15(a). Contrary to an incorrect statement of law in the pattern jury instructions, a finding of actual malice in the liability stage did not obviate the need for the jury to find one of the statutory aggravating factors.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 263 N.C. App. 26, 823 S.E.2d 412 (2018), affirming the order and judgment entered 18 November 2016 and the order entered 30 January 2017 by Judge A. Graham Shirley in Superior Court, Wake County. Heard in the Supreme Court on 4 November 2019.

Dement Askew & Johnson, by James T. Johnson and Chymna T. Smith, for plaintiff-appellee Beth Desmond.

The Bussian Law Firm, PLLC, by John A. Bussian, McGuire Woods, by Bradley R. Kutrow, and Brooks, Pierce, Mclendon, Humphrey & Leonard, L.L.P., by Mark J. Prak, Julia C. Ambrose, and Timothy G. Nelson, for defendant-appellant The News and Observer Publishing Company, Tharrington Smith L.L.P., by Wade M. Smith, for Mandy Locke.

Essex Richards, P.A., by Jonathan E. Buchan, for The Reporters Committee for Freedom of the Press, et al., amici curiae.

Wyche, PA, by William M. Wilson, III, for Professor William Van Alstyne, amicus curiae.

EARLS, Justice.

Plaintiff, Beth Desmond, filed a complaint alleging defamation on the part of defendants, the News and Observer Publishing Company (the N&O) and reporter Mandy Locke, arising out of a series of articles published by defendants in 2010. Following a trial, in which the jury found defendants liable for defamation and awarded plaintiff compensatory and punitive damages, defendants appealed. On appeal, the Court of Appeals affirmed the trial court's order and judgment, concluding that plaintiff presented clear and convincing evidence of actual malice and that there was no error in the jury instructions. *Desmond v. News & Observer Pub. Co.*, 263 N.C. App. 26, 67, 823 S.E.2d 412, 438–39 (2018) (*Desmond II*). We affirm in part and reverse in part.

Background

Plaintiff's defamation claim arises out of a series of articles published by defendants in 2010 entitled "Agents' Secrets," which reported on alleged problems within the North Carolina State Bureau of Investigation (the SBI) that purportedly led to wrongful convictions. Plaintiff was at that time a Special Agent with the SBI serving as a forensic firearms examiner, which is a "discipline in forensic science" mainly concerned with "comparing cartridge cases and bullets and other ammunition components." In the final article of the four-part "Agents' Secrets" series, defendants reported on and were critical of plaintiff's work in two related criminal cases in Pitt County. *See generally State v. Green*, 187 N.C. App. 510, 653 S.E.2d 256, 2007 WL 4234300 (2007) (unpublished); *State v. Adams*, 212 N.C. App. 235, 713 S.E.2d 251, 2011 WL 1938270 (2011) (unpublished).

Charges in both cases originated from a confrontation that occurred on 19 April 2005 in Pitt County. Two groups of women engaged in a series of verbal altercations over the course of an afternoon that ultimately culminated with multiple gun shots and one bullet striking a ten-year-old child, Christopher Foggs, in the chest. Foggs died from the gunshot wound at the hospital later that evening. *Desmond II*, 263 N.C. App. at 31–33, 823 S.E.2d at 418–19.

Jemaul Green, who drove his girlfriend, Vonzeil Adams, to the scene of the incident, was indicted for multiple offenses, including first-degree murder. His trial took place in 2006. In support of its case, the State presented testimony from twelve eyewitnesses to the shooting. Green testified on his own behalf and asserted that when he drove to the Haddock house he had in his possession a 9mm handgun that he had illegally purchased and that he took it with him that day out of concern for his own safety.[1] Green testified that during the incident he saw an unknown black male in between the Haddock house and a neighboring house standing closely behind a car—a "black Neon"—and that this man fired a handgun in Green's direction, prompting Green to return fire in self-defense. According to Green, Adams then snatched the gun from him and fired additional shots at the Haddock house before they both got back in the car and left the scene. None of the State's twelve eyewitnesses observed anyone at the scene with a gun other than Green. Green's own witness Victoria Gardner testified that she was standing in between the houses, that she did not see anyone near the black Neon, that she did not hear

1. Green testified that one of the women riding in the car with him and Adams to the Haddock house had a Taser and that another of the women had a sword.

any shots other than those coming from Green, and that she did not see anyone with a gun other than Green.

The State also presented evidence concerning eight fired cartridge casings and six bullet fragments recovered from the scene. The casings were found "in a fairly small circle" next to a tree where Green had been standing when he fired his 9mm handgun, and the bullet fragments were found "in a very tight pattern" leading from Green's location. The State also presented testimony from plaintiff, who had been assigned by the SBI to the case and who performed microscopic comparison analysis of the cartridge casings and bullet fragments. The prosecutors in the case originally sent only the cartridge casings to the SBI's crime lab for analysis, mistakenly assuming that the bullet fragments had no forensic value. When plaintiff arrived in Pitt County to testify and learned that bullet fragments had also been recovered from the scene, she discussed with the prosecutors whether they wanted the bullets examined as well. The prosecutors decided that they did want the bullets examined, and the trial judge rescheduled plaintiff's testimony for the following day so that plaintiff could perform an examination of the bullets. Accordingly, plaintiff returned to the crime lab that day, performed an examination of the six bullet fragments, and compiled a report of her examination. Plaintiff's work was reviewed by her senior supervisor, Neal Morin, who examined the bullets under a comparison microscope and arrived at the same conclusions as plaintiff.

On the following day, plaintiff returned to Pitt County to give her testimony. Plaintiff opined that the eight cartridge casings had been fired from the same gun and that the gun was a Hi-Point 9 millimeter semiautomatic pistol. Regarding the bullet fragments, plaintiff opined that while four of the bullets were too damaged to have any forensic value, two of the bullets were fired from the same *type of gun*, a Hi-Point 9 millimeter semiautomatic pistol, but she could not conclusively determine whether the bullets were fired from the same gun. Plaintiff's analysis involved examining the "class characteristics," or "rifling impressions," which are the "lands and grooves" (i.e. ridges and impressions) that are left on a bullet as it travels through the barrel of a gun.[2] Plaintiff determined

2. Firearms examiners also analyze "individual characteristics," which "come[ ] from the markings that are inside the gun" and "that are actually imparted to the firearm during the manufacture." Plaintiff explained that "when the manufacturer makes the gun the tools that are used to make the gun are harder than the metals of the gun itself and so those tools would leave unique markings, irregularities, random markings on the internal part of the gun, so every place that that cartridge, the soft metals of that ammunition comes in contact would be a potential for us to look at it as a firearms examiner for this unique individual detail." Plaintiff's determination regarding the individual characteristics was "inconclusive."

that the class characteristics of the two bullets were the same—"nine lands and grooves with a left hand direction of twist down the barrel." Because only one manufacturer makes their guns "9-left," plaintiff was able to determine that the type of gun was a Hi-Point Model C.

After plaintiff had testified regarding her forensic examination of the cartridge casings and the bullet fragments, the prosecutor sought to have plaintiff hold a semiautomatic handgun (unloaded) and explain to the jury where the "ejection port" is and how it operates to eject the cartridge casing each time the gun is fired. During a brief *voir dire* examination by defense counsel while the jury was in recess, plaintiff stated with "absolute certainty" that the two bullets came from a 9mm Hi-Point firearm. Following a court recess, the prosecutor had plaintiff hold a 9mm Hi-Point model C handgun to explain how the ejection port in a semiautomatic handgun works.

Green was ultimately convicted of second-degree murder, as well as multiple counts of discharging a weapon into occupied property and assault with a deadly weapon. Green appealed on grounds unrelated to the ballistics evidence, and on appeal the Court of Appeals upheld his convictions. *Green*, 2007 WL 4234300, at *2, *6–*7.

Vonzeil Adams was also indicted for first-degree murder and other offenses in connection with the shooting; her trial took place in 2010.[3] Before trial, Adams's defense attorney, David Sutton, filed a motion seeking to preclude the State presenting plaintiff's expert testimony at trial. The motion was affixed with an extensive affidavit from Adina Schwartz, a professor at the John Jay College of Criminal Justice, in which Schwartz challenged the scientific reliability of firearms examination, as well as the SBI's firearms examination protocols and plaintiff's documentation. The trial court denied this motion and plaintiff again testified regarding her opinions concerning the cartridge casings and bullet fragments.

Near the end of the *Adams* trial, Sutton, with permission of the trial court, asked another local attorney, Fred Whitehurst, to take photographs of the two bullet fragments about which plaintiff had testified. Whitehurst, a former FBI chemist, had no training in firearms examination, but he owned a microscope with the capacity to take photographs. Whitehurst and Sutton emailed the resultant photographs (the Whitehurst Photographs) to other attorneys, including one attorney

3. A mistrial was declared in Adams' initial trial in 2009, and the second trial took place in April of 2010.

representing an as of-yet untried co-defendant of Vonzeil Adams, and other individuals interested in firearms examination, including Schwartz. The Whitehurst Photographs, including one photograph in particular (the Comparison Photograph) in which the bullets are posed back-to-back, or "base-to-base," raised questions among those circulating the photographs because they could not perceive any matching class characteristics in the two bullets. Based largely on these photographs, Sutton filed a motion for mistrial.

In the motion, Sutton alleged that the photographs "clearly show that the 'lands and grooves' in Q-9 and Q-10[, the two bullet fragments,] are distinctly dissimilar." Additionally, Sutton asserted that "[t]he photographs have been sent to William Tobin, formerly of the FBI laboratory for analysis," and that Tobin had stated that " 'preliminary' [sic] based upon a photograph sent by Dr. Whitehurst there is ample reason to question whether the class characteristics in Q-9 and Q-10 are the same."[4] The trial court denied the motion for mistrial. Adams was convicted—under an aiding-and-abetting theory—of one count of voluntary manslaughter, three counts of discharging a firearm into occupied property, and one count of assault with a deadly weapon. *Adams*, 2011 WL 1938270, at *3. On appeal, the Court of Appeals concluded there was no error in her convictions. *Id.* at *7.

Around this time, Locke, who was a staff writer for the N&O, became interested in the *Green* and *Adams* cases and obtained copies of the photographs from Whitehurst. After speaking with Sutton, Locke began working on a story about plaintiff's work in the *Green* and *Adams* cases. As part of her research, Locke reviewed the court filings and evidence from the *Green* and *Adams* cases, interviewed Jemaul Green in prison, and researched the discipline of firearms examination. In an early draft for her story, Locke included a direct quote from Sutton: "[Plaintiff] just made it up. She made it up because she could, and prosecutors needed her to. It's that simple." Locke began looking for experts in firearms examination or related fields willing to comment on the Whitehurst Photographs. To that end, Locke communicated by email and phone with Bill Tobin and Adina Schwartz, both mentioned above, as well as Liam Hendrikse, a firearms forensic scientist from Canada, and Dr. Stephen Bunch, a firearms forensic scientist and former FBI scientist from Virginia. Locke and the N&O ultimately published statements which were attributed to these four individuals as purported firearms experts and which in effect confirmed Sutton's allegation—that

4. Tobin later testified that this statement attributed to him in the motion was accurate except for the use of the word "ample," which he did not recall using.

is, defendants published statements asserting that firearms experts had examined the Whitehurst Photographs, determined that plaintiff's analysis was false, and questioned whether plaintiff was extremely incompetent or had falsified her report in order to help the prosecution convict a potentially innocent man. As will be discussed more in-depth below, these four individuals strongly disputed making the statements attributed to them by defendants.

Defendants planned to publish Locke's story as part of its "Agents' Secrets" series in August of 2010. John Drescher, the executive editor and senior vice president of the N&O, described the series in an email to the N&O's vice president in charge of marketing, stating: "In August, we'll publish a four-part series, 'Agents' Secrets,' showing how practices by the [SBI] have led to wrongful convictions. The series, by reporters Joseph Neff and Mandy Locke, reveals that the agency teaches its laboratory analysts and agents to line up with prosecutors' theories, sometimes with devastating results." Locke testified that she and Neff, as well as Steve Riley, the senior editor directly responsible for editing the "Agents' Secrets" series, "were constantly in communication" when preparing the series for publication. According to Locke, "we do double-check each other's work," and "there wasn't a day that passed that we weren't comparing notes and collaborating in some form or fashion."

In one of these email communications in May of 2010, Locke stated that they were "rocking and rolling on the SBI project" and included plaintiff in a list of "a few agents/analyst[s] who we are bearing down on." Locke requested "reports (absolutely everything we know)" on these agents. Upon learning that plaintiff had a degree from Julliard, Locke wrote that she was "curious to know of her discipline" and asked for a "search or anything else . . . that would register someone who was an artistic genius." When she received in response an article discussing plaintiff's previous career as a ballerina; Locke wrote: "Yes. Bingo! How in the world this woman went from ballet to firearms identification work is beyond me. But, what a lovely tidbit." Locke passed this information along to Neff, who responded, "lovely. [T]hat's even better than a bassoonist." In an email Riley sent to Drescher, Locke, and Neff, he discussed the progress of the "Agents' Secrets" series, stating that "this all adds up to some pretty serious allegations against individual agents, and we've got to be properly loaded if this is to be written with an edge, as it should be." An internal story folder circulated to N&O staff summarized the upcoming article, stating that "Beth Desmond, the SBI analyst charged with studying the cartridges and bullet fragments . . . said she's dead certain there was a single gun used that day" and that "Desmond

had no idea how to evaluate firearm evidence or, worse, she ignored all rules of the trade and fabricated the results to help police secure their victory."

Near the end of July 2010, defendants decided to move up their planned publication date of the "Agents' Secrets" series. John Drescher explained in an email: "News breaking here. In advance of our SBI series, Roy Cooper [the Attorney General] is replacing the SBI director. We likely will move series to start Sunday, Aug. 7." In an email later that day, Steve Riley confirmed the decision to move up the publication date, stating: "I know this makes things harder for everyone, but this will make us much more timely," and "[e]verything won't be perfect, but it'll be good." Locke later emailed Shawn Rocco, one of defendants' photojournalists involved in the series, apologizing for the "strain" of the new publication date and stating "[b]elieve me, I'm feeling it too. Especially with Joe [Neff] gone and out till Friday." Rocco responded:

> [H]mmm, how to say this nicely . . . shut up. [Smiley Icon] we're all in this together.
>
> [C]oncentrate on writing the best damn piece you've ever done. [I] want you to compel our readers to gather pitchforks and torches. [B]ecause shit like this has got to change.
>
> [I]'m infuriated that robin [Pendergraff] still keeps a job. t'aint nothing new in state gov, I know, but I'm pissed nonetheless.

When the SBI and plaintiff first became aware of the Whitehurst Photographs in July 2010, they immediately had concerns that the photographs were misleading due to a variety of issues. Jerry Richardson, then the assistant director of the SBI Crime Laboratory, emailed Whitehurst to discuss the misleading nature of the photographs, stating:

> [W]e have noted a number of issues associated with the photos. These issues include: photographs are not properly oriented, improper side lighting, unknown microscope magnification; focus; and, the use of what appears to be tweezers or other metal objects to handle evidence during photography which could alter the evidence.

When plaintiff learned that the N&O and Locke were planning a story about firearms examination involving the Whitehurst photographs, plaintiff contacted Locke to arrange a meeting.

During the resulting interview at the SBI's crime lab on 3 August 2010, plaintiff explained to Locke that for numerous reasons the Whitehurst Photographs did not depict the matching class characteristics that plaintiff had observed in her laboratory analysis. Plaintiff explained that firearms examination is "three-dimensional" and that "it's very difficult to show in just one picture what we do. It's not truly representative of what we do in firearms."[5] Further, plaintiff noted that while she "ha[s] great respect for [Whitehurst]," "he's not a firearms expert, and he knows that." One of the problems with the Whitehurst Photographs, plaintiff explained, was the lighting. Plaintiff stated that "[i]t takes hours under the microscope to get the right lighting, to get them lined up the right way to be able to measure those. It's very careful and patient examination." Plaintiff stated that another issue on a more fundamental level was that the bullets in the Comparison Photograph were improperly positioned. Plaintiff explained:

> MS. DESMOND: And so that's the end of the base right here and that's it. This bullet here, this is the base but the—
>
> MS. LOCKE: Uh-huh.
>
> MS. DESMOND: –the nose is up here.
>
> MS. LOCKE: So it's base to base.
>
> MS. DESMOND: Correct.
>
> MS. LOCKE: Okay.
>
> MS. DESMOND: In firearms, we don't do that. We never do that. Every bullet we look at would be similar in casings. The nose is to the left the nose is to the left, or if the nose is to the right and the nose to the right. [sic] Okay. So we would never compare anything base to base. That's wrong. That's just not right. Everyone who is a firearms examiner 101 knows not to do that.
>
> But this is basically what this picture is showing. If you do that base to base – this is the base and there's the base here. Put these together and you try to line them up. They're going to be off. Right? They're going to look like they're not in alignment.

5. The transcript of Locke's interview with plaintiff contains formatting issues that are omitted here for clarity.

> MS. LOCKE: Uh-huh.
>
> MS. DESMOND: They're not going to look right. They're – it's a mis-perception. You can't – it doesn't look like the other base, not even close.

Plaintiff repeatedly stressed that the Comparison Photograph "is not depicting what I saw in the microscope and what I measured." Plaintiff explained, "[t]hat's why you need to put it on the microscope. You cannot do it from a picture." Plaintiff and Locke discussed the fact that plaintiff's work had been checked by Neal Morin, who examined the bullets under a microscope and reached the same conclusions as plaintiff. Moreover, plaintiff stated: "I guarantee that if you ask another qualified examiner, a qualified firearms examiner, what they – to go ahead and examine it under the microscope, that they will come to the same conclusion I have." In that regard, Locke asked plaintiff about the fact that the bullets were going to be sent for an independent examination. Plaintiff responded, "[t]his is what we've been asking them to do. . . . Of course, we would like for it to be sent to any other qualified firearms examiner. We have been asking for it."

At no point in the interview did Locke mention anything about firearms experts asserting based on the Whitehurst Photographs that plaintiff's analysis had been false and questioning whether plaintiff was incompetent or corrupt. According to plaintiff, Locke simply told her that "it's a firearms piece in a much larger article." Towards the end of the interview, plaintiff attempted to make sure Locke understood what she was saying, asking "[d]id I make things clear for you?" and "[d]o you understand what I'm saying." Locke said that she did. Plaintiff would later testify that:

> I thought she understood. I thought that – I thought I set the record straight. You know, I thought I had – I went in there and told her how I had testified in the Pitt County case, I told her the facts of the case, and then I explained to her why this picture – she shouldn't rely on the picture and how we in turn don't rely on pictures to – you don't form an opinion on a picture.

Plaintiff testified that she "felt relieved that [she] had done the interview with" Locke. Before Locke left, she asked if she could take plaintiff's picture, stating "I would love to take a picture of you because we've asked for your photo to be provided." Plaintiff stated:

MS. DESMOND: It's – it's fine. You can. I would prefer, though, if – if you don't mind, if you – how can I say this? I absolutely don't mind you taking my picture. If you were going to print the picture, please take great care because I work a lot of cases.

MS. LOCKE: Uh-huh.

MS. DESMOND: And I do work on sometimes cases that are very sensitive and I don't want my name and picture out there for safety reasons. And that's the only thing.

MS. LOCKE: Okay.

MS. DESMOND: So just be aware of that, if you don't mind.

Eleven days later, in accordance with their advanced publication schedule, defendants published on the front page of the N&O the following story (the 14 August Article) featuring plaintiff's picture, as well as an even more prominent picture of the Comparison Photograph coupled with a caption inquiring of the audience, "WHAT CAN YOU SEE?":

- Doc Ex 900 -

THE NEWS&OBSERVER

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MORE NEWS

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COMING SUNDAY

ETHAN HYMAN - ehyman@newsobserver.com

High school football season begins Friday. See analyses of the Triangle's toughest teams and players.

ONE GUILTY PLEA IN DEATH OF APEX TEEN

One of four teens accused of taking part in the 2008 death of Matthew Stillman pleads guilty to second-degree murder and will testify against another suspect. 1B

911 ADAPTS TO THE SMART PHONE

Durham is among a few 911 emergency centers in the state that could soon be receiving emergency texts and videos, but AT&T objects. 4B

FDA GIVES OK TO NEW CONTRACEPTIVE

Family planning advocates praised the FDA's approval of a pill that can prevent pregnancy for up to five days after sex, but anti-abortion groups disagreed. 3A

S.C. CANDIDATE FOR SENATE INDICTED

Alvin Greene, the unemployed veteran who unexpectedly won the Democratic nomination, is indicted on obscenity charges. 6A

WEATHER

Today: A slight chance for thunderstorms. High 90, low 72

Sunday: Pretty much the same as

AGENTS' SECRETS: JUNK SCIENCE, TAINTED TESTIMONY AT THE SBI

SBI relies on bullet analysis critics deride as unreliable

'This is as bad as it can be,' a former FBI analyst says of work in Pitt County case.

Last of four parts

By Mandy Locke and Joseph Neff
STAFF WRITERS

Beth Desmond looked through a microscope at two mangled bullets.

It was the start of a 2006 murder trial in Pitt County, and prosecutors needed her help to fix a potentially crippling weakness in their case. They asked Desmond, an SBI firearms analyst, to determine whether the two bullet fragments had passed through the same gun, a Hi-Point 9 mm she had already linked to a cluster of casings at the crime scene.

SBI agent Beth Desmond

Desmond's answer was quick, sure and pleasing to the prosecution. But her work in the case has threatened the integrity of yet another unit of the State Bureau of Investigation.

A News & Observer investigation of the SBI has revealed more than a dozen instances in which agents cheated or bent the rules to secure an answer prosecutors sought. At the crime lab, examiners have bypassed accepted techniques, despite pushback in the wider scientific community. Even when their bosses learn of missteps, they often do nothing.

Attorney General Roy Cooper has asked his new director, Greg McLeod, to review the work of the firearms identification unit, citing concerns raised by The N&O this summer. Cooper, a Democrat, removed previous director Robin Pendergraft, who in an N&O interview struggled to explain flawed lab work.

With Desmond's Pitt County assignment, the stakes were high. A 10-year-old boy had caught a bullet during a street fight between two groups of rival teens. His death rocked the small town of Ayden. Her analysis would make or break the case against Jemaul Green, the man they believed accidentally killed Christopher Poggs.

Jemaul Green is in prison.

Desmond would turn to firearms and toolmark identification, one of the oldest and most controversial disciplines of forensic science, to harness these clues into proof that Green was the only gunman. Green had insisted from the start that another man had fired first and that he shot back in self defense. The gun – or guns – had vanished, leaving only a smattering of casings and bullet fragments.

Desmond examined a bullet found in the eaves of a nearby house; the other was collected from the yard near where Christopher collapsed.

SEE BULLETS, PAGE 8A

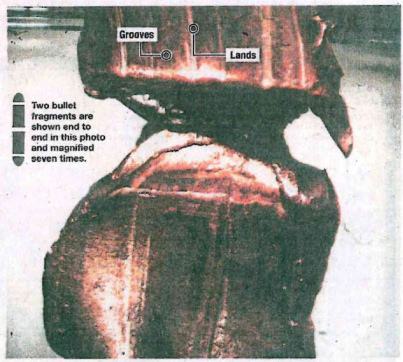

Photo courtesy of Fred Whitehurst — The News & Observer

WHAT CAN YOU SEE?

SBI firearms analyst Beth Desmond compared these two bullet fragments (photo, left) in 2006 for a murder case in Pitt County. She testified they came from the same model handgun, helping prosecutors win a conviction.

Firearms analysts compare the markings made on bullets as the projectiles travel through the barrel of a gun.

Lands are depressions on a bullet. Grooves are the raised areas between the lands. The number of lands and grooves are the same on each bullet that passes through the barrel of an individual firearm; they are also consistent for all guns of a particular type.

To find that number for a deformed bullet, analysts measure a single land and a single groove and plug the results into a formula. Desmond plugged in virtually identical measurements for the land and groove on each bullet.

Other firearms analysts say that even with the poor photo lighting and deformed bullets, it's obvious that the width of the lands and grooves are different.

Desmond took no photos. The photo was taken by a former FBI crime lab analyst in the presence of a prosecutor. Desmond said the photos don't match what she saw under the microscope. She said that bullets can be manipulated in photos "to make them look like they don't match."

Sunday: A confession doesn't add up | Tuesday: Bloodstain analysis: 'A bunch of malarkey' | Thursday: Lab's policies pump up prosecution | TODAY: Alarm bells about ballistics work | ONLINE: See videos and catch up on the series at newsobserver.com.

Soldiers wonder if their work is enough

By Dion Nissenbaum
McClatchy Newspapers

ARGHANDAB, Afghanistan – Setting out on one of their final patrols in Afghanistan, the U.S. Army and Afghan soldiers waded through waist-deep streams, scampered over crumbling mud walls and were closing in on a suspected bomb-making factory when their mission came to an unexpected halt.

Fifty yards short of their target, an Afghan soldier had

Sophomore Ashley Matthews, left, helps senior Mary Woessner move into The Oaks, apartment-style housing at Meredith College.

ETHAN HYMAN - ehyman@newsobserver.com

Meredith hopes to leave

Alcoa foe paid worker on TV story

By Lynn Bonner
STAFF WRITER

A researcher who worked on UNC-TV news stories critical of the aluminum

tabbies

PLAINTIFF'S EXHIBIT 1

Defendant's 14 August Article is highly critical of plaintiff and her work in the *Green* case and includes numerous assertions and opinions concerning plaintiff that Locke later attributed to the four purported firearms experts mentioned above, including, *inter alia*, the following five statements:

> 1. "Independent firearms experts who have studied the photographs question whether Desmond knows anything about the discipline. Worse, some suspect she falsified the evidence to offer prosecutors the answers they wanted."
>
> 2. " 'This is a big red flag for the whole unit,' said William Tobin, former chief metallurgist for the FBI who has testified about potential problems in firearms analysis. 'This is as bad as it can be. It raises the question of whether she did an analysis at all.' "
>
> 3. "The independent analysts say the widths of the lands and the grooves on the two bullets are starkly different, which would make it impossible to have the same number."
>
> 4. " 'You don't even need to measure to see this doesn't add up,' said Hendrikse, the firearms analyst from Toronto. 'It's so basic to our work. The only benefit I can extend is that she accidentally measured the same bullet twice.' "
>
> 5. "Other firearms analysts say that even with the poor photo lighting and deformed bullets, it's obvious that the width of the lands and grooves are different."

In a section alleging that "[a]t the SBI lab, training is often minimal," the article claims that plaintiff "was a novice examiner" who "came to the field through a peculiar route" and discusses plaintiff's prior career as a ballerina. According to the article, the prosecutors in the *Green* case "needed [plaintiff's] help to fix a potentially crippling weakness in their case" and that her analysis of the two bullet fragments pictured in the Comparison Photograph[6] "would make or break the case against Jemaul

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6. The 14 August Article notes that the Comparison Photograph was taken by Whitehurst, whom the article describes as a "former FBI crime lab analyst" and an attorney "who formerly worked at the SBI's crime lab." The article includes a quote from Whitehurst, stating that "[i]t didn't take a lot of analysis to see there was something really off here." The article does not explain, as Locke discussed in her trial testimony, that firearms "was not [Whitehurst's] discipline; he was a chemist" and that Whitehurst "just so happen[ed] to own a microscope that had the capacity to take a photograph."

Green." The article does not mention that thirteen eyewitnesses to the shooting testified that they saw no one other than Green with a firearm. The article also asserts that when plaintiff examined the two bullets in the Comparison Photograph she "scribbled down the measurements of the lands and grooves" and that "[h]er report eliminated doubt about another shooter." The article does not mention that four additional bullets were recovered from the scene and that plaintiff, as reflected both in her typed report and her trial testimony, concluded that no determinations could be made as to these four bullets.

Additionally, the article mentions plaintiff's use of the "absolute certainty" language and states that plaintiff "said this month that she meant to say she was absolutely certain that the bullets were consistent with a Hi-Point 9mm." According to the article, "[t]o make either determination, [plaintiff] had to conclude that the bullets had the same number of lands and grooves," and that, in any event, "[i]t is [plaintiff's] measurements that befuddle independent analysts asked to evaluate the photographs of the two bullets."

Shortly after the 14 August article was published, Bill Tobin called Jerry Richardson to apologize for the way his statement had been portrayed, to explain that the statement explicitly attributed to him in the article was a version of a statement he made only in response to hypothetical "what-if" questions from Locke, and to make clear that he was not one of the "independent" experts referenced in the other statements in the article. Liam Hendrikse, who was also unaware that he was supposed to be one of the "independent" experts referenced in the article, contacted the N&O to request a retraction for statements that were explicitly attributed to him.

Plaintiff was in Pennsylvania visiting her father in the hospital when she heard about the 14 August Article. Plaintiff testified that when she was able to get to a computer and pull up the article, she was stunned:

> I was surprised at how the size of this, the picture was just right there, and this picture just popped up on the screen, and all I could see was like what can you see in asking the reader what they can see looking at this photograph after I had just finished telling her all the reasons, everything I thought was wrong with why you shouldn't use this photograph.
>
> And so I immediately felt like the blood just ran out of my body. I didn't know if I was angry or if I was upset. I didn't know how to feel when I looked at this and so I

> started trying to read it and I couldn't get through the first paragraph. I had to walk away. I had to keep coming back and reading the article in little bits and pieces and there were things that just kind of stuck out with me like they needed her to fix, you know, fix the case, and falsify the evidence and ballerina. It was almost implying that someone like me, a ballerina, had no business doing firearms examinations and that I was incompetent. I mean, this is – it was insane. It's reporting that these experts in my field are saying – are saying that I falsified evidence and saying that I didn't even do the analysis and that these can't possibly be what I said they were, that they're starkly different, and so I was stunned.
>
> I was stunned at how large the article was. I thought it was just going to be a little blurb. I thought it was just going to be a little piece in a larger article, and the fact that it was me and my picture and these bullets are there on the front page as soon as you look, I was stunned.

An August newsletter for John Jay College of Criminal Justice reported that "a forensic analyst from the [SBI] in North Carolina and John Jay College of Criminal Justice alumna, Beth Desmond, has been accused of making a mistake in matching two bullets that sent an innocent man to prison for murder, according to the *News and Observer*, Raleigh, NC."

After the 14 August Article was published, Stephen Bunch performed an independent examination of the ballistics evidence from the *Green* case. The results of Bunch's report corroborated plaintiff's examination. Bunch testified that plaintiff "basically got the same answers [he] did." Regarding the class characteristics in the two bullets depicted in the Whitehurst Photographs, Bunch stated that "[t]hey're spot on."

On 31 December 2010, the N&O published a follow-up article (the 31 December Article), also written by Locke and Neff and entitled "[r]eport backs SBI ballistics."[7] Compared to the 14 August Article, the 31 December Article devotes considerably more attention to plaintiff's use of the "absolute certainty" language and includes a subheading stating, "[h]owever, agent's courtroom certainty that bullets came from one gun in question."[8] The article, which repeats much of the factual recitation

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7. The article, published on the front page of the N&O, again features plaintiff's picture.

8. Plaintiff never testified that the bullets came from one gun.

from the 14 August Article, briefly discusses the results of Bunch's independent examination of the ballistics evidence that had been the focus of the previous article, but alleges that Bunch's "findings undermined the certainty of [plaintiff's] testimony." In the same vein as the five statements from the 14 August Article quoted above, the 31 December Article includes an additional allegation that is attributed explicitly, in part, to Bunch:

> 6. "Ballistics experts who viewed the photographs, including a second FBI scientist who wrote the report released Thursday, said the bullets could not have been fired from the same firearm."

In one of her first cases following the publication of the 14 August Article plaintiff was told "to be prepared, they're coming after you," and thereafter she began facing aggressive cross-examination from defense attorneys on the basis of the article's allegations. Plaintiff testified that in an Alamance County case a respected defense attorney "came after [her] really hard," holding up the 14 August Article in front of the jury and vigorously interrogating plaintiff about the various things of which she'd been accused. The same attorney was quoted at that time in an article in the Charlotte Observer, also written by Locke and Neff, as stating that plaintiff "is putting false information in the courts" and "lacks the credentials and training to do her job."[9] Plaintiff testified that when she realized this attorney was representing a defendant in one of her subsequent cases, "she became very pale knowing that it was him" and "was so afraid of what [he] might have done when [she] went to testify in front of him again."[10] Plaintiff stated that her "credibility and [her] character had been attacked and that [she] was always constantly having to defend [her]self from that point on."

Plaintiff's difficulties continued following the publication of the 31 December Article. Plaintiff stated that she "felt like [the 31 December Article] didn't really do anything to clear [her] name" and that "[i]t seemed like it was just following me around and there was nothing I

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9. This Charlotte Observer article, which repeats statement 2 from the 14 August Article, was admitted into evidence only on the issue of damages.

10. Plaintiff testified that this attorney apologized to her at a subsequent trial, stating:

> I remember when I got off the stand, I went down and as I crossed by his table, I remember him reaching up, grabbing my hand and pulling me down and saying, "Hey, listen. I'm so sorry for what I did to you." He said, "I hope you can forgive me," and I shouldn't have listened to them or something to that effect.

could do to get rid of what was in that first article." At an Association of Firearms and Tool Mark conference that plaintiff attended in Buffalo, New York, after putting on her nametag, plaintiff was asked, "[y]ou know you're a little famous, don't you?" Plaintiff stated she became embarrassed to wear her name tag because everyone seemed to be discussing the 14 August article, with one prominent firearms expert asking, "aren't you the girl that's caused all the trouble down in North Carolina?"

Plaintiff testified that she realized that her "life as a firearms examiner or in the forensic science field had changed and . . . [she] had continued to struggle ever since then." Plaintiff found "it was difficult to work cases," and she began "having trouble concentrating on anything." When the SBI's crime lab was evacuated due to a bomb threat, she felt responsible. Following an incident in which plaintiff returned home from work and saw "a car in front of [her] house and there were two men, and one guy was outside of his car with the door open and taking pictures of [her] house and [her] son was playing in the driveway," plaintiff became "obsessed with safety" and "would GPS [her] son everywhere that he went." Eventually, plaintiff requested a transfer and ultimately was transferred out of the crime lab in September 2013.

Procedural History

Plaintiff filed this defamation action against defendants on 29 November 2012.[11] Plaintiff originally alleged that sixteen statements contained in the 14 August and 31 December articles were defamatory. Defendants moved for summary judgment, which was denied on 14 March 2014. Defendants appealed.

On appeal, the Court of Appeals determined that defendants' interlocutory appeal was appropriate because the case involved application of the "actual malice" standard, the misapplication of which could "have a chilling effect on a defendant's right to free speech." *Desmond v. News & Observer Pub. Co.*, 241 N.C. App. 10, 16, 772 S.E.2d 128, 134 (2015) (*Desmond I)* (quoting *Boyce & Isley, PLLC v. Cooper*, 211 N.C. App. 469, 474, 710 S.E.2d 309, 314 (2011)). The court explained that "[i]n order to recover for defamation, a plaintiff generally must show that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person." *Id.* at 16, 772 S.E.2d at 135 (citing *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29, 568 S.E.2d 893, 897 (2002)). Significantly

11. Plaintiff's original complaint included additional defendants, including McClatchy Newspapers, Inc., the "corporate parent" of N&O, that were subsequently dismissed from the case.

however, First Amendment principles mandate that "[w]here the plaintiff is a public official and the allegedly defamatory statement concerns his official conduct, he must prove that the statement was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[12] *Id.* at 17, 772 S.E.2d at 135 (alteration in original) (quoting *Lewis v. Rapp*, 220 N.C. App. 299, 302–03, 725 S.E.2d 597, 601 (2012)). Having concluded that defendants' interlocutory appeal was properly before the court, the Court of Appeals proceeded to address whether genuine issues of material fact existed as to sixteen allegedly defamatory statements contained in defendants' 14 August and 31 December articles.

In evaluating each of these statements, the court noted that while in order to be actionable as defamation a statement must be one of fact, not merely opinion, the United States Supreme Court has cautioned against "an artificial dichotomy between 'opinion' and fact" and has stated that "expressions of 'opinion' may often imply an assertion of objective fact." *Id.* at 20, 772 S.E.2d at 137 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18–19 (1990)); *see also Milkovich*, 497 U.S. at 18–19 ("Simply couching such statements in terms of opinion does not dispel these implications; and the statement, 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement, 'Jones is a liar.' As Judge Friendly aptly stated: 'It would be destructive of the law of libel if a writer could escape liability for accusations of defamatory conduct simply by using, explicitly or implicitly, the words "I think." ' "). The Court of Appeals noted that fact and opinion can be particularly difficult to separate in a case like this one, "which involves mostly Locke's reports of opinions of experts regarding Desmond's work." *Id.* at 21, 772 S.E.2d at 137. As the court stated:

> Some of the allegedly defamatory statements, though stated as expressions of opinion from experts, may be factually false because Locke reported that the experts expressed opinions regarding Desmond's work that they actually did not express. In some instances, the evidence indicates that Locke asked the experts a hypothetical question, and they answered on the assumption that the facts of the hypothetical question were true, while the facts were actually false and Locke either knew the facts were false or she asked the question with reckless disregard for the actual facts. The experts' opinions were then stated in the article as opinions which the experts

12. Plaintiff stipulated that she was a public official.

> gave about Desmond's actual work, instead of in response to a hypothetical question. Thus, the statements, even as opinions, "imply a false assertion of fact" and may be actionable under *Milkovich*.

Id. at 21, 772 S.E.2d at 137; *see Milkovich*, 497 U.S. at 20 (stating that "where a statement of 'opinion' on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth"). Ultimately, the court held that ten of the statements were not actionable as defamation, but that the six statements—five published in the 14 August Article and one published in the 31 December Article—were actionable and that genuine issues of material fact existed as to whether those six statements were false and defamatory and whether defendants published these six statements with actual malice. *Id.* at 30–31, 772 S.E.2d at 143. Accordingly, the court affirmed in part and reversed in part the trial court's denial of defendants' motion for summary judgment and remanded the case for trial.

Defendants filed a petition for discretionary review of the interlocutory appeal, which this Court denied.

At trial, plaintiff called approximately twenty-three witnesses and presented over one hundred exhibits. Plaintiff's evidence in support of her defamation claim included extensive evidence relating to the *Green* and *Adams* cases, Locke's research and preparation of the articles, Locke's interviews and communications with various individuals, and communications between employees of the N&O. Plaintiff also presented evidence concerning the issue of damages focusing heavily on the mental and emotional impact plaintiff suffered as a result of defendants' articles, including testimony from her psychiatrist and counselor stating that plaintiff suffered from post-traumatic stress disorder. Defendants called two witnesses, including Locke, and presented fewer than twenty exhibits. At the close of plaintiff's evidence, and again at the close of all evidence, defendants moved for directed verdict under Rule 50 of the Rules of Civil Procedure. The trial court denied these motions. The jury found both the defendants liable for defamation for the first five statements and awarded plaintiff $1,500,000 in damages; as to statement six, the jury found the N&O liable for defamation and awarded plaintiff $11,500 in actual damages.

The punitive damages phase of the trial began on 19 October 2016. The jury awarded plaintiff $7.5 million in punitive damages against the

N&O and $75,000 against Locke. The trial court reduced the punitive damages award against the N&O to $4,534,500.00 pursuant to N.C.G.S. § 1D-25(b).[13] Defendants moved for Judgment Notwithstanding the Verdict (JNOV), or, in the alternative, for a new trial. The trial court denied this motion on 30 January 2017. Defendants appealed.

On appeal, defendants argued that the trial court erred in denying its motion for directed verdict and motion for JNOV because plaintiff failed to present sufficient evidence of actual malice and that there were several errors in the jury instructions. The Court of Appeals disagreed, first determining after a careful review of the record that plaintiff presented clear and convincing evidence that defendants published the six statements with actual malice. *Desmond II*, 263 N.C. App. at 55, 823 S.E.2d at 431. The court then addressed defendants' arguments concerning the jury instructions, concluding that: the trial court did not err in denying defendants' proposed instruction concerning the element of falsity; the trial court did not err in instructing the jury to evaluate falsity using the preponderance of the evidence standard, as opposed to the clear and convincing evidence standard applicable to the issue of actual malice; and the trial court did not err by failing to instruct the jury on the statutory aggravating factors required to support an award of punitive damages. *Id.* at 60–67, 823 S.E.2d at 435–38. Accordingly, the Court of Appeals affirmed the trial court's order and judgment. *Id.* at 67, 823 S.E.2d at 439.

Defendants filed a petition for discretionary review, which this Court allowed on 27 March 2019.[14]

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13. This statute limits punitive damages to the greater of three times the amount of compensatory damages or $25,000.

14. After the Court heard arguments in this case, the N&O filed a "NOTICE OF BANKRUPTCY PROCEEDING" advising the Court that The McClatchy Company had filed a chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Southern District of New York and that the N&O was included as an affiliated entity and debtor in the filing. The N&O stated that as a result of the bankruptcy filing, its position was that "further proceedings in this matter are subject to the automatic stay provisions of 11 U.S.C. § 362 pending further order of the Bankruptcy Court." In an order filed 2 April 2020, this Court directed the parties "to inform this Court if and when the bankruptcy court grants relief from the automatic stay provisions or when the automatic stay lapses." On 30 June 2020, the parties jointly filed a "NOTICE OF BANKRUPTCY COURT'S ORDER MODIFYING THE AUTOMATIC STAY," informing the Court that the United States Bankruptcy Court for the Southern District of New York entered an order modifying the automatic stay "Solely to the Extent Necessary to Permit the North Carolina Supreme Court to Issue an Appeal Opinion" in this case.

Analysis

I. Actual Malice

[1] Defendants argue that the defamation verdict here cannot be squared with the First Amendment because plaintiff failed to present clear and convincing evidence of actual malice. According to defendants, plaintiff's evidence reveals only a post-publication dispute between an investigative reporter and her quoted experts centered on subjective intent and unspoken context. These "misunderstandings," defendants contend, do not establish constitutional actual malice under the First Amendment. Accordingly, defendants argue that they were entitled to judgment as a matter of law on plaintiff's defamation claim because the evidence was insufficient to create a triable issue of actual malice. After careful review, we conclude that plaintiff presented clear and convincing evidence of actual malice and that the trial court did not err in denying defendant's motions for directed verdict and JNOV.

The standard of review for the denial of a directed verdict or JNOV is the same and inquires "whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Green v. Freeman*, 367 N.C. 136, 140, 749 S.E.2d 262, 267 (2013) (quoting *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 SE.2d 133, 138 (1991)). "If 'there is evidence to support each element of the nonmoving party's cause of action, then the motion for directed verdict and any subsequent motion for [JNOV] should be denied.' " *Id.* at 140–41, 749 S.E.2d at 267 (quoting *Abels v. Renfro Corp.*, 335 N.C. 209, 215, 436 S.E.2d 822, 825 (1993)). Whether a party is entitled to a directed verdict or JNOV is a question of law that we review de novo. *Id.* at 141, 749 S.E.2d at 267 (first citing *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 720, 693 S.E.2d 640, 643 (2009); then citing *N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc.*, 366 N.C. 505, 512, 742 S.E.2d 781, 786 (2013)). Further, "[w]e review decisions of the Court of Appeals for errors of law." *Pine v. Wal-Mart Assocs., Inc.*, 371 N.C. 707, 715, 821 S.E.2d 155, 160 (2018) (quoting *Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611, 781 S.E.2d 282, 284 (2016)).

As the Court of Appeals noted, "[i]n order to recover for defamation, a plaintiff generally must show that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person." *Desmond I*, 241 N.C. App. at 16, 772 S.E.2d at 135 (citing *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29, 568 S.E.2d 893, 897 (2002)). Moreover, as the United States Supreme Court first explained in *New York Times Co. v. Sullivan*,

the First Amendment[15] places an additional burden on a plaintiff who is a public official seeking damages for defamation relating to his or her official conduct by requiring the plaintiff to "prove[ ] that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. 254, 279–80 (1964); *see also Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 499 (1991) ("The First Amendment protects authors and journalists who write about public figures by requiring a plaintiff to prove that the defamatory statements were made with what we have called 'actual malice,' a term of art denoting deliberate or reckless falsification.").

Notably, "[m]ere negligence does not suffice. Rather, the plaintiff must demonstrate that the author 'in fact entertained serious doubts as to the truth of his publication,' or acted with a 'high degree of awareness of . . . probable falsity.' " *Id.* at 510 (alteration in original) (first quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); then quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)); *see also Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989) ("Although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category." (citing *St. Amant*, 390 U.S. at 733)). Further, "[a]ctual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will." *Masson*, 501 U.S. at 510–11 (citing *Greenbelt Cooperative Publ'g Assn., Inc. v. Bresler*, 398 U.S. 6 (1970)).

Following *New York Times Co. v. Sullivan*, the Supreme Court has further elaborated on the actual malice standard and the role of the courts in enforcing this constitutional safeguard:

> [t]he question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law. This rule is not simply premised on common-law tradition, but on the unique character of the interest protected by the actual malice standard. Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of breathing space so that protected speech is not discouraged. The meaning of terms such as "actual malice"—and, more particularly, "reckless disregard"—however, is not readily captured in

15. The First Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *New York Times*, 376 U.S. at 277 (citations omitted).

one infallible definition. Rather, only through the course of case-by-case adjudication can we give content to these otherwise elusive constitutional standards. Moreover, such elucidation is particularly important in the area of free speech for precisely the same reason that the actual malice standard is itself necessary. Uncertainty as to the scope of the constitutional protection can only dissuade protected speech—the more elusive the standard, the less protection it affords. Most fundamentally, the rule is premised on the recognition that judges, as expositors of the Constitution, have a duty to independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'

. . . .

We have not gone so far, however, as to accord the press absolute immunity in its coverage of public figures or elections. If a false and defamatory statement is published with knowledge of falsity or a reckless disregard for the truth, the public figure may prevail. A "reckless disregard" for the truth, however, requires more than a departure from reasonably prudent conduct. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. The standard is a subjective one—there must be sufficient evidence to permit the conclusion that the defendant actually had a high degree of awareness of probable falsity. As a result, failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard. . . .

In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full. Although credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the opportunity to observe the demeanor of the witnesses, the reviewing court must examine for itself the statements in issue and the circumstances under which they were made to see

> whether they are of a character which the principles of the First Amendment protect.

Harte-Hanks, 491 U.S. at 685–89 (cleaned up); *see also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) ("[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' " (quoting *New York Times*, 376 U.S. at 284–86)).[16]

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16. Amici, The Reporters Committee for Freedom of the Press, citing *Bose Corp. v. Consumers Union of the United States, Inc.*, contend that the Court of Appeals below erred by viewing the evidence of actual malice in the light most favorable to plaintiff and, in doing so, failed to conduct an "independent examination of the whole record" required by United States Supreme Court precedent. 466 U.S. at 499. In *Bose Corp.*, the Supreme Court held that a federal trial judge's ultimate "finding" of actual malice was not insulated from an appellate court's independent examination of the record by virtue of the "clearly erroneous" standard applicable to findings of fact in a federal bench trial. *Id.* at 514 ("[T]he clearly-erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times*."). Notably, however, the Court did not suggest that an appellate court, in reviewing whether the record in a defamation case is sufficient to support a finding of actual malice, should make its own findings of fact and credibility determinations, or overrule those of the trier of fact. For example, the petitioner there alleged that the respondent, in a critical magazine review of the petitioner's loudspeaker system, falsely asserted with actual malice that musical instruments heard through the speakers tended to wander "about the room," as opposed to the truthful description of wandering "along the wall." *Id.* at 488–91. The district court found as fact a lack of credibility in the respondent's employee's assertion in his trial testimony that he interpreted these descriptions as synonymous and, based only on that finding and its finding that "about the room" was not an accurate description, determined that the petitioner had proven actual malice. *Id.* at 511–12. The Supreme Court did not disturb the district court's credibility finding, or any of the district court's "purely factual findings," but simply held that the lack of credibility stemming from the respondent's employee's unconvincing and "vain attempt to defend his statement as a precise description of the nature of the sound movement" did not, by itself constitute clear and convincing evidence that respondent possessed actual malice at the time of the publication. *Id.* at 512–13. This is factually distinguishable from the situation here, in which, as discussed below, plaintiff presented ample evidence tending to show defendants' awareness of falsity and doubts regarding the truth of the six statements at the time of the publication. More to the point, the principle of viewing the evidence in the light most favorable to the nonmoving party on a motion for JNOV, while it must be applied in conjunction with the heightened clear and convincing evidentiary standard and with the appellate court's "independent examination of the whole record," is necessary—where findings of fact and credibility determinations must ultimately be made by the jury—in order to ascertain whether the record can permissibly and constitutionally support a finding of actual malice. Were we to, as amici seemingly urge, make our own factual determinations on the evidence and on the ultimate question of actual malice itself, we would impermissibly invade the province of the jury and conflict with Supreme Court precedent to the contrary. *See, e.g.*, *Time, Inc. v. Hill*, 385 U.S. 374, 394 n.11 (1967) (stating that where a result of either negligence or actual malice "finds reasonable support in the

Here, because plaintiff stipulated that she was a public official and because the allegedly defamatory statements concerned her official conduct, she was required to present sufficient evidence for the jury to find by clear and convincing evidence that defendants published the statements at issue with actual malice. The trial court, in denying defendants' motions for directed verdict and JNOV, determined that plaintiff had met this evidentiary burden, and the Court of Appeals affirmed this ruling. Consistent with our "duty to independently decide whether the evidence in the record is sufficient to cross th[is] constitutional threshold," we "must consider the factual record in full" and "examine . . . the statements in issue and the circumstances under which they were made to see whether they are of a character which the principles of the First Amendment protect." *Harte-Hanks*, 491 U.S. at 686, 688. In addition to the evidence as summarized in the factual background provided above, we will summarize additional portions of the evidence relevant to plaintiff's claim[17]

The crux of plaintiff's defamation claim is that in the six statements defendants falsely claimed that independent firearms experts were asserting based on the Whitehurst Photographs that plaintiff, either through extreme incompetence or deliberate fraud, had botched her laboratory analysis in the *Green* case with the added consequence of securing the conviction of a potentially innocent man. Plaintiff contended that this false narrative began when Locke first learned of the Whitehurst Photographs and the motion for mistrial filed in the *Adams* case, in which Adams' attorney, David Sutton, stated that "William Tobin says preliminary [sic], based upon a photograph sent by Dr. Whitehurst, there is ample reason to question whether the class characteristics in Q-9 and Q-10 are the same." When Locke discussed the *Green* and *Adams* cases

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record it is for the jury, not for this Court, to determine whether there was knowing or reckless falsehood" (citing *New York Times*, 376 U.S. at 284–285)). As such, we do not view an appellate court's "duty to independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice,' " *Harte-Hanks*, 491 U.S. at 685–89, as inherently inconsistent with the principle that a court, on a motion for directed verdict or JNOV, must determine "whether the evidence, taken in the light most favorable to the non-moving party, *is sufficient as a matter of law* to be submitted to the jury," *Green*, 367 N.C. at 140, 749 S.E.2d at 267 (emphasis added) (citation omitted).

17. We emphasize that our discussion of the evidence in this case is a reflection of the record as viewed in the light most favorable to plaintiff and summarizes what the jury could permissibly have found as fact under a clear and convincing evidentiary standard. It was for the jury, not this Court, to determine whether defendants in fact acted with actual malice, and we note that we give due regard here to the principle that credibility determinations are within the province of the jury.

with Sutton in April 2010 and decided to write the story, she included a quote from Sutton in an early draft that was later removed, stating that "[plaintiff] just made it up. She made it up because she could, and prosecutors needed her to. It's that simple." According to plaintiff's theory of the case, defendants decided early on that this was the story and that it would constitute the last of their four-part "Agents' Secrets" series, which reported on alleged errors or wrongdoing by SBI agents and "how practices by the [SBI] have led to wrongful convictions." An internal story folder circulated to N&O staff summarized the planned article, stating that "Desmond had no idea how to evaluate firearm evidence or, worse, she ignored all rules of the trade and fabricated the results to help police secure their victory."

However, all that existed to support such a story, apart from a rather sensational allegation by a zealous defense attorney, was Tobin's statement that the Whitehurst Photographs raised a preliminary "question" over the class characteristics. As plaintiff's counsel stated in closing arguments, Locke "needed [the story] to be what David Sutton had said. . . . That was what she needed the story to be, but she didn't have it. This is what she had, a question." Accordingly, Locke set out to procure independent experts who would substantiate the story suggested by Sutton. Defendants' articles reported that Locke did indeed obtain such "independent firearms experts" who, having "studied the photographs," not only stated, *inter alia*, that "the widths of the lands and grooves on the two bullets are starkly different, which would make it impossible to have the same number," and that "the bullets could not have been fired from the same firearm," but also "question[ed] whether Desmond knows anything about the discipline" and "suspect[ed] she falsified evidence to offer the prosecutors the answer they wanted." Yet, plaintiff's evidence tends to show no one, not least of which the four individuals to whom the statements were attributed, was willing to make such statements—that is, experts were *not* asserting based on the Whitehurst Photographs that plaintiff's analysis was false and questioning whether plaintiff was incompetent or corrupt. As plaintiff's counsel stated at the end of her closing argument:

> This was the story on April 6th. "William Tobin says preliminary [sic], based upon a photograph sent by Dr. Whitehurst, there is ample reason to question whether the class characteristics in Q-9 and Q-10 are the same."
>
> Well, guess what? This is exactly what [Locke] had on August 14, 2010, the story was the same. After all of the attempts to scramble, to try to talk to everybody,

> . . . everybody is saying the same thing. That was still all she had.

Moreover, plaintiff's evidence tends to show defendants' publication of the false statements was not a result of mere negligence or failure to investigate, but stemmed rather from a "purposeful avoidance of the truth." *Harte-Hanks*, 491 U.S. at 692.

One of Locke's purported sources for the six statements was Bill Tobin, a "former chief metallurgist for the FBI." Plaintiff presented evidence tending to show that Tobin did not make some of the statements attributed to him and that he only made other statements when asked as a hypothetical to assume that a serious mistake had been made in the analysis. For example, in his deposition testimony, Tobin was asked about several of the statements attributed to him:

> Q If I understand your answer correctly, your comment, This is as bad as it can be, or It doesn't get any worse than this, was assuming that it was determined that a mistake or an error had been made; is that fair to say?
>
> A Yes, I would also remind, should remind somebody, that that was out of context. In context I was also implying that what I just said is true with regard to the practice of firearms identification, but one needs to put that also in a systemic context because what I believe we had already discussed, if in fact an error had been made, how it crept through the system through what should have been some systemic peer reviews, supervisory reviews of the crime lab, itself, as well.
>
> So in other words, even if an error existed, it should have been detected somewhere along the normal system of reviews before it's admitted or before it's released from the agency. So that was in the context in which I said it doesn't get any worse than that, if in fact an error was made. Again, that's the subjunctive, the caveat or disclaimer, then, comma, then this is it doesn't get any worse than the easiest of the three types of an error creeping all the way through the system. That what I was meaning by it doesn't get any worse than this.
>
> Again, I was not referring to a specific examiner or a specific case. I was just discussing general errors as Type 1, Type 2, and Type 3 errors and the presumed system of

checks and balances and error quality control process that should exist in the system. Does that make any sense?

Q It does. So is it fair to say that your comment of either, This is as bad as it could be or It doesn't get any worse than this, that you may have made to Mandy Locke was not referring to Beth Desmond's work in this case?

A Correct.

Q In any of your conversations with Ms. Locke, did you state to Ms. Locke that you questioned whether Beth Desmond knew anything at all about the discipline of firearms examination?

A First of all, I continue to advise Fred and Mandy that I have no basis to make any claims of this particular examiner's work. I have none. I have no, I didn't know who she or he was. I had no experience with her work product, so I have no basis to make any statements regarding a specific examiner's proficiency.

It's not even a field in which I normally will deal anyway. So on numerous levels I had no basis to make any claim about someone's proficiency. So I don't recall making any statement that she doesn't know anything about firearms or whatever you, firearms identification. I don't recall making that statement.

If I did, it would have been included in the universe or the entire same pool, it's known as, entire possible events leading up to an error if one occurred, if one had occurred, but I don't recall making that statement.

Q So is it fair to summarize your answer by saying you don't recall making any statement like that, but if you had made a statement like that, the only way you could have possibly made a statement like that is if in response to the assumption that a mistake had, in fact, been made and you were laying that out as one possibility along with a lot of other possibilities as the cause of the mistake.

A Yes, but that is such a foreign statement. I would not be in a basis to claim that somebody doesn't know anything about an area in which I don't even deal, in which I don't even perform, that I don't even operate.

So again, I continually admonish—well, not, *I continually reminded Fred and Mandy that I can only present generic assessments of errors, what types of errors and systematic issues from my experiences, both as a scientists and also as a[ ] forensic examiner inside, behind the blue wall. I can only address these areas generically.*

So I would not have any basis at all to make any statement about someone's proficiency in an area outside of metallurgy material science and possibly legally, in the legal community. *But I would not make such a statement. That's not, I have no basis to make that statement.*

Q In any of your conversations with Ms. Locke, did you ever tell Ms. Locke that you suspected that Beth Desmond falsified evidence to offer prosecutors the answer they wanted?

A *No. Again, I have no basis. There is not, that is so inconsistent on numerous levels for me to make that statement, so I did not make that statement.*

Q In any of your conversations with Ms. Locke did you ever tell Ms. Locke that you questioned whether Beth Desmond had done an analysis at all?

A I'll say if you take out the two words Beth and Desmond, yes. I do recall including that in the—that's called drylabbing—take the name out and I concluded that, included that in the possible universe of explanations as to what could have occurred if an error had, in fact, been made.

But I did not specifically indicate that Beth Desmond committed an error. Again, over and over I told anyone with whom I was interacting, I have no basis to judge her work product or her proficiency.

(Emphases added.) While there were no recordings of Locke's interviews or conversations with the expert sources, Locke wrote in her notes from a conversation with Tobin that Tobin stated that "[p]hotographs are not data upon which I rely to make my decision." Following this passage, Locke's notes include a variation of the Tobin quote later reported in the article as statement 2 ("This is a big red flag for the whole unit," said William Tobin, former chief metallurgist for the FBI, who has testified about potential problems in firearms analysis. "This is

as bad as it can be. It raises the question of whether she did an analysis at all."). Yet, immediately preceding this quote, Locke noted Tobin as stating: "Preface this by saying photographs present accurate picture." Locke admitted in her testimony that Tobin was qualifying his statement on the assumption that it was later determined that the Whitehurst Photographs were in fact accurate depictions of the class characteristics of the bullets. Yet, Locke did not include Tobin's prefatory qualifying statement in the article.

Tobin's testimony is bolstered by email communications between Locke and Tobin prior to the publication of the articles. In a 3 August 2010 email from Tobin to Locke, he stated:

> *I don't do F/TM [firearms/toolmark] examinations, and most particularly don't render opinions from photographs in an area in which I don't function.* I only testify as a scientist objecting to the lack of a scientific foundation for testimonies of individualization (specific source attribution), and report on the opinion of my [rather distinguished] colleagues who also strenuously disagree with the conclusions rendered by F/TM examiners. The science doesn't support such conclusions.
>
> I never testify as to the possible fact of a match, only as to the lack of scientific (and statistical) foundation for inferences of individualization.

(Emphasis added.) Thus, despite Tobin's explicit statement that he did not "render opinions from photographs in an area in which I don't function," defendants attributed statements to Tobin representing that Tobin had specifically analyzed plaintiff work in the *Green* and *Adams* cases. Statement 2 was explicitly reported as a quote from Tobin, and Locke asserted that Tobin was one of the "independent" expert sources for the other statements.

Shortly after the 14 August article was published, Tobin called Jerry Richardson, then the assistant director of the SBI Crime Laboratory, to apologize for the way Tobin's statements had been portrayed and make clear that he was not one of the "independent" experts referenced in the article. According to Richardson:

> [T]he first morning after I was back in the office after the articles were published I did receive a phone call from a Mr. Tobin. Mr. Tobin immediately apologized to me . . . . He wanted me to share his apologies also with the crime

> laboratory, with Ms. Desmond, and with our director at the time because of the things that were printed in the article. He made it clear he was not one of the I guess external experts that had made comments. He made it clear to me that his comments were in very general terms. He did say he was answering those questions in a form of "what-ifs," what if this happened and those were how his responses were based, and again he apologized, and he stated at that point he would not have any further contact with the reporter.

This conversation is reflected in an email that Richardson sent later that day to other individuals in the SBI, in which Richardson stated:

> FYI
>
> Bill Tobin, FBI Chief Metallurgist, who is quoted from Saturday's article contact[ed] me earlier today. He wanted to apologize to Beth Desmond, the SBI Firearms Section and me for the manner in which his comments were portrayed in Firearms article. He advises that he only answered questions from the reporter in general terms and actually was not aware of the circumstances of any of the cases and has no knowledge of Desmond's work. Tobin advises that his quotes are from three different questions and appears to have been combined from a series of "What ifs." He further wanted us to know that he is *not* one of the independent experts that is mentioned in the article.

In his deposition testimony, Tobin confirmed that this email accurately described his conversation with Richardson.

Another of Locke's purported expert sources was Liam Hendrikse, a consulting forensic scientist in the field of firearms and ballistics living in Canada. Hendrikse was among those included in the emails circulating the Whitehurst Photographs following the *Adams* trial. When Locke contacted Hendrikse asking if he would be willing to discuss the case, Hendrikse was hesitant to speak with her in part because of the possibility that he could be retained to perform an independent examination of the ballistics evidence from the *Green* case. In an email to Whitehurst and Schwartz, Hendrikse asked if he should speak with Locke and noted that he had not "examined and compared the samples Q9 and Q10 'first hand' " and that "anything that [he] would say would of course be a qualified opinion." Hendrikse wrote that he "suppose[d] he should discuss [Locke's] intentions with her, and then go from there." Schwartz

advised Hendrikse to "do whatever's comfortable" and that if he spoke with Locke, "make sure you qualify your opinions as much as you think they should be qualified." Hendrikse also discussed his concerns in an email with another local attorney, stating that he intended to speak with Locke "just to get an idea of her intentions with respect to this article" and that "[i]f the article seems to be more general, than specific, then [he] would see no reason why [he] couldn't comment." After Hendrikse spoke with Locke, he wrote that his concerns were alleviated "given the nature of the article" and that he had "had a very general conversation with the reporter, in my mind perfectly harmless."

At trial, Hendrikse testified that when he spoke with Locke they largely discussed firearms examination generally, and he told her that the class characteristics of the bullets looked different in the Whitehurst Photographs but repeatedly stressed the limitations of photographs and the fact that a physical examination would be necessary to make any determinations about the bullets. With respect to statement 1 ("Independent firearms experts who have studied the photographs question whether Desmond knows anything about the discipline. Worse, some suspect she falsified the evidence to offer prosecutors the answers they wanted."), Hendrikse denied making any such comments and assumed when the article was published that Locke must have been referring to other sources. Similarly, Hendrikse denied making statements 3 and 4 as written, testifying that he never stated that "the widths of the lands and the grooves on the two bullets are starkly different, which would make it impossible to have the same number" or that "You don't even need to measure to see this doesn't add up." With respect to the last portion of statement 4 ("It's so basic to our work. The only benefit I can extend is that she accidentally measured the same bullet twice."), which was specifically attributed to Hendrikse in the article, Hendrikse testified that he did state something similar, but only by way of explanation in response to a question in which he was asked to assume that a serious mistake had in fact been made. According to Hendrikse, this comment

> was an explanation that I gave to Ms. Locke in our conversation. Based on assuming somebody went in there looked at these two samples and determined that they actually were different, then how would that mistake have been made, and that was the explanation that I gave her, but that wasn't the only benefit that I came up with because that was prefaced as "I can't tell you whether she's right or wrong because I haven't looked at the exhibits."

After the 14 August article was published, Hendrikse wrote to the N&O with his concerns about the inaccuracies in the article and to request a retraction for the statements that were explicitly attributed to him, stating:

> I've been having trouble with the context of the quotes that are attributed to me, and I was wondering if a retraction was possible.
>
> The two quotes that I have real issues with are the following:
>
> 1. "The chances of a gun not matching a bullet recovered from the crime scene when it involves an American gun is highly likely. Our days of speaking with such certainty should be over."
>
> The first part of that was misinterpreted. We were speaking on the phone, about Class Characteristics, not Individual Characteristics. When we spoke about how Agent Desmond arrived at determining that the bullet was fired from a Hi-Point, I mentioned that it is usually very difficult to narrow down the possible makes of gun, to just one when analyzing the Class Characteristics of a bullet. The quote makes it seem like I'm saying it's unlikely that you can link a bullet to the individual gun that fired it. This is wrong, and in a nutshell makes me appear to be a lunatic. The existence of such a quote could have longer-term ramifications with respect to my career and credentials.
>
> The latter part of that quote doesn't really say anything without that first part.
>
> 2. The only benefit I can extend is that she accidentally measured the same bullet twice.
>
> I feel that this is unfair to both agent Desmond, and to myself. Both verbally, and in writing, I stated that I couldn't tell you if she was right or wrong unless I examined the items.

(Emphasis added.) As previously stated, Hendrikse was unaware at the time that he was purportedly a source for the other statements attributed to the "independent" experts.

Another of Locke's expert sources for the six statements was Dr. Stephen Bunch, a firearms examiner and a supervisor of the firearms

and tool mark section at the Virginia Department of Forensic Science laboratory. In his testimony, Bunch stated that in his one phone conversation and follow-up emails with Locke he answered general questions about firearms examination and denied that he made any of the statements as reported in defendants' articles. In his first email following their phone conversation, Bunch asked that any of his comments be kept off the record, stating: "Thank you for being understanding of my refusal to comment about this case. Frankly, I know nothing factual about it at all." In subsequent emails, after Bunch had seen the Whitehurst Photographs, Bunch wrote to Locke that "it appears" in the photographs that the class characteristics are different, but that he "would have to look at the actual specimens to really offer a firm opinion." In a separate email, Bunch wrote to Locke: "I wish I could see the actual specimens and then I could render a real opinion"; and "[s]trange things can happen though when one observes photos, so I hate to state anything with firmness." Bunch testified that he never told Locke that the class characteristics of the bullets were actually different (or that it was obvious they were different), that he questioned whether plaintiff knew anything about the discipline of firearms examination, or that he questioned whether plaintiff had done an analysis at all:

> Q. . . . [D]id you ever tell Ms. Locke that it was obvious that the widths of the lands and grooves on the two bullets at issue were different?
>
> A. I may have suggested that they appeared different in the photographs but I wouldn't have said definitively they were different, no.
>
> Q. And similar question: Did you ever tell Ms. Locke that the widths of the lands and grooves on the two bullets were starkly different?
>
> A. Only I may have used that word in referring to their appearance in the key photograph possibly. I don't recall. But I wouldn't have said as a fact that they were starkly different, no, not without examining them.
>
> Q. Okay. And in any of your conversations with Ms. Locke did you ever tell Ms. Locke that you questioned whether Beth Desmond knew anything at all about the discipline of firearms examination?
>
> A. I really don't think so. I don't think that came up at all in our one telephone conversation so at least not to my

> recollection. I can't conceive of – I've had dealings with that and when the FBI questions one examination over another. That can be a dicey topic. I've thought about that a lot over the years, so no, I can't conceive of saying something like that just based on a potential single mistake.
>
> Q. And I believe I've already asked you this but I'm going to ask you again: In any of your conversations with Ms. Locke, did you ever tell Ms. Locke that you suspected that Ms. Desmond falsified the evidence to offer the prosecutors the answer they wanted?
>
> A. No, I wouldn't have done that. I didn't even think of that myself, as mentioned.
>
> Q. Did you ever tell Ms. Locke that you questioned whether or not Beth Desmond had done an analysis at all?
>
> A. No, I don't think so. I don't even know for sure whether her name came up in an initial conversation, I don't know. It may have, it may not have. I'm not sure, but it was a general conversation I think about where she could find other examiners to do this or comment on it, and it was the general – maybe a little bit of a general discussion on the science and, you know, the good and the bad or whatever.

Locke originally asserted in a sworn deposition that Tobin, Hendrikse, and Bunch were her expert sources for the six statements. The following day, however, Locke asserted that she had inadvertently omitted Schwartz as an additional expert source for the statements. Locke had one conversation with Schwartz, who is not a firearms expert. In Locke's notes from this conversation, Locke quotes Schwartz as stating "Hi-Point Model C. I don't know enough to dispute that." In her deposition, Schwartz testified that she did not recall Locke asking for her opinion as to whether the bullets in the Whitehurst photograph had been fired from the same gun. Had she been asked, Schwartz stated that she would have explained she was not "qualified to judge" and "would have referred her to Liam [Hendrikse]." Schwartz further testified in this respect:

> Q. Did you or would you have ever told Mandy Locke that the widths of the land and groove impressions on the bullets that Beth Desmond examined are starkly different,

> and therefore it's impossible for the bullets to have the same number of land and groove impressions?
>
> A. I could only have said I might have said that Liam had that opinion or that Fred had that opinion, or possibly if Bill Tobin had that opinion, or possibly if Bill Tobin got involved that they had that opinion. I'm not competent to have such an opinion. I was not then and I am not now. I have never been competent to have such an opinion.
>
> Q. And would you have ever told Mandy Locke that the bullets in question could not have been fired from the same firearm?
>
> A. Again, I am not competent to have such an opinion.

Regarding statement 1 ("Independent firearms experts who have studied the photographs question whether Desmond knows anything about the discipline. Worse, some suspect she falsified the evidence to offer prosecutors the answers they wanted"), Schwartz testified:

> Q. Would you have ever told Mandy Locke that you questioned whether or not Beth Desmond knew anything about the discipline of firearms examination?
>
> A. I don't recall saying such a thing, I don't. I'd say that this isn't the kind of thing I would have said.
>
> . . . .
>
> Q. Would you have ever told Mandy Locke that you suspected that Beth Desmond had falsified her report?
>
> A. No, that is not something I would have said, chiefly because I don't have access to Ms. Desmond's mind. To say falsified would have been that she did something deliberately lied. How could I know without having access to her mind.

Schwartz's testimony that she would not have made such statements is consistent with her affidavit and testimony in the *Adams* case, as well as an email she sent to individuals interested in the Whitehurst Photographs on 10 April 2010, in which she stated: "[A] definitive statement that the bullets came from two different guns can't be made on the basis of Fred's photographs or, indeed, any photos. To reach a definite conclusion as to the class characteristics on the two bullets, the bullets themselves will need to be examined."

Locke's communications with her purported expert sources tend to show not only that Locke frequently sought to obtain their statements on the hypothetical assumption that plaintiff's analysis had already been determined to be false, which is not the manner in which any of the resulting statements that were actually made were reported in the articles, but also that Locke tended to misrepresent to her sources the SBI's response to any questions that had been raised by the Whitehurst Photographs. For example, when the SBI first received the Whitehurst Photographs on 24 July 2010, Richardson emailed Whitehurst to discuss the misleading nature of the photographs. Richardson wrote:

> [W]e have noted a number of issues associated with the photos. These issues include: photographs are not properly oriented, improper side lighting, unknown microscope magnification; focus; and, the use of what appears to be tweezers or other metal objects to handle evidence during photography which could alter the evidence.

This email was forwarded to Locke, who then emailed Bunch and Hendrikse stating:

> Not surprisingly instead of addressing a grave mistake the SBI leadership is trying to discredit the photos you and the others saw of those bullet fragments in the case in North Carolina that we discussed. The photographer had the fragments propped up on metal tweezers, but he said he didn't handle the bullets with them. The SBI leadership is saying that the metal-to-metal contact likely corrupted the evidence. Liam, could tweezers, particularly if they are not used to pick up the bullets affect the number of lands and grooves visible? Could it make a new land or groove?

Locke's email, which again opened with the false premise that it was already established that plaintiff's analysis was unsound (i.e. "a grave mistake"), omitted the SBI's legitimate concerns with the photographs and falsely suggested the SBI was asserting that the use of tweezers had "*likely* corrupted the evidence" or even had created new lands and grooves on the bullets. Bunch responded that the fictitious latter proposition was "laughable," and Hendrikse stated that "you'd have to be some sort of ham-handed strong man to accidentally create what looks like equidistant rifling impressions on either of the fragments, or obliterate rifling that was originally there."

Notably, in Hendrikse's response, he again stressed the necessity of an independent examination in order to resolve any questions

concerning the bullets, stating "[t]he fact remains that unless I physically examine them I won't know if ultimately SBI NC are correct or not. Did they ever employ an independent examiner to give a second opinion?" In her responding email,[18] Locke acknowledged that an independent examination was planned, but again misrepresented the position of the SBI:

> Liam, thanks for that; it's what I suspected. They've hired the guy and run through a million hoops to physically get the bullets sent. The DA has dragged his feet per pressure from the SBI. They're avoiding scrutiny.

As Locke admitted in her trial testimony, the latter statements were false, as both the Pitt County DA and the SBI wanted to have an independent examination performed on the bullets.[19]

Locke similarly mispresented what plaintiff had said about the photographs when Locke spoke to her purported sources. In their interview, plaintiff repeatedly stressed to Locke that firearms examination requires physical examination under a microscope by a qualified examiner and cautioned against attempting to draw any conclusions from a photograph, particularly one taken by someone who, like Whitehurst, is not a firearms expert. On the subject of the use of tweezers, plaintiff pointed to this as one example of Whitehurst's noticeable inexperience in firearms examination, stating that this could have "potentially, potentially" impaired the bullets for future examination. Plaintiff explained, "I'm just saying that a firearms person would never use tweezers on any type[,] I don't even care if you['re] only holding them up for a picture. You don't do that. If I had done that, I would have been chased out of here." Plaintiff further stressed that she and the SBI were eager for the bullets to be reexamined, stating, "[t]his is what we've been asking them to do" and that "[o]f course, we would like for it to be sent to any other qualified firearms examiner. We have been asking for it. . . . I am – I have – I'm wanting someone to look at them. That's fine with me." Yet, in an email to Hendrikse later that day, Locke stated that plaintiff was "sure that the tweezers as we discussed last week had ruined the evidence and that no one would be able to make any good conclusions now."

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18. This email evidently was not provided to plaintiff by defendants along with the other emails produced during discovery and was instead provided to plaintiff by Hendrikse.

19. Locke asserted that the false accusations in her email originated with Sutton, stating that "Sutton has a very strong personality, and he had some very strong thoughts, and I think that he had made the issues sound bigger than it was to me, and I erroneously repeated it," and that "Sutton was very frustrated. He felt that Mr. Everett's office was standing in the way of these bullets being tested. I now know and think he was wrong[.]"

While misrepresenting these portions of the interview to her sources, plaintiff's evidence also shows that Locke ignored other critical aspects of her interview with plaintiff. In the interview, plaintiff not only reiterated what Locke's experts had stated—that no conclusions can, or should, be drawn from mere photographs—but also repeatedly stressed that due to conspicuous issues with the photographs, including the poor lighting and improper positioning of the bullets, the class characteristics she and Morin had observed *are not visible in the Whitehurst Photographs*, particularly in the Comparison Photograph. As previously noted, plaintiff explained at length how firearms examiners "never compare anything base to base," that "[e]veryone who is a Firearms examiner 101 knows not to do that," and that if "you try to line them up[,] [t]hey're going to be off. Right? They're going to look like they're not in alignment." In this respect, plaintiff also presented evidence that, prior to publication, a photographer for defendants' "Agents' Secrets" series tried to raise this same concern in a team meeting by drawing lines diagonally across a piece of paper, tearing the paper in two down the middle of the lines, and then turning one of the pieces around to show that the lines no longer lined up with each other. Additionally, Locke testified that as part of her research she "read every operating procedure manual for every section of the state crime laboratory as far back as they had retained those materials" and was aware that the bullets were improperly positioned in the comparison photograph. Thus, plaintiff's evidence tends to show that in spite of Locke's awareness of the myriad problems with the Whitehurst Photographs, particularly the "base-to-base" Comparison Photograph, and the fact that no one, most especially plaintiff, was asserting that the relevant class characteristics were visible in the Comparison Photograph, defendants featured the Comparison Photograph prominently on the front page of their newspaper along with the caption "WHAT CAN YOU SEE?" inviting the average reader to look for something that could not be seen and to do what independent firearms experts would not—form an opinion based merely on a photograph.

Plaintiff's evidence also demonstrated that, despite Locke's sources' repeated statements that any substantive analysis of the bullets in question would require physical examination under a microscope, Locke never sought to interview or otherwise contact Neal Morin. Morin, plaintiff's supervisor at that time, was the only other qualified firearms examiner who had examined the bullets under a microscope, and he had agreed with plaintiff's conclusions regarding the matching class characteristics and had signed off on her work. Plaintiff presented evidence

that Locke was aware of Morin and his role in reviewing plaintiff's analysis. In Locke's interview with plaintiff, plaintiff explained:

> MS. DESMOND: . . . All of my work is checked by a senior examiner, someone that is more senior to me. And so that person takes it back through all the evidence, looks at it and has to come to the same conclusion I did before they sign up – off on it."
>
> MS. LOCKE: And that would be Neal Morin.
>
> MS. DESMOND: Yes, it was.

Locke even wrote in her research notes "Check on Neal Morin, approved peer review of Desmond," yet never attempted to contact Morin.

When asked why she had interviewed plaintiff but not Morin, Locke first testified that she did not interview Morin because "the chain of custody log indicated that Mr. Morin had access to specimen for ten minutes," and because "one of the primary concerns was how [plaintiff's] testimony differed from her laboratory report," and Morin did not testify. Locke acknowledged that plaintiff's "determinations on the class characteristics w[ere] the central question" but asserted that she did not understand how interviewing Morin would "have changed or made this story any different for Ms. Desmond." In her testimony on the following day, when asked why she had not sought to interview Morin when she was already at the SBI crime lab interviewing plaintiff, Locke suggested an additional reason why she had not interviewed Morin:

> "[t]he protocol for talking to anybody employed with the SBI is to reach out to the public information officer. . . . A public information officer was not present in that interview, and so I would not have stormed over to the firearms unit at that moment to try to interview anybody else without looping in the public information officer."

Yet, plaintiff had testified that when she contacted Locke to discuss her concerns with the Whitehurst Photographs, a public information officer's presence was a prerequisite to the interview:

> A. . . . I went to the director and I told him that I wanted to talk to her and at least give the facts of the case that I testified on, only to give the facts of a case that I testified on and to explain, you know, these pictures, if this is what she was looking at, and he had agreed and he had said that the only way he would let me do that is

> if he would have – he would have the public information officer come in with me to make sure, you know, sit in the room – the interview room, and I said that would be fine.
>
> And so then I called Mandy Locke, and I set up an interview to talk about the Pitt County case.
>
> Q. And did you in fact have an interview with Mandy Locke?
>
> A. I did.
>
> . . . .
>
> Q. And it was you and Mandy Locke and who else was there?
>
> A. Her name was Jennifer Canada, and she was the public information officer with the Department of Justice.

Morin testified that he was at the lab during Locke's interview with plaintiff, he anticipated being asked questions by Locke, and he was surprised that he was not.

Also relevant to the question of defendants' regard for the truth or falsity of their publications is plaintiff's evidence concerning various mischaracterizations and omissions in the articles. Consistent with the theme of the "Agents' Secrets" series—to show "how practices by the [SBI] have led to wrongful convictions"—the 14 August article asserted that Pitt County prosecutors needed plaintiff's bullet analysis to "fix a potentially crippling weakness in their case" and that plaintiff's "analysis would make or break the case against Jemaul Green." Yet, despite Locke's insistence in her trial testimony that "we try to tell our readers as much as we know and provide to them as much information as we can," the article omits key information about the case against Green, perhaps most pertinently the fact that thirteen eyewitnesses testified at the trial and none of them observed anyone other than Green with a firearm. Further, Locke acknowledged she was aware of credibility issues with Green and his claim of self-defense which were omitted from the 14 August and 31 December articles. According to Locke, "I think any intelligent reader understanding that a man opened fire in a populated street who had been convicted of murder and sent to prison might have some credibility issues. I didn't need to say that."

The 14 August Article mischaracterizes not only the strength of the State's case, but also the impact of plaintiff's testimony upon the case. For example, the article asserts that when plaintiff examined the two

bullets in the Comparison Photograph she "scribbled down the measurements of the lands and grooves"[20] and that "her report eliminated doubt about another shooter." The article mentions neither the four additional bullets recovered from the scene nor the fact that plaintiff, as reflected both in her typed report and her trial testimony, concluded that no determinations could be made as to these four bullets. The 14 August Article also discusses the fact that Green wanted to introduce evidence tending to show that, not long after the shooting, the victim's brother was seen at Vonzeil Adams' house threatening Adams with a gun. According to the article, this "evidence that [the victim's brother] could have been a second shooter" was excluded because "Desmond had convinced the judge: Nothing but bullets and casings from a Hi-Point 9mm Model C had been recovered there." This is false, as the judge's primary ruling was that the proffered evidence was inadmissible hearsay and, as previously stated, plaintiff made no determinations as to four additional bullets recovered from the scene.

The 14 August Article also discusses plaintiff's use of the "absolute certainty" language in her trial testimony, noting that plaintiff at one point "concluded with 'absolute certainty' that they were fired from the same kind of gun." The article states that plaintiff "said this month that she meant to say she was absolutely certain that the bullets were consistent with a Hi-Point 9 mm." What the article does not state and what Locke, having read the trial transcripts and specifically discussed this issue with plaintiff, was aware of is that plaintiff's "absolute certainty" comment was made during *voir dire* outside of the presence of the jury, that it occurred after plaintiff had already testified regarding her analysis of the cartridge casings and bullet fragments, and that the *voir dire* examination concerned the prosecution's proposed demonstration of how a semiautomatic handgun's ejection port works.[21] Thus, it is unlikely that any purported issue with plaintiff's "absolute certainty" language (as opposed to "scientific certainty" or "consistent with") had

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20. In her trial testimony, Locke denied that the word "scribbled" conveyed any negative connotation, stating, "[n]o, I do not agree with that. My doctor scribbles." Locke also asserted that the 14 August Article's discussion of plaintiff's prior career in ballet was intended to be complimentary and denied that it was in any way derogatory, explaining that "it was really interesting that she had this background." The discussion is included in the article as part of a section alleging that "[a]t the SBI lab, training is often minimal" and claiming that plaintiff "was a novice examiner" who "came to the field through a peculiar route." By contrast, in discussing with Hendrikse his prior work as a model, Locke told him she would not have reported it because it would not have been relevant.

21. Thus, the *voir dire* examination was not conducted in order for the trial court to rule on the admissibility of plaintiff's expert testimony.

any effect on the trial or the jury's verdict, contrary to the suggestion of the 14 August Article. This information is similarly omitted in the 31 December Article, despite the fact that this article focuses far more heavily on the purported "absolute certainty" issue rather than on plaintiff's substantive analysis of the bullets.[22] Additionally, the subheading of the 31 December Article erroneously refers to plaintiff's "certainty that bullets came from *one gun*," rather than one type of gun.

Finally, plaintiff's evidence demonstrates that defendants were aware not only of the necessity of an independent examination of the bullets in order for any determinations to be made concerning plaintiff's analysis, but also of the fact that the bullets were indeed going to be independently examined—but not before the planned publication date of defendants' "Agents' Secrets" series, in which the 14 August Article was set to be the final article in the four-part series. Defendants did not wait for the results of the independent examination, which ultimately confirmed plaintiff's analysis. Instead, shortly before publication, defendants decided to move the "Agents' Secrets" series up a week in order to be "more timely"—that is, to piggyback on the breaking news that the Attorney General had replaced the SBI director.

Overall, following "an independent examination of the whole record," *Bose Corp.*, 466 U.S. at 499, we conclude that the evidence is sufficient to support a finding by clear and convincing evidence that Locke and the N&O published the six statements with serious doubts as to the truth of the statements or a high degree of awareness of probable falsity, *Masson*, 501 U.S. at 510. If the evidence reflected, as defendants urge, a simple "misunderstanding" or a "he-said/she-said dispute" between a reporter and her sources, then it may very well have been insufficient to meet the *New York Times* standard. Here, however, the evidence concerning Locke's purported expert sources, including, *inter alia*, the numerous confirmations that no conclusions should be drawn from photographs, not only tends to support those four individuals' testimony that they did not make the six statements attributed to them, but also tends to show, particularly in light of the expert subject matter at issue, that those individuals would never have made such statements—that, indeed, it would have made little to no sense for them

22. The evidence, including the 31 December Article and the trial testimony, tends to show an effort by defendants to deflect from what was reported in the 14 August Article about plaintiff's substantive analysis and to portray their story all along as one largely concerned with plaintiff's "testimonial overstatement" in using the "absolute certainty" language.

to have made such statements. Meanwhile, the evidence of numerous statements made by Locke in her communications with her purported expert sources and in her deposition and trial testimony would support a finding by the jury of a lack of credibility on her part with respect to the statements attributed to those purported sources and, more generally, to decisions made at each step of the publication process leading up to the 14 August Article. This evidence concerning Locke, including the myriad ways in which she was aware, and repeatedly made aware, of the false aspects of the six statements and various other portions of the 14 August and 31 December Articles, yet evidently disregarded this information, is highly pertinent to the question of Locke's state of mind with respect to the truth or falsity of the six statements at the time of publication. Moreover, the contrasting evidence between Locke and the purported expert sources must be also considered in the context of the additional evidence concerning the internal communications of defendants' employees, the significant mischaracterizations and omissions in the 14 August and 31 December Articles tending to portray a narrative of events divorced from reality, the attempts by defendants in their 31 December Article and in their testimony and representations in the trial court to shift the focus away from the Whitehurst Photographs and plaintiff's substantive analysis in the *Green* case to the purported issue of plaintiff's "testimonial overstatement," and the fact that defendants did not wait for the independent examination of the ballistics evidence but rather advanced their publication date in order to capitalize on the latest headlines—all of which tends to show, as the Court of Appeals below described it, "that the primary objective of defendants was sensationalism rather than truth." *Desmond II*, 263 N.C. App. at 54, 823 S.E.2d at 431. When viewed as a whole, the evidence is sufficient for the jury to find by clear and convincing evidence that defendants published the statements with actual malice—that is, "knowledge of falsity or a reckless disregard for the truth." *Harte-Hanks*, 491 U.S. at 688.

Certainly, the jury could have found that false and defamatory statements published in the 14 August and 31 December Articles were the result of a significant pattern of negligence on the part of defendants that fell short of actual malice.[23] Where, however, the record would support

23. Defendant argues that the law protects a reporter's "rational interpretation" of an ambiguous source, even if the interpretation is wrong. *Time, Inc. v. Pap*e, 401 U.S. 279, 289–90 (1971). While the jury, which was instructed on rational interpretation, could have found that defendants' statements were within the realm of rational interpretation, plaintiff presented sufficient evidence to support the jury's finding that the reported statements transcended any rational interpretation and resulted instead from a deliberate falsification or a reckless disregard for the truth. Additionally, defendants note that a plaintiff must

either finding, the question must be submitted to the jury. *See Time, Inc. v. Hill*, 385 U.S. 374, 394 n.11 (1967) (stating that where a result of either negligence or actual malice "finds reasonable support in the record it is for the jury, not for this Court, to determine whether there was knowing or reckless falsehood" (citing *New York Times*, 376 U.S. at 284–285)).

We recognize the significant societal interests implicated by the issue here and discussed at length in amici curiae briefs filed by several organizations on behalf of defendants. The First Amendment "demands that the law of libel carve out an area of breathing space so that protected speech is not discouraged," *Harte-Hanks*, 491 U.S. at 686 (cleaned up), and this breathing space is particularly vital in the context of the discussion of issues affecting our criminal justice system and our system of government. The Supreme Court, however, "ha[s] not gone so far . . . as to accord the press absolute immunity in its coverage of public figures" and public officials. *Id.* at 688; *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) ("The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation."). An individual still maintains a "right to the protection of his own good name." *Gertz*, 418 U.S. at 341. Moreover, while the clear and convincing evidentiary standard is more stringent than the preponderance of the evidence standard, it is not an insurmountable burden. *See, e.g.*, *California ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90, 93 (1981) (per curiam) (footnote omitted) ("Three standards of proof are generally recognized, ranging from the 'preponderance of the evidence' standard employed in most civil cases, to the 'clear and convincing' standard reserved to protect particularly important interests in a limited number of civil cases, to the requirement that guilt be proved 'beyond a reasonable doubt' in a criminal prosecution." (citing *Addington v. Texas*, 441 U.S. 418, 423–44 (1979))); *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 721, 693 S.E.2d 640, 643 (2009) (stating that the clear and convincing standard "is more exacting than the 'preponderance of the evidence' standard generally applied in civil cases, but less than the 'beyond a reasonable doubt' standard applied in criminal matters" (citing *Williams v. Blue Ridge Bldg. & Loan Ass'n*, 207 N.C. 362, 363–64, 177 S.E. 176, 177 (1934))). Where

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establish that a challenged statement is not "substantially true." The issue of the sufficiency of the evidence regarding the issue of falsity is not properly before the Court; in any event, plaintiff presented ample evidence that the six statements were not substantially true.

plaintiff presented sufficient evidence to meet this evidentiary burden, the issue was properly submitted for a jury determination.

As such, the trial court did not err in denying defendants' motions for directed verdict and JNOV. Accordingly, we affirm the decision of the Court of Appeals with respect to this issue.

II. Jury Instructions

[2] Defendants next argue that the trial court erred in its jury instructions regarding the issue of material falsity by instructing the jury as follows:

> The attribution of statements, opinions or beliefs to a person or persons may constitute libel if the attribution is materially false, or put another way, if it is not substantially true. The question is whether the statements, opinions or beliefs of the individuals that were reported as being held or expressed by the individuals were actually expressed by those individuals.

According to defendants, when a publication attributes a statement to a speaker, the defamatory "sting" is not in the attribution to the source but instead is in "the underlying statement of fact attributed to the speaker." Defendants contend that the trial court instructed the jury to consider only the material falsity of the attribution, standing alone, and never instructed the jury to consider the material falsity of the underlying statement of fact attributed to the speaker. Defendants argue that the trial court should have adopted their proposed instruction, stating:

> If you find that the underlying facts reported by a challenged Statement are substantially true, separate and apart from the attribution to a cited or quoted source or sources, you should find that Plaintiff has not carried her burden of proving material falsity.

We disagree.

"It is a well-established principle in this jurisdiction that in reviewing jury instructions for error, they must be considered and reviewed in their entirety." *Murrow v. Daniels*, 321 N.C. 494, 497, 364 S.E.2d 392, 395 (1988) (citing *Gregory v. Lynch*, 271 N.C. 198, 203, 155 S.E.2d 488, 492 (1967)). Further, "[w]here the trial court adequately instructs the jury as to the law on every material aspect of the case arising from the evidence and applies the law fairly to variant factual situations presented by the evidence, the charge is sufficient. *Id.* at 497, 364 S.E.2d at 395 (citing *King v. Powell*, 252 N.C. 506, 114 S.E.2d 265 (1960)).

With respect to the issue of falsity, "[t]he common law of libel" "overlooks minor inaccuracies and focuses on *substantial truth*." *Masson*, 501 U.S. at 516 (emphasis added). As such, "[m]inor inaccuracies do not amount to falsity so long as 'the substance, the gist, *the sting*, of the libelous charge be justified.' " *Id.* at 517 (emphasis added) (citation omitted). Thus, a plaintiff must establish that "the sting," the aspect causing injury to the plaintiff's reputation, is materially false. Stated differently, "the issue of falsity relates to the *defamatory* facts implied by a statement." *Milkovich*, 497 U.S. at 20 n.7. Here, however, what constitutes the actionable defamatory facts has been difficult at times to parse due to the unique factual posture, which involves statements that attribute other statements to third parties as experts opining about plaintiff's work as an expert in the same specialized field. As the Court of Appeals stated in *Desmond I*, "[i]n this case, which involves mostly Locke's reports of opinions of experts regarding Desmond's work, fact and opinion are difficult to separate." *Desmond I*, 241 N.C. App. at 21, 772 S.E.2d at 137.

In that appeal, the court rejected defendants' argument that " '[m]any of the statements identified in [plaintiff's] Complaint are simply expressions of opinion' by various experts whom Locke interviewed, not assertions of fact, and thus not actionable." *Desmond I*, 241 N.C. App. at 20, 772 S.E.2d at 136–37. The court explained, as noted above, that "[s]ome of the allegedly defamatory statements, though stated as expressions of opinion from experts, may be factually false because Locke reported that the experts expressed opinions regarding Desmond's work that they actually did not express." *Id.* at 21, 772 S.E.2d at 137. Thus, in these instances, an expert's opinion that by itself would not have been actionable is actionable here because defendants published *an assertion of fact* that the expert made a *statement of opinion* that they did not state. For example, if Bill Tobin had published an article on his personal blog in which he opined that the Comparison Photograph is "a big red flag" and "*raises the question* of whether [plaintiff] did an analysis at all," plaintiff would have been hard pressed to establish that his indeterminate statement, though critical, was sufficiently an assertion of fact to be actionable as defamation against Tobin himself. Where, however, defendants publish a statement claiming that Tobin expressed that same statement of opinion, this statement attributing an opinion critical of plaintiff to an expert in her field is an actionable assertion of fact. In such an instance, "the sting" is in the attribution alone—the false *assertion of fact* that an expert in plaintiff's field holds an *opinion* critical of plaintiff. Thus, the trial court correctly instructed the jury that an "attribution . . . *may constitute libel* if the attribution is *materially false*." (Emphases added.)

On the other hand, other statements published by defendants attribute to experts statements that contain an assertion of fact in their own right. For example, statement six provides that "[b]allistics experts who viewed the photographs . . . said the bullets could not have been fired from the same firearm." This statement asserts as fact not only that experts made statements concerning plaintiff, but also, in turn, that those experts' statements are assertions of fact that plaintiff's analysis was conclusively wrong. The sting in such a statement is not only in the attribution,[24] but also in the underlying assertion of fact.[25] As such, in order to establish the falsity of such a statement plaintiff was required to show that both the attribution and the underlying assertion were materially false.

In this respect, we think the trial court's instruction on material falsity provided a correct statement of the law:

> Plaintiff must prove by the greater weight of the evidence that the statement was materially false. If a statement is substantially true it is not materially false. It is not required that the statement was literally true in every respect. Slight inaccuracies of expression are immaterial provided that the statement was substantially true. This means that the gist or sting of the statement must be true even if minor details are not. The gist of a statement is the main point or heart of the matter in question. *The sting of a statement is the hurtful effect or the element of the statement that wounds, pains or irritates. The gist or sting of a statement is true if it produces the same effect*

24. We do not agree with defendants' assertion that "when a publication attributes a statement to a speaker, it is not the truthfulness of the attribution that matters." Part of the sting in the allegedly defamatory statements here necessarily lies in the fact that they are attributed to an expert in plaintiff's specialized field. As the Court of Appeals stated, "[w]ithout attribution to experts in the relevant field, the statements have 'a different effect on the mind of the reader.' " *Desmond II*, 263 N.C. App. at 63, 823 S.E.2d at 436 (citation omitted); *see also id.* at 63, 823 S.E.2d at 436 ("The statements are close to nonsense if they are attributed to people with no expertise: '[Several people at Starbucks] who have studied the photographs question whether Desmond knows anything about the discipline. Worse, some suspect she falsified the evidence to offer prosecutors the answers they wanted.' ").

25. As a hypothetical, had Bunch's report, rather than confirming plaintiff's analysis, revealed that the bullets could not have been fired from the same gun, we do not believe that plaintiff would have been able to establish material falsity of this statement in such a scenario. We recognize that in such a scenario a statement attributing only an opinion, rather than an assertion of fact, would necessarily be affected as well; however, we believe that the effect on such a statement would properly be considered not with the issue of falsity, but rather with the issue of damages, *i.e.* the extent to which plaintiff suffered, for example, any harm to her reputation or loss of standing in the community.

> *on the mind of the recipient which the precise truth would have produced.*

(Emphasis added.) On the issue of material falsity the trial court instructed the jury to evaluate whether "the sting" of each statement was substantially true. We do not view the fact that the trial court elsewhere instructed the jury that an attribution may constitute libel, which as discussed above is a correct statement of the law, as an invitation to the jury to disregard its earlier directive to evaluate "the heart of the matter in question" and determine whether "the sting" of each statement was substantially true. Absent such an attribution instruction, the jury may have questioned whether it could properly find an attribution of a mere opinion to be a defamatory statement. By contrast, defendants' proposed instruction could potentially have misled the jury by inviting the jury to attempt to evaluate "underlying facts"—which the instruction does not define or explain in relation to an assertion of fact actionable as defamation—when there was only an underlying opinion.

Viewing the jury instructions in their entirety, we conclude that the trial court properly instructed the jury regarding the issue of falsity and that there was no error in the instructions.

III. Punitive Damages Jury Instructions

[3] Finally, defendants argue the trial court erred in instructing the jury on punitive damages because the instructions did not require the jury to find the existence of one of the statutorily required aggravating factors. We agree.

N.C.G.S. § 1D-15 provides:

> (a) Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:
>
> (1) Fraud.
> (2) Malice.
> (3) Willful or wanton conduct.
>
> (b) The claimant must prove the existence of an aggravating factor by clear and convincing evidence.

N.C.G.S. § 1D-15(a)-(b) (2019). "Malice" and "willful or wanton conduct" are defined under this chapter as follows:

> (5) "Malice" means a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant.
>
> . . . .
>
> (7) "Willful or wanton conduct" means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. "Willful or wanton conduct" means more than gross negligence.

N.C.G.S. § 1D-5.

Here, over defendants' objection, the trial court did not instruct the jury that it was required to find one of the statutory aggravating factors under N.C.G.S. § 1D-15 before awarding punitive damages. The trial court, in reliance on the pattern jury instructions, reasoned that a finding of actual malice in the liability stage automatically allowed for an award of punitive damages and obviated any need for the jury to find one of the statutory aggravating factors. The Court of Appeals affirmed, stating that "the trial court instructed in accord with the pattern jury instructions," which are "the preferred method of jury instruction[.]" *Desmond II*, 263 N.C. App. at 66, 823 S.E.2d at 438 (citing *In re Will of Leonard*, 71 N.C. App. 714, 717, 323 S.E.2d 377, 379 (1984)).

We conclude that the pattern jury instructions utilized in this case do not accurately reflect the law regarding punitive damages and that the trial court erred in failing to instruct the jury that it was required to find one of the statutory aggravating factors before awarding punitive damages. The preface to the relevant pattern jury instructions provide:

> Under current U.S. Supreme Court jurisprudence, however, in the case of a public figure or public official, the element of publication with actual malice must be proven, not only to establish liability, but also to recover presumed and punitive damages. *Thus, in a defamation case actionable per se, once a public figure plaintiff proves liability under the actual malice standard, that plaintiff will be able to seek presumed and punitive damages without proving an additional damages fault standard[.]*

N.C.P.I.—Civil 806.40 (2017) (emphasis added) (footnote omitted). While the first quoted sentence is correct, the following sentence reflects a misapprehension of the law in this context.

As noted above, the Supreme Court has held that a public official plaintiff seeking damages for defamation relating to his or her official conduct must prove actual malice. *New York Times*, 376 U.S. at 279–80. Additionally, the Supreme Court has held that states may not permit an award of punitive damages in a defamation case absent a showing of actual malice, even where the plaintiff is a private figure. *Gertz*, 418 U.S. at 349. The Supreme Court, however, has not held that a showing of actual malice automatically obviates any state law prerequisites to an award of punitive damages. Thus, plaintiff's successful showing of actual malice in the liability stage *permits* an award of punitive damages under Supreme Court precedent, but it does not eliminate the necessity of a jury finding one of the statutory aggravating factors under N.C.G.S. § 1D-15(a), which does not include actual malice.

In that regard, based on the plain language of the statutory definitions of "malice" and "willful or wanton conduct," we do not view either of these aggravating factors as synonymous with actual malice. As previously noted, unlike "malice" as defined by N.C.G.S. § 1D-5(5), "[a]ctual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will." *Masson*, 501 U.S. at 510–11 (citing *Greenbelt Coop. Publ'g Assn., Inc. v. Bresler*, 398 U.S. 6 (1970)). Moreover, while actual malice refers solely to a defendant's subjective concern for the truth or falsity of a publication (*i.e.*, knowledge of falsity or reckless disregard for the truth), "willful or wanton conduct" focuses on a defendant's "conscious and intentional disregard of and indifference to *the rights and safety of others*." N.C.G.S. § 1D-5(7) (emphasis added). On top of that, "willful or wanton conduct" requires an additional finding unnecessary for a showing of actual malice—specifically, that "the defendant knows or should know" that the conduct "is reasonably likely to result in injury, damage, or other harm." *Id.*

Certainly, much of the evidence presented in support of plaintiff's showing of actual malice would also be relevant to the jury's determination regarding the existence of the statutory aggravating factors. However, the jury must in fact make such a determination upon proper instructions from the trial court before an award of punitive damages can be awarded. Accordingly, the trial court erred in failing to instruct the jury that it was required to find one of the statutory aggravating

factors before awarding punitive damages. As such, we reverse the Court of Appeals on this issue.

Conclusion

In summary, we conclude that plaintiff presented sufficient evidence to support a finding of actual malice by clear and convincing evidence and that the trial court did not err in denying defendants' motions for directed verdict and JNOV. Further, the trial court did not err in instructing the jury on the issue of falsity. We affirm the decision of the Court of Appeals with respect to these issues. However, the trial court erred in failing to instruct the jury that it was required to find one of the statutory aggravating factors before awarding punitive damages pursuant to N.C.G.S. § 1D-15(a). As such, we reverse the decision of the Court of Appeals on this issue and remand to that court for further remand to the trial court for a new trial on punitive damages only.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

GLOBAL TEXTILE ALLIANCE, INC., PLAINTIFF
v.
TDI WORLDWIDE, LLC, DOLVEN ENTERPRISES, INC., TIMOTHY DOLAN, INDIVIDUALLY AND IN HIS CAPACITY AS AN OFFICER, SHAREHOLDER AND DIRECTOR OF DOLVEN ENTERPRISES, INC. AND AN OFFICER AND OWNER OF TDI WORLDWIDE, LLC; JAMES DOLAN, INDIVIDUALLY AND IN HIS CAPACITY AS AN OFFICER, SHAREHOLDER AND DIRECTOR OF DOLVEN ENTERPRISES, INC., STEVEN GRAVEN, INDIVIDUALLY AND IN HIS CAPACITY AS AN OFFICER, SHAREHOLDER AND DIRECTOR OF DOLVEN ENTERPRISES, INC., RYAN GRAVEN, INDIVIDUALLY AND IN HIS CAPACITY AS AN OFFICER, SHAREHOLDER AND DIRECTOR OF DOLVEN ENTERPRISES, INC., GARRETT GRAVEN, INDIVIDUALLY, GFY INDUSTRIES LIMITED, GFY, LIMITADA DE CAPITAL VARIABLE, GFY COOPERATIVE, U.A., 上海冠沣源贸易有限公司 A/K/A GFY SH, AND FRESH INDUSTRIES, LTD., DEFENDANTS

No. 279A19

Filed 14 August 2020

1. Discovery—attorney-client privilege—communications by agent of sole shareholder—not agent of corporation—not protected

The Business Court did not abuse its discretion by compelling the production of communications involving the agent of a corporation's sole shareholder because that person was not also the agent of the corporation—a properly formed corporation is a distinct entity and not the alter ego of shareholders, even one who owns all

of the corporation's stock. The communications at issue were not protected by the attorney-client privilege, nor would they be under specialized applications of the privilege—the functional-equivalent test or the *Kovel* doctrine—even if those applications were recognized by North Carolina law.

2. Discovery—work-product doctrine—corporate litigation—communications with agent of shareholder

The Business Court did not abuse its discretion by determining that communications involving an agent of a corporation's sole shareholder were not protected from discovery under the work-product doctrine where the communications were not prepared in anticipation of litigation—the agent had no role at the corporation, was not retained by the corporation to work on the current litigation, and did not advise the corporation about the litigation in any capacity.

3. Discovery—compelling production—in-camera review—limited in scope—abuse of discretion analysis

The Business Court did not abuse its discretion by limiting its in camera review of contested communications to a "reasonable sampling" where the corporation seeking protection from a discovery request failed to promptly provide all documents necessary for an exhaustive review and welcomed the accommodation of a limited review.

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) from the order compelling discovery entered on 26 February 2019 by Judge Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases, in Superior Court, Guilford County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 16 June 2020.

Hagan Barrett PLLC, by J. Alexander S. Barrett, Charles T. Hagan III, and Kurt. A. Seeber, and Akin Gump Strauss Hauer & Feld LLP, by Stanley E. Woodward, Jr., for plaintiff-appellant.

Ellis & Winters LLP, by Jon Berkelhammer, Steven A. Scoggan, and Scottie Forbes Lee, for defendant-appellee Steven Graven, K&L Gates LLP, by A. Lee Hogewood III, John R. Gardner, and Matthew T. Houston, for defendant-appellees Dolven Enterprises, Inc., Ryan Graven, and GFY Cooperative, U.A., James McElroy & Diehl, P.A., by Fred B. Monroe and Jennifer M. Houti, for defendant-appellees

TDI Worldwide, LLC and Timothy Dolan, Morningstar Law Group, by Shannon R. Joseph and Jeffrey L. Roether, for defendant-appellee Garrett Graven, and Brooks, Pierce, McLendon, Humphrey & Leonard LLP, by Eric M. David and Shepard D. O'Connell, for defendant-appellee James Dolan.

NEWBY, Justice.

This case is about whether a one-hundred percent shareholder of a corporation is that corporation's alter ego for the purposes of privilege against discovery. Specifically, we must decide whether communications with someone who is an agent of the sole shareholder, but not of the corporation, fall under the corporation's attorney-client privilege or the work-product doctrine. They do not. Once a corporate form of ownership is properly established, the corporation is an entity distinct from the shareholder, even a shareholder owning one-hundred percent of the stock. An agent of the shareholder is not automatically an agent of the corporation. We also must decide whether the Business Court should have conducted an exhaustive in camera review of all relevant communications, even though plaintiff invited the court to conduct a more limited review of a sample of documents. The Business Court's limited review in this case was appropriate. Because the Business Court did not abuse its discretion either by ordering production of the relevant communications or by conducting a limited review of those communications, that court's decision is affirmed.

Global Textile Alliance, Inc. (GTA), the sole plaintiff, is a North Carolina corporation with its principal place of business in Reidsville, North Carolina. Luc Tack is GTA's only shareholder. Remy Tack, Luc Tack's son, is GTA's Chief Executive Officer. As a corporation, GTA is governed by a board of directors. GTA filed this lawsuit in the Business Court against defendants, alleging that defendants engaged in several improper acts during the formation and operation of Dolven Enterprises, Inc.

During discovery, defendants asked GTA to identify Stefaan Haspeslagh as a custodian required to provide electronically stored information (ESI). Haspeslagh is Luc Tack's longtime friend, financial advisor, and advisor to some of Luc Tack's businesses. GTA did not comply with defendants' request, asserting that Haspeslagh is not an employee, officer, or director of GTA. Both Luc Tack and Remy Tack testified that Haspeslagh has no role with GTA and that Haspeslagh has not advised GTA about this lawsuit.

On 24 July 2018 the Business Court heard oral argument on the custodial issue. GTA's counsel argued that Haspeslagh was "a third-party consultant not retained by GTA, [but] retained by the Tacks." Based on this assertion, the Business Court determined that Haspeslagh was not a custodian of GTA documents. Thus, it did not require GTA to name Haspeslagh as a custodian required to provide defendants with ESI during discovery.

Months later, GTA produced a privilege log that identified categories of documents that GTA had withheld from defendants during discovery. One category of documents was described as "[c]onfidential correspondence between GTA and/or its outside counsel and Stefaan Haspeslagh conveying and/or summarizing legal advice regarding the matters giving rise to the instant litigation." GTA claimed that these communications were protected on the grounds of the attorney-client privilege and the work-product doctrine. GTA's attorneys instructed witnesses not to answer questions about their discussions with Haspeslagh.

Defendant Steven Graven filed a motion with the Business Court to compel GTA to produce the communications involving Haspeslagh and to instruct the witnesses to answer questions about their discussions with Haspeslagh. Defendant argued that GTA waived the attorney-client privilege by including Haspeslagh on communications with GTA's counsel.

GTA responded that its attorney-client privilege extends to communications involving Haspeslagh. It argued that Haspeslagh is GTA's agent because Luc Tack is GTA's sole shareholder and because Haspeslagh works for some of Luc Tack's businesses. GTA also asserted privilege on two other special bases: (1) Haspeslagh is the functional equivalent of Luc Tack's employee, and (2) communications with Haspeslagh are privileged under the *Kovel* doctrine.

The motion to compel was submitted to a special discovery master. The special master heard oral argument on 5 February 2019, and on 7 February 2019 recommended that the Business Court grant defendant's motion to compel.

The Business Court conducted a de novo review of the special master's recommendation. As part of its review, the Business Court asked GTA to submit all disputed documents for in camera review. GTA responded that it would "gather the correspondence as requested and submit the documents." When GTA failed to produce the documents promptly, the Business Court requested that GTA provide a timeframe for the documents' production. GTA responded that it "hoped to review the [documents] before providing them to the Court" and that it wanted

more time to do so. The Business Court accommodated GTA by instead allowing it to submit "a reasonable sampling of such communications." GTA agreed and submitted twelve emails involving Haspeslagh for in camera review. After this review, GTA did not ask the Business Court to review additional documents.

On 26 February 2019 the Business Court issued an order granting the motion to compel. GTA filed a motion for reconsideration with the Business Court. In its brief supporting the motion for reconsideration, GTA quoted selected portions from the allegedly privileged materials. After denial of its motion for reconsideration, GTA appealed to this Court.

GTA raises three issues on appeal. First, GTA argues that the Business Court erred by determining that communications involving Haspeslagh are not protected by the attorney-client privilege. Second, it argues that the Business Court erred by determining that communications involving Haspeslagh are not protected under the work-product doctrine. Third, it argues that the Business Court erred by not conducting an exhaustive in camera review of all communications involving Haspeslagh. Because we conclude that the Business Court did not abuse its discretion regarding any of these issues, we affirm.

[1] First, the Business Court did not abuse its discretion by determining that communications involving Haspeslagh are not privileged under the attorney-client privilege. This Court reviews a trial court's application of the attorney-client privilege for abuse of discretion. *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, 370 N.C. 235, 241, 805 S.E.2d 664, 669 (2017). As the party asserting the attorney-client privilege, GTA has the burden of establishing that privilege. *See State v. McNeill*, 371 N.C. 198, 240, 813 S.E.2d 797, 824 (2018). Communications do not merit the attorney-client privilege when they are made in the presence of a third party. *State v. Murvin*, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981). GTA has asserted several arguments that communications including Haspeslagh are protected under the attorney-client privilege. In essence, each of GTA's arguments improperly treat Haspeslagh as an agent of GTA who merits protection under the attorney-client privilege for conversations with GTA's attorneys.

GTA argues that Luc Tack and GTA are the same entity for the purpose of establishing the applicability of the attorney-client privilege; in other words, that GTA is Tack's alter ego. This argument ignores clearly established North Carolina corporate law. This Court has long acknowledged that "[a] corporation is an entity distinct from the shareholders which own it." *Bd. of Transp. v. Martin*, 296 N.C. 20, 28, 249 S.E.2d 390,

396 (1978) (citing *Troy Lumber Co. v. Hunt*, 251 N.C. 624, 627, 112 S.E.2d 132, 134 (1960)). Even a corporation owned by a "single individual" is a distinct entity from its shareholder. *Id.* at 28–29, 249 S.E.2d at 396 (citing *Huski-Bilt, Inc. v. Trust Co.*, 271 N.C. 662, 669–670, 157 S.E.2d 352, 358 (1967); *Acceptance Corp. v. Spencer*, 268 N.C. 1, 8–9, 149 S.E.2d 570, 575–576 (1966)). This rule ensures that a shareholder who forms a corporation "to secure its advantages" cannot "disregard the existence of the corporate entity" to avoid its disadvantages. *Martin*, 296 N.C. at 29, 249 S.E.2d at 396. We decline to overturn this long-established precedent, which has informed North Carolina corporate law for over half a century. And GTA has not shown that circumstances exist which would require a court to disregard the corporate form. Accordingly, at best, Haspeslagh is Luc Tack's agent as to some of Tack's personal affairs, but Haspeslagh is not GTA's agent. The corporation could have made Haspeslagh its agent, but it did not do so. Regarding the custodian issue, GTA had specifically argued to the trial court that Haspeslagh had no role with respect to GTA. Because Haspeslagh is not GTA's agent, the Business Court did not abuse its discretion by concluding that GTA does not merit the attorney-client privilege for conversations which included Haspeslagh.

GTA's argument for specialized applications of the attorney-client privilege likewise fails because Haspeslagh is not GTA's agent. GTA claims that communications involving Haspeslagh are entitled to protection under the "functional[-]equivalent" test or, in the alternative, the *Kovel* doctrine. *See In re Bieter Co.*, 16 F.3d 929, 939 (8th Cir. 1994) (establishing the functional-equivalent test for federal courts in the Eighth Circuit); *United States v. Kovel*, 296 F.2d 918, 921–22 (2d Cir. 1961) (establishing the *Kovel* doctrine for federal courts in the Second Circuit). Neither of these specialized applications has been recognized under North Carolina law. *See, e.g.*, *Technetics Grp. Daytona, Inc. v. N2 Biomedical, LLC*, No. 17 CVS 22738, 2018 WL 5892737, *3–5 (N.C. Bus. Ct. Nov. 8, 2018).

Yet, even if these specialized attorney-client privilege applications were recognized under North Carolina law, the Business Court did not abuse its discretion by determining that these specialized applications do not apply in this case. Under the functional-equivalent test, an individual is the functional equivalent of a company's employee when his communications with counsel "fell within the scope of his duties" for the company. *In re Bieter Co.*, 16 F.3d at 940. This specialized application does not apply because Haspeslagh lacks any sort of agency relationship with GTA and thus cannot have "duties" at GTA.

Under the *Kovel* doctrine, communications involving a third party are privileged when the communications are "necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit." *Kovel*, 296 F.2d at 922. GTA does not argue that Haspeslagh's presence was necessary for GTA to communicate with its attorneys; rather, GTA argues that Haspeslagh's presence was highly useful for *Luc Tack* to communicate with GTA's attorneys. This argument, again, improperly assumes that Tack and GTA are the same entity. Therefore, communications involving Haspeslagh are not protected under either specialized application GTA requests.

Because GTA would not merit privilege even if these specialized applications of the attorney-client privilege were recognized under North Carolina law, this Court need not and does not address whether these specialized applications should be recognized under North Carolina law. Therefore, the Business Court did not abuse its discretion by determining that GTA does not merit a specialized application of the attorney-client privilege under the functional-equivalent test or *Kovel* doctrine.[1]

[2] Next, the Business Court did not abuse its discretion by determining that communications involving Haspeslagh are not protected under the work-product doctrine. The work-product doctrine only protects communications when they are "prepared in anticipation of litigation" by a person acting as a company's "consultant . . . or agent." N.C.G.S. § 1A-1, Rule 26(b)(3) (2019); *see also Willis v. Duke Power Co.*, 291 N.C. 19, 35–36, 229 S.E.2d 191, 201 (1976). Here, Haspeslagh has no role at GTA and has not been retained by GTA to work on this lawsuit. Indeed, Luc and Remy Tack both testified that Haspeslagh did not advise GTA about this lawsuit at all. Communications involving Haspeslagh therefore cannot be said to have been "prepared in anticipation of litigation" by Haspeslagh acting as GTA's consultant or agent. The Business Court did not abuse its discretion by determining that GTA does not merit protection under the work-product doctrine for the communications involving Haspeslagh.

[3] Finally, the Business Court did not abuse its discretion by not conducting an exhaustive in camera review of all communications involving Haspeslagh for which GTA sought protection. GTA cannot assert any argument for exhaustive in camera review because it failed to promptly provide all documents necessary for a full review, and because

1. Because we hold that no privilege exists protecting the disputed documents from discovery, we need not address defendants' argument that GTA waived its right to assert such a privilege.

it welcomed a more limited one. When the appellant fails to raise an argument at the trial court level, the appellant "may not . . . await the outcome of the [trial court's] decision, and, if it is unfavorable, then attack it on the ground of asserted procedural defects not called to the [trial court's] attention." *Nantz v. Emp't Sec. Comm'n*, 28 N.C. App. 626, 630, 222 S.E.2d 474, 477, *aff'd*, 290 N.C. 473, 484, 226 S.E.2d 340, 347 (1976).

Here GTA challenges the Business Court's decision to adopt a limited in camera review procedure instead of an exhaustive in camera review procedure, apparently because the Business Court's ruling that came after that limited review is unfavorable to GTA. Significantly, the Business Court adopted this limited review to accommodate GTA. The court initially proposed an exhaustive in camera review, but GTA indicated that it needed more time for an internal review before it would comply. The Business Court then permitted GTA to submit a "reasonable sampling" of the documents for a limited in camera review as an accommodation to GTA. GTA agreed to this procedure and submitted twelve emails for review. After the limited review, GTA did not ask the Business Court for a more exhaustive review. Because GTA did not promptly comply with the court's request as necessary for an exhaustive review, and because the Business Court's limited review was an accommodation which GTA welcomed, GTA cannot now claim that the Business Court's accommodation constitutes reversible error.

Even if GTA could properly raise an in camera review argument, the Business Court did not abuse its discretion by conducting a limited in camera review. A trial court acting in its discretion may require an in camera review of documents to assist in ascertaining whether certain materials are entitled to privileged status. *Duke Power Co.*, 291 N.C. at 36, 229 S.E.2d at 201; *see also In re Miller*, 357 N.C. 316, 336–37, 584 S.E.2d 772, 787 (2003). Though this Court has not directly addressed the issue of limited in camera reviews, courts in this state and around the nation have consistently permitted limited in camera reviews as a substitute for exhaustive in camera reviews. *See, e.g.*, *In re Vioxx Prods. Liab. Litig.*, Nos. 06-30378, 06-30379, 2006 WL 1726675, at *3 (5th Cir. May 26, 2006); *Wachovia Bank, National Ass'n v. Clean River Corp.*, 178 N.C. App. 528, 531–32, 631 S.E.2d 879, 882 (2006). In *Clean River Corporation*, our own Court of Appeals rejected an argument claiming that the trial court had abused its discretion because the "[a]ppellants could have, but chose not to, produce the documents for *in camera* inspection." 178 N.C. App. at 532, 631 S.E.2d at 882. We find that court's reasoning persuasive here because GTA asserts that the Business Court erred by accommodating GTA with a limited in camera review instead

of an exhaustive review, which the Business Court originally intended to conduct. Both limited and exhaustive reviews were thus within the Business Court's discretion.

Furthermore, the fundamental issue presented to the Business Court was whether communications which included Haspeslagh were privileged. The Business Court properly considered the twelve emails GTA selected for its consideration as well as the other evidence. It determined, as previously discussed, that no privilege exists. Therefore, the court had no need to review additional emails.

In sum, we hold that the Business Court did not abuse its discretion by determining that GTA's conversations in which Haspeslagh participated do not merit protection under the attorney-client privilege or the work-product doctrine. Nor did the Business Court abuse its discretion by conducting a limited in camera review of the contested communications. The decision of the Business Court is affirmed.

AFFIRMED.

EVE GYGER, PLAINTIFF
v.
QUINTIN CLEMENT, DEFENDANT

No. 31PA19

Filed 14 August 2020

Child Custody and Support—affidavits—person residing outside the state—signed under penalty of perjury—notarization not required

In a child support case, the trial court erred by declining to admit into evidence the affidavit of plaintiff-mother, who resided outside of the United States, on the basis that the affidavit was not notarized and plaintiff was not present to be examined. Pursuant to the special evidentiary rule in N.C.G.S. § 52C-3-315(b) (part of the Uniform Interstate Family Support Act), the affidavit was admissible because plaintiff signed it under penalty of perjury, and notarization was not required.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 823 S.E.2d 400 (N.C. Ct. App. 2018),

upholding a denial of plaintiff's Rule 60(b) motion for relief from an order vacating the registration of her foreign support order entered on 30 November 2017 and 2 January 2018 by Judge Lora C. Cubbage in District Court, Guilford County. Heard in the Supreme Court on 17 June 2020.

George Daly and Anna Daly for plaintiff-appellant.

D. Martin Warf for defendant-appellee.

NEWBY, Justice.

In this case we decide whether an affidavit under N.C.G.S. § 52C-3-315(b) (2019), which applies to child support cases involving parties residing out of state, must be notarized. Notaries, as defined by our legal system, may not be readily accessible in all parts of the world. In recognition of the hardship that may result from the traditional notary requirement, the General Assembly created special evidentiary rules provided in Chapter 52C, the "Uniform Interstate Family Support Act" (UIFSA) to permit affidavits in some circumstances to be admitted into evidence without notary acknowledgement if they were sworn to under penalty of perjury. Here, for an international party in a child support action, the party's signature on the affidavit under penalty of perjury suffices. No notarization is required under subsection 52C-3-315(b). The decision of the Court of Appeals is reversed.

Between 1997 and 1999, plaintiff-mother Eve Gyger and defendant-father Quintin Clement were involved in a romantic relationship in North Carolina. In 2000, the parties had two children who were born in Geneva, Switzerland. In October 2007, plaintiff initiated an action in the Court of First Instance, Third Chamber, Republic and Canton of Geneva against defendant to establish paternity and child support. Defendant did not appear, and the Swiss court entered judgment against defendant on both counts.

In May 2014, the Swiss Central Authority for International Maintenance Matters applied to register and enforce the Swiss support order with the North Carolina Department of Health and Human Services, Office of Child Support and Enforcement. The Guilford County Clerk of Court registered the Swiss support order for enforcement on 13 June 2016. Defendant was served with a Notice of Registration of Foreign Support Order on 20 June 2016. On 1 July 2016, defendant filed a Request for Hearing to, among other things, vacate the registration of the foreign support order. After a hearing in District Court, Guilford County,

the trial court vacated the registration of the foreign support order under N.C.G.S. §§ 52C-6-607(a)(1) and 52C 7-706(b)(3) and dismissed the action, finding that the court file lacked any evidence that defendant had been provided with proper notice of the Swiss proceedings.

On 26 July 2017 plaintiff filed a Motion for Relief from the trial court's order under N.C.G.S. § 1A-1, Rules 60(b)(1), (2), (4), and (6). The trial court conducted a hearing on the motions, and plaintiff attempted to introduce two affidavits and a transcript. The trial court excluded the first affidavit, an "Affidavit of Eve Gyger" purportedly signed by plaintiff, because it was not notarized and plaintiff was not present to be examined.[1] The trial court ultimately denied plaintiff's motions for relief from judgment, and plaintiff timely appealed.

The Court of Appeals affirmed the trial court's ruling denying plaintiff's Rule 60(b) motions for relief from the order vacating the registration of her foreign support order. *Gyger v. Clement*, 263 N.C. App. 118, 130, 823 S.E.2d 400, 409 (2018). The court based its decision on this Court's ruling in *Alford v. McCormac*, 90 N.C. 151, 152–53 (1884), that an essential element of an affidavit is an oath administered by an officer authorized by law to administer it. *Gyger*, 263 N.C. App. at 125, 823 S.E.2d at 406. The Court of Appeals thereby interpreted N.C.G.S. § 52C-3-315(b) to require notarization for the affidavit to be admissible. *Id.* at 125, 823 S.E.2d at 406. Because plaintiff's purported affidavit was not notarized, the court concluded that it lacked proper certification and could not be used in this case. *Id.*

Plaintiff petitioned this Court for discretionary review, and this Court allowed review as to the issue of whether N.C.G.S. § 52C-3-315(b), which allows affidavits to be admitted into evidence if given under penalty of perjury, requires affidavits to be notarized.

We hold that the trial court erred by not admitting into evidence plaintiff's affidavit under N.C.G.S. § 52C-3-315(b). Generally, affidavits must be notarized. But the General Assembly, recognizing the challenges of interstate and international document production, created an exception for certain Chapter 52C cases.

Chapter 52C of the North Carolina General Statutes, the "Uniform Interstate Family Support Act," applies to situations involving child support with parties residing outside of this State. Within Chapter 52C the General Assembly chose to provide "Special Rules of Evidence and

1. The other affidavit, an "Affidavit of Translation," was excluded as well. It is not at issue before this Court.

Procedure" to accommodate those special circumstances which arise when parties reside outside of North Carolina. N.C.G.S. § 52C-3-315(b). That subsection provides that

> [a]n affidavit, a document substantially complying with federally mandated forms, or a document incorporated by reference in any of them, which would not be excluded under the hearsay rule if given in person, is admissible in evidence if given under penalty of perjury by a party or witness residing outside this State.

N.C.G.S. § 52C-3-315(b).

Defendant argues that this provision continues to require affidavits filed under it to be notarized. As with any question of statutory interpretation, the intent of the legislature controls. *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001). "The best indicia of that intent are the language of the statute[,] . . . the spirit of the act[,] and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980).

Subsection 52C-3-315(b)'s plain terms do not require notarization. The provision instead simply requires an "affidavit" to be "given under penalty of perjury." Our case law, however, generally expects affidavits to be notarized if they are to be admissible. *See, e.g.*, *Alford v. McCormac*, 90 N.C. at 152–53.

Nevertheless, the General Assembly has the power to make exceptions to general rules for special circumstances as it sees fit. It did so with the provision relevant to this case. In 2015 the legislature expanded subsection 52C-3-315(b) from applying only to parties in other states to applying to parties outside of this State. *Compare* N.C.G.S. § 52C-3-315(b) (2013) (prior version of the statute applying to parties or witnesses "in another State") *with* N.C.G.S. § 52C-3-315(b) (2019) (current version of the statute applying to parties or witnesses "residing outside this State"). According to the Official Commentary, the purpose of this expansion was to extend its reach to an individual residing anywhere, including individuals residing outside of the United States. N.C.G.S. § 52C-3-315 (2019), Official Comment (2015). More specifically, the Official Commentary states that

> [s]ubsections (b) through (f) provide *special rules of evidence* designed to take into account the *virtually unique nature* of interstate proceedings under this act. These subsections provide exceptions to the otherwise

> guiding principle of UIFSA . . . . Because the out-of-state party, and that party's witnesses, necessarily do not ordinarily appear in person at the hearing, *deviation from the ordinary rules of evidence is justified in order to assure that the tribunal will have available to it the maximum amount of information on which to base its decision*.

Id. (emphases added).

When the legislature expanded the statute to apply to international residents, it recognized the difficulties that parties may face when dealing with child support claims in this State. Other nations have legal practices and traditions significantly different from those of our own, and thus in certain locations obtaining notarization of affidavits may be impractical or impossible. Notaries, as understood by the United States legal system, may not be as accessible in other parts of the world, so if notarization were required for affidavits involving international parties, many relevant and helpful materials likely would not be presentable before the court. Subsection 52C-3-315(b), as amended, allows the trial court to consider helpful evidence when it must decide child support issues involving nonresident parties.

Not surprisingly, then, subsection (b) is not the only place where the General Assembly made appropriate accommodations to address the special circumstances arising in child support cases involving out-of-state parties. Subsection 52C-3-315(f), for example, permits depositions of out-of-state parties and witnesses to simply be taken "under penalty of perjury" by telephone or other electronic means.

Though the preceding analysis of legislative intent is sufficient to discern that the subsection at issue does not require notarization, additional evidence bolsters this conclusion. Since the statute substantially mirrors the 2008 Model UIFSA[2], *see* Uniform Interstate Family Support Act § 316 (2008), we may reference the commentary to the Model UIFSA for further evidence of statutory meaning. Though an oath was once required by the model statute, that requirement was removed in 2001. Unif. Interstate Fam. Support Act § 316 (2001). The comment to the 2001 Model UIFSA explains that the change "replaces the necessity of swearing to a document 'under oath' with the simpler requirement that the

2. The provisions of Chapter 52C closely reflect the corresponding Model UIFSA provisions. Section 316(b) of the UIFSA corresponds with the specific provision in question, subsection 52C-3-315(b).

document be provided 'under penalty of perjury' . . . ." *Id.* at § 316 cmt. Thus, the uniform law provision on which subsection 52C-3-315(b) is based does not require an oath if the affidavit is submitted under penalty of perjury.

The legislature has the ability to explicitly require an oath if it deems it necessary, and it has done so in other provisions within Chapter 52C. For example, N.C.G.S. § 52C-3-311 (2019) provides that "an affidavit . . . under oath" is required when a party raises an issue of child endangerment. Thus, the lack of a specific oath requirement in subsection 52C-3-315(b) is significant evidence of legislative intent.

Allowing affidavits into evidence in accordance with a proper interpretation of the statute here is not likely to harm trial court processes. An affidavit serves to convey information from the signing party in a form that attests to the statement's credibility. In 2004, *Black's Law Dictionary* defined an affidavit as "a voluntary declaration of fact written down and sworn to by the declarant before an officer authorized to administer oaths." *Affidavit*, *Black's Law Dictionary* (8th ed. 2004). Eventually, though, the definition was changed to "a voluntary declaration of fact written down and sworn by a declarant, *usu[ally]* before an officer authorized to administer oaths." *Affidavit*, *Black's Law Dictionary* (10th ed. 2014) (emphasis added). This change contemplates that affidavits may be valid and acceptable in some circumstances even when not sworn to in the presence of an authorized officer.

One such circumstance is when an affidavit is submitted under penalty of perjury. Affidavits without notarization may still be substantially credible. When a statement is given under penalty of perjury, it alerts the witness of the duty to tell the truth and the possible punishment that could result if she does not. "The form of the administration of the oath is immaterial, provided that it involves the mind of the witness, the bringing to bear [of the] apprehension of punishment [for untruthful testimony]." *United States v. Looper*, 419 F.2d 1405, 1406 (4th Cir. 1969).

Accordingly, in federal court proceedings too, written declarations made under penalty of perjury are permissible in lieu of a sworn affidavit subscribed to before a notary public. *See* 28 U.S.C § 1746 (stating that an unsworn declaration under penalty of perjury has the same "force and effect" as an affidavit).

Because petitioner submitted her affidavit under penalty of perjury, she was made aware of her duty to tell the truth and of the possible punishment if she failed to do so. The document satisfied the requirements

of subsection 52C-3-315(b). The trial court may accord whatever *weight* to plaintiff's statements it deems appropriate, but plaintiff's affidavit is at the very least admissible.

Asserting to the contrary, defendant and the Court of Appeals relied on cases which did not involve special rules of evidence due to special circumstances. None involved international parties or triggered the statutory provision applicable in this case. *See Alford*, 90 N.C. at 152–53 (holding that an affidavit verifying a complaint is not complete until it is certified by the officer before whom the oath was taken); *Ogburn v. Sterchi Bros. Stores*, 218 N.C. 507, 508, 11 S.E.2d 460, 461 (1940) (holding that a statement followed by an unsigned, unsealed, and unauthenticated statement was not an affidavit when seeking authorization to sue as a pauper); *In re Adoption of Baby Boy*, 233 N.C. App. 493, 500–02, 757 S.E.2d 343, 347–48 (2014) (holding that a critical part of an acknowledgement under oath was that the word "swear" was administered to the witness in the presence of a notary when relinquishing parental rights). Rather, each case involved affidavits used in more standard proceedings that do not implicate a special statutory procedure adopted by the General Assembly to address situations when parties reside out-of-state or out-of-country.

In recognition of the unique nature of these types of proceedings the General Assembly enacted an exception to the usual notarization requirement, and for that reason subsection 52C-3-315(b) does not require that an affidavit given under penalty of perjury be notarized to be admissible. Plaintiff's affidavit is admissible because it was executed under penalty of perjury as allowed by subsection 52C-3-315(b). We therefore reverse the decision of the Court of Appeals and remand the case to that court with instructions to remand to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

NHUNG HA AND NHIEM TRAN	)	
	)	
v.	)	From Wake County
	)	
NATIONWIDE GENERAL INSURANCE COMPANY	)	

312A19

ORDER

The Court of Appeals' judgment in this case is vacated and the matter is remanded. On remand to the Court of Appeals, that court is to determine whether Article 41, Article 36 or other statutes govern in this matter. The Court of Appeals may remand this matter to the trial court for further proceedings if necessary.

By order of the Court in Conference, this the 14th day of August, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 14th day of August, 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court of
North Carolina

s/Amy L. Funderburk
~~Assistant~~ Clerk

IN RE E.F.

[375 N.C. 88 (2020)]

IN THE MATTER OF E.F., I.F., H.F., Z.F.

No. 14A20

Filed 14 August 2020

1. Termination of Parental Rights—best interests of child—statutory factors—likelihood of adoption—aid in accomplishing permanent plan

The trial court did not abuse its discretion by determining that termination of a mother's parental rights to her four children was in the children's best interests. Although the father of the three youngest children retained his parental rights at the time of the termination hearing, the trial court properly found that the children had a high likelihood of being adopted and that terminating the mother's parental rights would aid in accomplishing the children's permanent plan of adoption (N.C.G.S. § 7B-1110(a)(2)-(3)) where competent evidence showed that the father wanted his children's foster caretaker to adopt the children and that the foster caretaker had already taken steps toward doing so.

2. Termination of Parental Rights—best interests of child—potential guardian—findings of fact—not required

In determining that termination of a mother's parental rights to her four children was in the children's best interests, the trial court did not err by failing to consider the maternal great-grandmother as a potential guardian because the mother presented insufficient evidence of the great-grandmother's willingness or ability to provide the children a permanent home. Thus, when making its best interests determination, the court was not obligated to enter findings under N.C.G.S. § 7B-1110(a)(6) about the great-grandmother's eligibility as a placement option for the children.

3. Termination of Parental Rights—best interests of child—consideration of factors—no abuse of discretion

The trial court did not abuse its discretion by determining that termination of a mother's parental rights to her four children was in the children's best interests. When making its best interests determination, the court properly considered each dispositional factor under N.C.G.S. § 7B-1110(a), entered findings of fact supported by the evidence, and assessed the children's best interests in a way that was consistent with those findings and with the recommendations made by the children's guardian ad litem.

IN RE E.F.

[375 N.C. 88 (2020)]

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 12 September 2019 by Judge Stephen Higdon in District Court, Union County. This matter was calendared for argument in the Supreme Court on 29 July 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Perry, Bundy, Plyler & Long, LLP, by Ashley J. McBride and Dale Ann Plyler, for petitioner-appellee Union County Division of Social Services.

La-Deidre Matthews for appellee Guardian ad Litem.

David A. Perez for respondent-appellant.

NEWBY, Justice.

Respondent appeals from the trial court's order (termination order) terminating her parental rights in her minor children Ethan, Isaac, Henry, and Zane.[1] Because we conclude the trial court did not abuse its discretion by determining that it was in the children's best interests that respondent's parental rights be terminated, we affirm.

Ethan was born in January 2011. His father is Jamie R. Dallas W. is the father of respondent's twins, Isaac and Henry, born in September 2012, and of Zane, born in April 2014. On 19 February 2018, the Union County Division of Social Services (DSS) filed a juvenile petition alleging neglect and dependency. On 26 March 2018, DSS obtained nonsecure custody of the four children. The trial court adjudicated the children to be neglected and dependent juveniles on 22 August 2018.

In support of the adjudication, the trial court found that respondent left the children with Dallas W. when she was arrested on 6 March 2018; that Dallas W. subsequently placed the children with Angela S., a caretaker for the children, because he was unable to care for them; and that Angela S. was unable to obtain necessary medical care for the children because she lacked their Medicaid information and parental authorization. The trial court further found that the family had a history of instability and inadequate housing; that respondent had been evicted from her residence and was unable to secure suitable housing; and that

1. We use pseudonyms to protect the privacy of the juveniles discussed in this opinion.

respondent was unemployed, suffered from untreated mental health issues, and had expressed no willingness to engage in remedial services for herself or her children. Respondent signed a DSS case plan agreeing to complete parenting classes and domestic violence counseling and comply with all recommendations, submit to a mental health and substance abuse assessment and comply with all recommendations, submit to random drug screens, and obtain and maintain stable employment and housing.

DSS filed a petition to terminate the parental rights of respondent, Jamie R., and Dallas W. on 19 February 2019. At the time, Dallas W. was incarcerated. None of the parents filed an answer to the termination petition. See N.C.G.S. § 7B-1107 (2019). After a series of continuances, the trial court convened a hearing on the termination petition on 21 August 2019. Counsel for DSS advised the trial court that it was proceeding only against respondent and Jamie R. and that it was not proceeding against Dallas W. at that time.

At the adjudicatory stage of the termination hearing, the trial court heard testimony from respondent, her DSS social worker, and Angela S., who had served as the children's foster care placement since their entry into DSS custody in March 2018. Respondent testified that she was unemployed, homeless, and using heroin daily, including on the morning of the termination hearing. She had been arrested five times since March 2018 and was awaiting trial on pending charges. Despite paying for her heroin habit, respondent had contributed nothing toward the children's cost of care while they were in DSS custody. Respondent acknowledged she was "unstable and unfit and that [she] need[ed] help." The trial court concluded there were grounds to terminate respondent's parental rights for neglect, failure to pay a reasonable portion of the children's cost of care, and dependency. N.C.G.S. § 7B-1111(a)(1), (3), (6) (2019). The trial court also found grounds to terminate the parental rights of Jamie R.

At the dispositional stage, the trial court received written reports from DSS and the children's guardian *ad litem* (GAL) and heard testimony from the social worker and the GAL. In accordance with the recommendations of DSS and the GAL, the trial court concluded that terminating the parental rights of respondent and Jamie R. was in the best interests of their respective children. The trial court entered its written termination order on 12 September 2019. Respondent filed notice of appeal.[2]

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2. There is no indication that Jamie R. appealed the termination order, and he is not a party to this appeal.

[1] Respondent does not challenge the grounds for termination adjudicated by the trial court under N.C.G.S. § 7B-1111(a), but argues that the trial court abused its discretion in concluding it was in the children's best interests that respondent's parental rights be terminated. "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *In re K.N.K.*, 374 N.C. 50, 57, 839 S.E.2d 735, 740 (2020) (quoting *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998)). The trial court's dispositional findings are binding on appeal if they are supported by any competent evidence. *Id.* We are likewise bound by all uncontested dispositional findings. *In re Z.L.W.*, 372 N.C. 432, 437, 831 S.E.2d 62, 65 (2019).

The dispositional stage of a proceeding to terminate parental rights is governed by N.C.G.S. § 7B-1110(a), which provides as follows:

> (a) After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest. . . . In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a) (2019). Although the trial court must "consider" each of the statutory factors, *id.*, we have construed subsection (a) to require written findings only as to those factors for which there is conflicting evidence. *In re A.R.A.*, 373 N.C. 190, 199, 835 S.E.2d 417, 424 (2019).

The trial court's termination order expressly states that the trial court "considered all factors set out in N.C.G.S. [§] 7B-1110 in

determining whether terminati[ng] the parental rights of [respondent] to her children" is in their best interests. The trial court made written findings about each of the criteria in N.C.G.S. § 7B 1110(a)(1)–(5) as follows:

> (A) The age of the juveniles: [Zane] is 5 Years and 4 Months, [Henry] and [Isaac] are 7 Years and 11 Months, [Ethan] is 8 Years and 7 Months.
>
> (B) The likelihood of adoption of the juveniles: The juveniles' [foster] placement wants to adopt the juveniles. There is a high likelihood of adoption.
>
> (C) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juveniles: The permanent plan for the juveniles is adoption. Termination of [respondent's] and Jamie R[.'s] parental rights will aid in [the] accomplishment of the permanent plan of adoption.
>
> (D) The bond between the juveniles and their parent: The juveniles do not have a good bond with [respondent]. [Respondent's] own action contributed to the court staying her visitation with the juveniles [on 22 August 2018]. The lack of visitation has affected the bond between the children and their mother.
>
> (E) . . . The quality of the relationship between the juveniles and the proposed adoptive parents: The juveniles and Angela S[.] and her family have a strong bond. The S[.'s] have tended to all of the juveniles' well-being needs. They have provided a safe, stable and loving home to the juveniles since being placed in the S[.] home around March of 2018. The S[.'s] intend to adopt the juveniles.

To the extent that respondent does not contest these findings, they are binding. *See In re Z.L.W.*, 372 N.C. at 437, 831 S.E.2d at 65.

Specifically, respondent argues these findings fail to account for the fact that DSS did not proceed against Dallas W. at the termination hearing, thereby leaving intact his parental rights in Isaac, Henry, and Zane. Because Dallas W. retained his parental rights in these children, respondent contends the evidence did not show a high likelihood that they would be adopted or that terminating her parental rights would facilitate their adoption. Respondent did not raise Dallas W.'s parental

rights or their impact on the prospects for adoption as an issue during the dispositional hearing.

The record shows only that DSS filed a petition to terminate his parental rights, but was not proceeding against him at the termination hearing.[3] The fact that Dallas W.'s parental rights remained in place at the time of the termination hearing does not render the trial court's findings under N.C.G.S. § 7B 1110(a)(2)–(3) erroneous. Subsection (a)(2) refers to the "likelihood"—not the certainty—of the children's adoption. N.C.G.S. § 7B-1110(a)(2). Similarly, subsection (a)(3) asks whether terminating respondent's parental rights would "*aid in the accomplishment of* the permanent plan for the juvenile[s]." N.C.G.S. § 7B-1110(a)(3) (emphasis added). Unquestionably, the termination of respondent's parental rights was a necessary precondition of the children's adoption.

Moreover, the DSS social worker attested to the high likelihood of the children's adoption and to the fact that terminating respondent's parental rights would aid in realizing the permanent plan of adoption. The social worker further advised the trial court that Dallas W. had made no effort to regain custody of his children and wanted Angela S. to adopt them. The GAL reported that Angela S. and her spouse "have gone through the licensing procedure to be able to adopt the children and have expressed a strong desire to do so." This competent evidence is sufficient to support the trial court's findings as to the likelihood of adoption. In the absence of an evidentiary conflict, the trial court is not required to make written findings under N.C.G.S. § 7B-1110(a)(6) on this issue. *See In re A.R.A.*, 373 N.C. at 199, 835 S.E.2d at 424.

[2] Respondent makes a similar argument regarding the availability of her own maternal grandmother, Linda R., as a potential guardian for the children. Although the GAL's written report included a bare statement that Linda R. "has been approved for consideration of guardianship/adoption of the children, and the home has been approved by DSS," Linda R. is only mentioned once during the adjudicatory stage of the termination proceeding. We recognize the trial court may—and should—consider evidence introduced during the adjudicatory stage of a termination hearing in determining the children's best interests

3. The record on appeal includes a "Notice of Dismissal of Petit[io]n for Termination of Parental Rights" filed in the trial court by DSS on 11 October 2019. The notice of dismissal states that Dallas W. had relinquished his parental rights in Isaac, Henry, and Zane and that "the time for revocation has expired." It appears this document may not have been before the trial court at the time of the termination hearing on 21 August 2019.

during the disposition stage. *See In re Pierce*, 356 N.C. 68, 71–72, 75–76, 565 S.E.2d 81, 84, 86 (2002); *In re M.A.I.B.K.*, 184 N.C. App. 218, 225, 645 S.E.2d 881, 886 (2007). Respondent, however, made no reference to Linda R. or any other alternative placement for the children at the disposition stage, during which the sole focus was upon identifying the best possible outcome for the children. *See* N.C.G.S. § 7B-1110(a)–(b); *see also In re Pierce*, 356 N.C. at 76, 565 S.E.2d at 86 (characterizing the "determination of best interests [a]s more in the nature of an inquisition" than an adversarial process).

Respondent testified only that her grandparents "want" her children and would allow respondent to "live with them once [she is] clean and once [she has] treatment and everything." Absent additional evidence regarding Linda R.'s willingness or ability to provide permanence for respondent's children, the trial court cannot be said to have erred even if, *arguendo*, it failed to consider Linda R. as a placement option. *Cf. In re S.D.C.*, 373 N.C. 285, 290, 837 S.E.2d 854, 858 (2020) (explaining "the extent to which it is appropriate" for the trial court to consider a relative placement for a child under N.C.G.S. § 7B-1110(a)(6) is "dependent upon the extent to which the record contains evidence tending to show whether such a relative placement is, in fact, available").

DSS and the GAL presented undisputed evidence that Angela S. and her husband had provided excellent care for respondent's four children since March 2018 and wished to provide them a permanent home through adoption. Because respondent did not present evidence about Linda R. to contradict the evidence that DSS and the GAL presented, the trial court was not obligated to make written findings about Linda R. under N.C.G.S. § 7B-1110(a)(6). *See In re A.R.A.*, 373 N.C. at 199, 835 S.E.2d at 424.

[3] Finally, we hold that respondent has failed to show the trial court abused its discretion under N.C.G.S. § 7B-1110(a) by concluding it was in the children's best interests to terminate her parental rights. The termination order reflects the trial court's consideration of the statutory dispositional factors. Its findings are supported by the evidence. Its assessment of the children's best interests arises rationally from its findings of fact and is consistent with the recommendation of the children's GAL. Accordingly, we affirm.

AFFIRMED.

IN RE E.J.B.

[375 N.C. 95 (2020)]

IN THE MATTER OF E.J.B., R.S.B.

No. 217A19

Filed 14 August 2020

Native Americans—Indian Child Welfare Act—termination of parental rights—tribal notice requirements

The trial court erred in terminating a father's parental rights to two children without fully complying with the notice requirements of the Indian Child Welfare Act (25 U.S.C. § 1912(a)) and related federal regulations (25 C.F.R. § 23.111). Although notices were sent to each of three federally-recognized Cherokee tribes, albeit not in a timely manner, which prompted responses from two of those tribes, the notices were legally insufficient because they did not include all necessary information. Even if the notices had been sufficient, the trial court failed to ensure that the county department of social services exercised due diligence when contacting the tribes, particularly with regard to the third tribe that did not respond to the notice.

Justice NEWBY dissenting.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 15 March 2019 by Judge Faith Fickling in District Court, Mecklenburg County. Heard in the Supreme Court on 17 June 2020.

Stephanie Jamison, Senior County Attorney, for petitioner-appellee Mecklenburg County Department of Social Services.

Law Office of Matthew C. Phillips, PLLC, by Matthew C. Phillips for appellee Guardian ad Litem.

Robert W. Ewing for respondent-appellant father.

BEASLEY, Chief Justice.

On appeal, respondent-father asks this Court to vacate the trial court's order terminating his parental rights and remand the matter to the trial court for compliance with all requirements under the Indian Child Welfare Act (the Act).[1] Because we conclude that the trial court

1. We use the terms "Indian" and "Indian child" to comply with the terminology used in the Indian Child Welfare Act.

failed to comply with the Act's notice requirements and that the post termination proceedings before the trial court did not cure the errors, we remand the matter to the trial court so that all of the requirements of the Act can be followed.

I. Background

The Mecklenburg County Department of Social Services (DSS) filed a juvenile petition on 7 April 2015, alleging that Eric and Robert[2] were neglected and dependent juveniles. The trial court entered a Non-Secure Custody Order on 7 April 2015, granting custody of the children to DSS. That same day, the DSS social worker contacted respondent-father, who denied being the children's biological father. The trial court held an initial seven-day hearing on 14 April 2015 and found that the Act did not apply. At the time of this hearing, respondent-father had not yet been served with the juvenile petition.

In preparation for the adjudication and disposition hearing scheduled for 3 June 2015, DSS filed a court summary report on 1 June 2015. The report included a section titled "Indian Child Welfare Act," which indicated that respondent-father "reported that he is affiliated with the Cherokee Indian tribe" but noted that "he has not provided this social worker with the necessary information to further investigate." The report also included the transcript from a Child and Family Team Meeting held on 4 May 2015, that quoted respondent-father as telling the team his "roots are Irish and Indian."

Respondent-father was personally served at the 3 June 2015 hearing, and the trial court found good cause to continue the matter until 12 August 2015. The adjudication hearing was continued for good cause on 12 August 2015 and ultimately took place on 3 December 2015. The trial court adjudicated the children to be dependent juveniles, as defined by N.C.G.S. § 7B-101(9), and ordered that they remain in the custody of DSS.

The trial court held multiple permanency planning hearings until the trial court ultimately granted sole physical and legal custody to the children's biological mother on 2 August 2017. Seven additional DSS court reports filed prior to this hearing included respondent-father's statements about his affiliation with the Cherokee Indian tribe. The trial court converted the matter to a Chapter 50 civil custody action and terminated

2. Pseudonyms are used to protect the juveniles' identities and for ease of reading.

the jurisdiction of the Juvenile Court. Respondent-father gave notice of his appeal on 11 October 2017.[3]

While respondent-father's appeal was pending, DSS filed a second juvenile petition on 2 January 2018, alleging that the minor children were neglected and dependent juveniles. The trial court entered a Non-Secure Custody Order on 2 January 2018, granting custody of the children to DSS. The children remained in the custody of DSS throughout these proceedings. On 10 July 2018 the trial court adjudicated the children neglected and dependent as defined in N.C.G.S. § 7B-101(9) and (15).

On 24 August 2018 DSS filed a motion to terminate respondent-father's parental rights. A termination hearing was held on 15 February 2019, at which the trial court found that respondent-father neglected the children as defined in N.C.G.S. § 7B-101(15), failed to make reasonable progress in correcting the conditions that led to the removal of the juveniles, and willfully failed to pay a reasonable portion of the cost of care for his children. The trial court concluded that it was in the best interests of the juveniles to terminate respondent-father's parental rights. Respondent-father filed his notice of appeal on 27 March 2019.

While respondent-father's appeal was pending before this Court, the trial court held post termination of parental rights hearings on 20 August 2019 and 18 February 2020, pursuant to N.C.G.S. § 7B-908. At the 18 February 2020 post termination hearing, the court made specific findings regarding compliance with the Act. The trial court found that, pursuant to the Act, notices had been sent to two Cherokee tribes in Oklahoma and one Cherokee tribe in North Carolina. Each notice had also been sent to the appropriate regional director of the Bureau of Indian Affairs.

Each relevant tribe was served by mail, with return receipt requested. As of 30 August 2019, the Eastern Band of Cherokee Indians and the Cherokee Nation tribes both replied and indicated that the children were neither registered members nor eligible to be registered as members of those tribes. The United Keetoowah Band of Cherokee Indians tribe received the notice in August 2019 but failed to respond. Ultimately, the trial court found that the Act did not apply.

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3. The Court of Appeals issued a unanimous unpublished opinion on 1 May 2018 dismissing respondent-father's appeal from the trial court's order granting custody to the children's biological mother. *See In re E.J.B.*, 812 S.E.2d 911, 2018 WL 2016138 (N.C. Ct. App. 2018) (unpublished).

II. Indian Child Welfare Act

In 1978 the United States Congress passed the Act, which established "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes" in order to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902 (2018).

The Act was a product of growing awareness in the mid-1970s of abusive child welfare practices that led to an "Indian child welfare crisis . . . of massive proportions." H.R. Rep. No. 95-1386, at 9 (1978) (hereinafter House Report); *see also Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32, 109 S. Ct. 1597, 1599–1600). Studies conducted by the Association on American Indian Affairs in 1969 and 1974, and presented during Senate oversight hearings in 1974, showed that between twenty-five and thirty-five percent of all Native American children were living in foster homes, adoptive homes, or institutions. *Miss. Band*, 490 U.S. at 32–33, 109 S. Ct. at 1600 (citing Indian Child Welfare Program, Hearings before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs, 93d Cong., 2d Sess., 3 (statement of William Byler) (hereinafter 1974 Hearings)); *see also* House Report, at 9. Moreover, approximately ninety percent of Native American children removed from their families were placed in non-Native American homes.[4] *Miss. Band*, 490 U.S. at 33, 109 S. Ct. at 1600 (citing 1974 Hearings, at 75–83). On the basis of extensive empirical and anecdotal evidence collected during congressional hearings in 1974, 1977, and 1978, Congress concluded that the "wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today," causing long term emotional harm for Native American children who lose their cultural identity,[5] mass trauma for Native American families,[6]

4. House Report, at 11 ("Discriminatory standards have made it virtually impossible for most Indian couples to qualify as foster or adoptive parents, since they are based on middle-class values.").

5. 1974 Hearings at 27–28 (citing research showing that the majority of removed Native American children suffered identity confusion contributing to problems "in meeting the demands of adult life" and the "[d]evelopment of self-defeating styles of behavior and attitudes").

6. 1974 Hearings at 28 (citing anecdotal evidence of "[g]rief of village parents, not only at their children's leaving home, but also at their children's personal disintegration away from home").

and the erosion of tribal communities, heritage, and sovereignty.[7] *See* House Report at 9; *see also* Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,781 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23).

Although this crisis flowed from multiple sources, Congress found that state agencies and courts were largely to blame for conducting unnecessary child removal and termination of parental rights proceedings. *See* Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38,779–80) (citing 25 U.S.C. 1901(4)–(5)); House Report at 10–12). During the 1978 hearings, Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and a representative of the National Tribal Chairmen's Association, summarized the consensus that had emerged regarding the principal cause of the crisis as follows:

> One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful [sic] of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.

Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs, 95th Cong. 2d 191–12 (1978).

Congress found that "in judging the fitness of a particular family, many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists." House Report at 10. "For example, the dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social

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7. Congress found that this "wholesale removal of Tribal children by nontribal government and private agencies constitutes a serious threat to Tribes' existence as on-going, self-governing communities," and that the "future and integrity of Indian tribes and Indian families are in danger because of this crisis." Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,781 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23) (alterations in original) (quoting 124 Cong. Rec. H38103).

workers, untutored in the ways of Indian family life, or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights." *Id.* Congress incorporated these sentiments into the congressional findings supporting the Act as follows:

> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . .
>
> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
>
> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. § 1901; *Miss. Band*, 490 U.S. at 35–36, 109 S. Ct. at 1601.

The Act governs child custody proceedings involving Indian children. Child custody proceedings include: (1) foster care placements; (2) terminations of parental rights; (3) preadoptive placements; and (4) adoptive placements. 25 U.S.C. § 1903(1)(i)–(iv) (2018). An Indian child is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). The Act further provides that:

> [i]n any involuntary proceeding in a State court where the court knows or has reason to know that an Indian child is involved, the party seeking the . . . termination of parental rights to[ ] an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.

25 U.S.C. § 1912(a) (2018). No child custody proceedings may occur until at least ten days after the receipt of the notice, and tribes may request an additional twenty days to prepare for the proceedings. *Id.*

Since its passage, the Act has helped stem the tide of the Native American child welfare crisis; however, the implementation and interpretation of the Act has been inconsistent, and Native American children are still disproportionately likely to be removed from their homes and communities. *See* Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778 at 38,784 (internal citations omitted).

In 2016, after finding that its nonbinding guidelines were "insufficient to fully implement Congress's goal of nationwide protections for Indian children, parents, and Tribes," the Department of the Interior issued binding regulations to promote the uniform application of the Act. Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38,782 (citations omitted). Specifically, the Department considered the promulgation of binding regulations necessary because "[s]tate courts frequently characterize the guidelines as lacking the force of law and conclude that they may depart from the guidelines as they see fit." *Id.*

In implementing binding regulations, the Department updated existing notice provisions and added a new subpart I to the regulations promulgating the Act. *See* 25 C.F.R. §§ 23.101–.144; *see also* Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38,867–68. The new regulations did not affect termination of parental rights proceedings that were initiated prior to 12 December 2016 but do apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child. 25 C.F.R. § 23.143.

Under subpart I of the current federal regulations, state courts bear the burden of ensuring compliance with the Act. *See* 25 C.F.R. § 23.107(a), (b); *In re L.W.S.*, 255 N.C. App. 296, 298 n.4, 804 S.E.2d 816, 819, n.4 ("We note that, now, it seems to be the case that the burden has shifted to state courts to inquire at the start of a proceeding whether the child at issue is an Indian child . . . ."). State courts must ask each participant in a child custody proceeding, on the record, whether that participant knows or has reason to know that the matter involves an Indian child. 25 C.F.R. § 23.107(a). The trial court must also inform the parties of their duty to notify the trial court if they receive subsequent information that provides reason to know the child is an Indian child. *Id.*

If the trial court has reason to know that the child is an Indian child, but lacks sufficient evidence to make a definitive determination, the trial court must:

> [c]onfirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of the Tribes of

> which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership) . . . .

25 C.F.R. § 23.107(b)(1). While the trial court is seeking this additional information, it must treat the child as an Indian child until it determines that the child does not qualify for that status. 25 C.F.R. § 23.107(b)(2). State courts should seek to allow tribes to determine membership because "[t]he Indian Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) determines whether the child is a member of the Tribe, or whether the child is eligible for membership in the Tribe." 25 C.F.R. § 23.108(a). This determination is committed to the sole jurisdiction of the tribe, and state courts cannot substitute their own determination regarding a child's membership for that of the tribe. 25 C.F.R. § 23.108(b). If a tribe fails to respond to multiple written requests, the trial court must first seek assistance from the Bureau of Indian Affairs. 25 C.F.R. § 23.1005(c). State courts can only make their own determination as to the child's status if the tribe and Bureau of Indian Affairs fail to respond to multiple requests. Indian Child Welfare Act Proceedings 81 Fed. Reg. at 38,806.

III. Analysis

Respondent-father asks this Court to vacate each of the judgments and orders entered in this case because the trial court failed to comply with the mandatory notice requirements under the Act before terminating his parental rights. He argues that his statements concerning his own Indian heritage were sufficient to trigger the notice requirements of the Act and that the trial court lacks jurisdiction because it failed to comply with said requirements. Petitioners moved to dismiss the appeal, asking this Court to hold that the post termination notices were adequate to cure the trial court's failure to provide notice in compliance with the Act, rendering moot respondent-father's arguments on appeal.[8] We conclude that the post termination notices failed to comply with the Act and therefore cannot cure the trial court's error.

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8. Although these notices and findings by the trial court were not in the record, this Court takes judicial notice of the actions by both DSS and the trial court during the post termination hearings. *See State ex rel. Utils. Comm'n v. S. Bell Tel. and Tel. Co.*, 289 N.C. 286, 287, 221 S.E.2d 322, 324 (1976) ("Consideration of matters outside the record is especially appropriate where it would disclose that the question presented has become moot, or academic, and therefore neither of the litigants has any real interest in supplementing the record.").

Here, the record shows that the trial court had reason to know that an Indian child might be involved. In eight separate filings, DSS indicated in its court reports that respondent-father indicated that he had Cherokee Indian heritage. Respondent-father also raised his Indian heritage during a Child and Family Team Meeting, and his comments were included in a report filed by DSS with the trial court. Although the trial court had reason to know that an Indian child might be involved in these proceedings, the trial court failed to readdress its initial finding that the Act did not apply and failed to ensure that any Cherokee tribes were actually notified.

The trial court was required to ask each participant in the proceeding, on the record, whether that participant knows or has reason to know that the matter involves an Indian child and inform them of their duty to inform the trial court if they learn any subsequent information that provides a reason to know that an Indian child is involved. *See* 25 C.F.R. § 23.107(a).[9] The party seeking the termination of parental rights, DSS, was required to notify the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of the tribe's right to intervene. 25 U.S.C. § 1912(a).

Here, there is no evidence in the record that the trial court inquired at the beginning of the proceeding whether any participant knew or had reason to know that an Indian child was involved or informed the participants of their continuing duty to provide the trial court with such information. In an attempt to rectify its failure to comply with the notice provisions of the Act, Mecklenburg County Department of Social Services Youth and Family Services sent a notice, with return receipt requested, on 1 August 2019 to each federally-recognized Cherokee tribe[10]: the Eastern Band of Cherokee Indians; the Cherokee Nation and the United Keetoowah Band of Cherokee Indians. Each notice was also sent to the appropriate regional director of the Bureau of Indian Affairs. Included with each notice was a copy of the juvenile petition and nonsecure custody order filed 2 January 2018. On 9 August 2019, a representative of the Eastern Band of Cherokee Indians tribes responded, indicating that the juveniles were neither registered members nor eligible to register as a member of the tribe. On 13 November 2019, a representative

9. Because the proceedings stemming from the 2 January 2018 juvenile petition began after 12 December 2016, the trial court was required to follow the binding federal regulations in addition to the statutory provisions of the Act.

10. *See* Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 85 Fed. Reg. 5,462 (Jan. 30, 2020).

of the Cherokee Nation tribe responded, indicating that the juveniles were not "Indian children" as defined in the Act. Both tribes indicated they did not have the legal right to intervene in the matters. The United Keetoowah Band of Cherokee Indians tribe received the notice on 5 August 2019 and had not responded as of the 18 February 2020 post termination of parental rights hearing.

Although the trial court attempted to comply with the Act by sending notices to these tribes after respondent-father appealed to this Court, the notices failed to include all necessary information as required under 25 U.S.C. § 1912 and 25 C.F.R. § 23.111(d). The notices did not contain any language informing the tribes of their right to intervene in the proceedings, and we find no other evidence in the record that these tribes were notified of their right of intervention, as mandated in 25 U.S.C. § 1912(a).

We further conclude that the notices were legally insufficient because they failed to contain all necessary information. Pursuant to binding federal regulations, notices must also include the following information:

> (1) [T]he child's name, birthdate, and birthplace;
>
> (2) [A]ll names known (including maiden, married, and former names and aliases) of the parents, the parents' birthdates and birthplaces, and Tribal enrollment numbers if known;
>
> (3) [I]f known, the names, birthdates, birthplaces, and Tribal enrollment information of other direct lineal ancestors of the child, such as grandparents;
>
> (4) [T]he name of each Indian Tribe in which the child is a member (or may be eligible for membership if a biological parent is a member); [and]
>
> (5) [A] copy of the petition, complaint, or other document by which the child-custody proceeding was initiated and, if a hearing has been scheduled, information on the date, time, and location of the hearing[.]

25 C.F.R. § 23.111(d)(1)–(5). Notices must also include statements setting out the following:

> (i) [T]he name of the petitioner and the name and address of petitioner's attorney.

> (ii) [T]he right of any parent or Indian custodian of the child, if not already a party to the child-custody proceeding, to intervene in the proceedings.
>
> (iii) [T]he Indian Tribe's right to intervene at any time in a State-court proceeding for the foster-care placement of or termination of parental rights to an Indian child.
>
> (iv) [T]hat, if the child's parent or Indian custodian is unable to afford counsel based on a determination of indigency by the court, the parent or Indian custodian has the right to court-appointed counsel.
>
> (v) [T]he right to be granted, upon request, up to 20 additional days to prepare for the child-custody proceedings.
>
> (vi) [T]he right of the parent or Indian custodian and the Indian child's Tribe to petition the court for transfer of the foster-care placement or termination-of-parental rights proceeding to Tribal court as provided by 25 U.S.C. § 1911 and § 23.115.
>
> (vii) [T]he mailing addresses and telephone numbers of the court and information related to all parties to the child-custody proceeding and individuals notified under this section.
>
> (viii) the potential legal consequences of the child-custody proceedings on the future parental and custodial rights of the parent or Indian custodian.
>
> (ix) that all parties notified must keep confidential the information contained in the notice and the notice should not be handled by anyone not needing the information to exercise rights under [the Act].

25 C.F.R. § 23.111(d)(6)(i)–(ix). Upon careful review of the notices sent, we observe that the notices also failed to fully comply with these regulations.

The notices failed to include: (1) the children's birthplaces, as required by 25 C.F.R. § 23.111(d)(1); (2) notice of the tribe's right to intervene, as required by 25 C.F.R. § 23.111(d)(6)(iii); (3) notice of the tribe's right to request an additional twenty days to prepare for the hearing, as required by 25 C.F.R. § 23.111(d)(6)(v); and (4) notice of the tribe's right to petition for a transfer of the proceeding to tribal court, as required by 25 C.F.R. § 23.111(d)(6)(vi).

Each of the three notices sent by DSS failed to comply with the Act and were not sent in a timely manner. The Eastern Band of Cherokee Indians and Cherokee Nation tribes responded to their respective notices, indicating that Robert and Eric were not "Indian children" as defined in 25 U.S.C. § 1903(4). Based on these responses, the trial court no longer had reason to know that Eric and Robert might be Indian children due to their affiliation with the Eastern Band of Cherokee Indians or Cherokee Nation tribes.

However, the trial court still had reason to know that Robert and Eric might be Indian children due to their affiliation with the United Keetoowah Band of Cherokee Indians tribe. The only notice that the tribe received was legally insufficient and it failed to comply with the Act because it did not contain all information required in 25 U.S.C. § 1912(a) and 25 C.F.R. § 23.111(d). Assuming, *arguendo*, that the notice was legally sufficient, the trial court still erred by finding that the Act did not apply because it failed to ensure that DSS used due diligence when contacting all three tribes. 25 C.F.R. § 23.107(b)(1). Tribes, not trial courts, determine whether a child is a member or is eligible for membership, and therefore considered an Indian child under the Act. 25 C.F.R. § 23.108. If a tribe fails to respond, the trial court must seek assistance from the Bureau of Indian Affairs prior to making its own independent determination. 25 C.F.R. § 23.105(c). This is because "[t]he State court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe." 25 C.F.R. § 23.108(b).

We therefore conclude that the post termination notice sent to the Keetoowah Band of Cherokee Indians tribe did not cure the trial court's failure to comply with the Act prior to terminating respondent-father's parental rights.

IV. Conclusion

The order terminating respondent-father's parental rights is reversed. We remand this matter to the trial court to issue an order requiring that a notice be sent to the Keetoowah Band of Cherokee Indians tribe by DSS that fully complies with the requirements of 25 U.S.C. § 1912(a) and 25 C.F.R. § 23.111. If the Keetoowah Band of Cherokee Indians tribe indicates that the children are not Indian children pursuant to the Act, the trial court shall reaffirm the order terminating respondent-father's parental rights. In the event that the Keetoowah Band of Cherokee tribe indicates that the children are Indian children pursuant to the Act, the trial court shall proceed in accordance with the relevant provisions of the Act.

REVERSED and REMANDED.

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

Justice NEWBY dissenting.

The ultimate question presented in this case is whether each child involved in this termination proceeding is an "Indian child" as defined by the Indian Child Welfare Act (ICWA). The specific question is whether the appropriate Indian tribes were notified of the allegation that the children were potentially of Indian heritage. While the Mecklenburg County Department of Social Services, Youth and Family Services (YFS) and the trial court did not timely investigate whether the ICWA applied, during post-termination proceedings YFS did provide notice to the three relevant Indian tribes and the respective directors of the Bureau of Indian Affairs. The notices were sent with return receipts requested, and all necessary entities received notification. Two tribes responded that the children were not eligible for membership. Although in receipt of the notification, the third tribe did not respond to the notice over a period of nearly seven months. The third tribe was notified through two separate avenues, to the tribe directly and to the regional director of the Bureau of Indian Affairs. Similarly, the Bureau of Indian Affairs did not respond. This information was presented to the trial court, and after evaluating all the evidence, it determined that the children are not Indian children. This determination rendered the ICWA inapplicable since the trial court had no reason to believe that the children were Indian children based on the tribes' responses, or lack thereof. Even if the notices to the tribes could have provided additional information about the tribes' respective rights in the proceedings, that information is unnecessary unless the children are Indian children. As such, and because the trial court has properly made the determination that the ICWA does not apply here, the appeal should be dismissed as moot.

Under North Carolina law the guiding principle in termination of parental rights cases is the best interests of the child. Children are best served with timely proceedings and placements in permanent homes. As a result of the majority's decision, the children in this case must endure months of further uncertainty waiting for the last tribe to respond, if it will. If the children are Indian children, the last tribe would have responded already. Despite the seeming lack of interest by the third tribe and the Bureau of Indian Affairs, the majority places the burden of obtaining a response from the tribe on the trial court and YFS. The

majority is also critical of the notice provided, saying that additional information should have been included. The majority assumes that Indian tribes are not motivated to respond if the research reveals the children's Indian heritage, or that tribes do not understand their rights. It uses these assumptions to keep these children embroiled in a continued, lengthy termination proceeding. Because the majority improperly elevates the form of the statutory notice requirements over the substance of actual notice, thereby undermining the best interests of the children, I respectfully dissent.

The children were initially placed with YFS in 2015, and after a series of proceedings in which the children's mother was awarded custody, she relinquished her rights to the children in 2018. Ultimately, on 15 March 2019 the trial court terminated respondent's parental rights.

Though respondent informed YFS that he was "affiliated with the Cherokee Indian tribe," YFS did not investigate because it believed that respondent had not provided the information necessary to require further inquiry into the matter. On 1 August 2019, YFS sent notices to three Indian tribes and the Bureau of Indian Affairs, with return receipts requested as required by statute, informing them that the children were currently involved in dependency actions and that the children may be eligible for enrollment in one of the tribes. Upon receipt of the notice, two of the tribes responded that the children were not eligible for enrollment; as such, the tribes noted that they were therefore not legally able to intervene. The third tribe, the United Keetoowah Band of Cherokee Indians, signed the return receipt indicating that they received notice in August of 2019, but the tribe did not respond, and still has not responded, to the notice. The Bureau of Indian Affairs affiliated with the United Keetoowah Band of Cherokee Indians was also served and did not respond.

The trial court conducted two post-termination hearings. At the second hearing on 18 February 2020, based on the information set forth above, the trial court determined that the ICWA does not apply.

The ICWA provides that:

> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the . . . termination of parental rights to[ ] an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and their right of intervention.

25 U.S.C. § 1912(a) (2018). By its terms, this provision only applies when the court knows or should know that an Indian child as defined by the ICWA may be involved. According to the ICWA, an Indian child is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4) (2018).

In accordance with the regulations promulgated under the ICWA, state courts must generally ask parties involved whether the children at issue are Indian children. 25 C.F.R. § 23.107(a) (2019). If the trial court has reason to suspect the children are Indian children through any of the avenues recognized in 25 C.F.R. § 23.107(c), including an allegation of Indian heritage, then the trial court must confirm that the relevant state agency or other party involved in the proceeding has sought a determination of the children's tribal membership status by the appropriate Indian tribe or tribes. 25 C.F.R. § 23.107(b)(1). The trial court should treat a child as an Indian child unless it is determined that the child does not meet the "Indian child" definition. 25 C.F.R. § 23.107(b)(2). Ultimately, "[s]tate courts have discretion as to when and how to make this determination." Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,806 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23). Moreover, the regulations provide a ten-day waiting period for termination proceedings to occur once a tribe has received notice, and the impacted tribe may request up to twenty days to prepare for the proceeding if an Indian child is in fact involved. 25 C.F.R. § 23.112 (2019). If the trial court determines that the children involved are not Indian children, then the ICWA does not apply. 25 C.F.R. § 23.107(b)(2).

These regulations place the burden on the trial court and Department of Social Services to determine whether a child is an Indian child when they have notice that an Indian child may be involved in the proceeding. While respondent here merely informed YFS that he had Cherokee Indian heritage, this information was sufficient to put the trial court and YFS on notice that the ICWA may apply. Therefore, the burden was on the trial court and YFS to investigate as soon as respondent provided this information.

While notice should have been provided earlier in the proceeding, YFS did ultimately provide notice to the three relevant Cherokee Indian tribes. The evidence arising from the notices was sufficient to allow the trial court to determine that the ICWA is inapplicable. The purpose of the ICWA is to notify the Indian tribes that a potential Indian child is involved in the state proceeding, not to delay termination proceedings

based on unsubstantiated allegations of Indian heritage. Given the responses from two tribes, and the third tribe's failure to respond in the nearly seven months after it received notice, the trial court properly determined that the ICWA is inapplicable.

It appears that the majority would put the termination proceeding on hold awaiting an actual response from the third tribe which failed to respond even though it indisputably received notice. It seems this issue has already caused a significant delay and that further delay will now occur. Our case law has supported the idea that the best interests of the child should be the lodestar in juvenile proceedings. *See In re T.H.T.*, 362 N.C. 446, 448, 665 S.E.2d 54, 56 (2008) (recognizing the importance of effectuating a child's best interests and the need for children to be timely placed in a permanent home); *id.* at 450, 665 S.E.2d at 57 (stating that, because a child's perception of time differs from that of an adult, "[t]he importance of timely resolution of cases involving the welfare of children cannot be overstated"); *see also* N.C.G.S. § 7B-100(5) (2019). Also, this Court has consistently recognized that form should not be elevated over substance. *See, e.g.*, *In re A.P.*, 371 N.C. 14, 19–22, 812 S.E.2d 840, 844–45 (2018) (reading the juvenile code holistically to determine that, despite statutory language to the contrary, the legislature did not intend to limit the proper petitioner in a juvenile adjudication to a single individual within a department of social services, as a determination to the contrary would not achieve the best interests of the child); *In re T.L.H.*, 368 N.C. 101, 111–12, 772 S.E.2d 451, 458 (2015) (concluding that, though the trial court could have conducted an inquiry into respondent's competence at trial in light of her mental health conditions, the trial court had a reasonable basis for concluding that respondent was capable of participating in the proceeding since its conclusion rested on other legitimate considerations); *In re J.T.*, 363 N.C. 1, 672 S.E.2d 17 (2009) (concluding that it would be unnecessary to address deficiencies in the summons, that the juveniles were not named in the petition as respondents nor was the summons served on a GAL, because the GAL fully participated in the proceedings despite any deficiency). Because the ultimate goal of juvenile proceedings is to determine and effectuate the best interests of the child, the proceedings in this case should not be invalidated over technical deficiencies.

Moreover, the majority seems to say that any allegation of Indian heritage, even one unsupported by anything more than a statement that a party has Indian heritage, is sufficient to halt all child proceedings so long as a tribe does not respond. This impractical approach does not appear to be the intent of the ICWA, nor is it consistent with our case law and statutes

recognizing the paramount interest being the best interests of the child, which favors timely resolution of these already lengthy proceedings.

Instead of asking if the trial court had evidence that the unresponsive tribe received notice about the children and the state court proceeding, the majority renders the notice deficient because, in addition to the fact that the tribe failed to respond, the notice itself did not include information such as the children's birthplace or an explicit statement that the tribe had a right to intervene. The majority fails to indicate why these technical deficiencies had any impact on the notice here since the United Keetoowah Band of Cherokee Indians failed to respond well beyond the time recognized in the federal regulations. As previously mentioned, two of the tribes who were given notice indicated a clear understanding of their rights, explicitly stating that the ineligibility meant they could not intervene in the proceeding. Moreover, those tribes were able to establish that the children were not eligible for membership in their tribes without being provided with the children's birthplace. Therefore, requiring additional notices to be sent in this case will only serve to delay the proceeding, which in turn delays permanency for the children.

In sum, the majority elevates form over substance, needlessly delaying indefinitely the permanency that would be in the children's best interests. Because the Indian tribes were all notified and the trial court, in consideration of the evidence, determined that the ICWA is inapplicable, this appeal should be dismissed as moot. I respectfully dissent.

IN RE J.A.E.W.

[375 N.C. 112 (2020)]

IN THE MATTER OF J.A.E.W.

No. 380A19

Filed 14 August 2020

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

The trial court properly terminated a father's parental rights to his daughter based on willful failure to pay child support (N.C.G.S. § 7B-1111(a)(3)) where the evidence showed that the father was employed during the six months prior to the filing of the termination petition, that he earned some income during that time, and that he had the financial means to support his child. The trial court was not obligated to enter findings about the father's living expenses in order to support its adjudication.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered 27 June 2019 by Judge Wes W. Barkley in District Court, Burke County. This matter was calendared in the Supreme Court on 29 July 2020 but was 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, and Mona E. Leipold for petitioner-appellee Burke County Department of Social Services.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Gray Wilson and Michael W. Mitchell, for appellee Guardian ad Litem.

Robert W. Ewing, for respondent-appellant father.

EARLS, Justice.

Respondent-father appeals from the trial court's order terminating his parental rights to J.A.E.W. (Jennifer).[1] We affirm.

Jennifer was born in December of 2003. On 19 August 2014, the Burke County Department of Social Services (DSS) obtained non-secure custody of Jennifer and filed a juvenile petition alleging that Jennifer

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

was a neglected and dependent juvenile. The petition alleged that on 9 February 2014, law enforcement officers responded to a residence where Jennifer, Jennifer's half-brother, her maternal grandmother, and her mother were present.[2] The mother and maternal grandmother appeared to be under the influence of an impairing substance, and the maternal grandmother had been involved in a physical altercation with another minor child while in the presence of Jennifer and Jennifer's half-brother. As a result, Jennifer and her half-brother were placed with a relative.

The petition further alleged that on 26 March 2014, the Catawba County Department of Social Services visited the mother's home and found her to be under the influence. On 19 June 2014, the mother was charged with prostitution. On 19 August 2014, law enforcement officers executed a search warrant for the mother's home and discovered the mother had removed Jennifer and her half-brother from the kinship placement. The mother was selling counterfeit heroin, appeared to be impaired, and admitted to using opiates, benzodiazepines, and marijuana. Needles and cocaine were located within reach of the children. At the time Jennifer came into DSS custody, respondent-father was incarcerated and had a projected release date of 2 February 2016.

The trial court held a hearing on the juvenile petition on 25 September 2014. On 20 November 2014, the trial court entered a consolidated adjudication and disposition order determining Jennifer to be a dependent juvenile. Custody of Jennifer was continued with DSS.

In a permanency planning order entered on 27 August 2015, the trial court found that respondent "writes letters and sends cards" to Jennifer. The permanent plan was reunification with respondent, concurrent with adoption and guardianship. In a permanency planning order entered 28 January 2016, the trial court found that respondent kept in regular contact with DSS through letters.

Following a hearing held on 5 May 2016, the trial court entered a permanency planning order on 19 May 2016. The trial court found that respondent was released from incarceration on 2 February 2016. The day following his release, he provided DSS his contact information and new address. The trial court further found that on 11 April 2016 respondent signed a family case plan and agreed to: (1) obtain and maintain stable housing, (2) obtain and maintain legal employment, (3) refrain from taking part in any illegal activities, (4) remain out of jail or prison, (5) obtain and utilize reliable transportation, and (6) maintain regular

2. Jennifer's half-brother is not a subject of this appeal.

and consistent contact with Jennifer. Respondent was authorized two hours per month of supervised visitation with Jennifer. The permanent plan remained reunification with respondent, concurrent with a plan of adoption and guardianship.

On 1 August 2016, DSS filed a motion requesting that all contact and visitation between Jennifer and respondent stop until Jennifer's therapist "recommends that it resumes," citing concerns raised by Jennifer's therapist that respondent had sexually abused Jennifer. On 25 August 2016, the trial court entered an order finding that the Wilkes County Department of Social Services was conducting an investigation of respondent's alleged sexual abuse of Jennifer, that was expected to be completed in the next sixty days. The trial court suspended visitation and contact between respondent and Jennifer and held that if the allegations were "not substantiated and [Jennifer's] therapist recommends visitation and telephone contact should resume, then visitation will resume as ordered in the previous order."

Prior to the completion of Wilkes County DSS's investigation, the trial court held a hearing on 22 September 2016 and entered a permanency planning order on 18 October 2016. The trial court found that since being released from jail, respondent had been charged with driving while under the influence. He was employed by Tyson Foods and was living with a girlfriend in a friend's home. Although DSS requested his girlfriend's information in order to complete a background check, respondent refused to provide it.

After a hearing held on 15 December 2016, the trial court entered a permanency planning order on 19 January 2017 finding that respondent was not complying with his case plan; a fact that he admitted. He also admitted to living with "people that are inappropriate." The primary permanent plan was changed to adoption. On 11 January 2017, the Wilkes County Department of Social Services closed its investigation of respondent with a determination that the allegations of abuse were unsubstantiated. Supervised visitation between respondent and Jennifer resumed on 26 January 2017.

Following a hearing held on 9 February 2017, the trial court entered a permanency planning order on 23 March 2017 finding that respondent's employer informed DSS that respondent had been fired from his job on 4 January 2017 for gross misconduct and would not be allowed to return. Respondent last reported that he was living with friends in Wilkes County but had purchased a trailer. However, because respondent failed to provide DSS with the address to either residence, DSS had been unable to

verify their safety. The trial court further found that Jennifer's therapist recommended respondent complete a parenting assessment, parenting classes, and therapy on how to parent a child with limited intellectual ability. Respondent refused to complete any of the therapist's recommendations, stating that he had "done enough" to be able to be reunited with Jennifer. The trial court suspended visitations with respondent based on his failure to engage in parenting classes.

Following a 1 June 2017 hearing, the trial court entered a permanency planning order on 24 August 2017 finding that respondent had failed to make progress on his case plan. The permanent plan was changed to a primary plan of adoption and secondary plan of guardianship, and the trial court ceased reunification efforts with respondent.

The trial court held subsequent permanency planning review hearings on 21 September 2017, 12 December 2017, 22 March 2018, and 9 August 2018. Respondent continued to fail to make progress on his case plan. Following the hearing held on 12 December 2017, the trial court entered a permanency planning order on 8 February 2018 allowing respondent to communicate with Jennifer's therapist "about [Jennifer's] needs/wishes." At the permanency planning review hearing held on 22 March 2018, however, the trial court found that respondent had not contacted the therapist. The therapist recommended that there only be phone contact between respondent and Jennifer. In the order entered after the 9 August 2018 hearing, respondent was permitted to have supervised phone calls with Jennifer "as long [as] the contact is therapeutically recommended by the juvenile's therapist."

The trial court held a hearing on 10 January 2019 and entered a permanency planning order on 24 January 2019. The trial court found that respondent reported that he was employed as an electrical apprentice. Although respondent had completed one section of the Triple P online parenting class, he had not completed the in-person course, as had been requested. The trial court further found that respondent failed to have contact with DSS since 30 April 2018. Respondent had been having supervised phone calls with Jennifer, but Jennifer asked for the phone calls to cease in August 2018 "due to her father not understanding that she wants to be adopted."

On 15 March 2019, DSS filed a petition to terminate respondent's parental rights. DSS alleged that respondent had neglected Jennifer and there was a reasonable likelihood that Jennifer would be neglected if placed in respondent's custody, *see* N.C.G.S. § 7B-1111(a)(1) (2019), respondent had willfully left Jennifer in foster care or placement

outside the home for more than twelve months without making reasonable progress to correct the conditions that led to her removal, *see* N.C.G.S. § 7B-1111(a)(2) (2019), respondent had for a continuous period of six months preceding the filing of the petition willfully failed to pay a reasonable portion of the cost of care for Jennifer although physically and financially able to do so, *see* N.C.G.S. § 7B-1111(a)(3) (2019), and respondent had willfully abandoned Jennifer, *see* N.C.G.S. § 7B-1111(a)(7) (2019).

Following a hearing held on 13 June 2019, the trial court entered an order on 27 June 2019 concluding that the evidence supported all four grounds alleged in the petition. The trial court also determined that it was in Jennifer's best interests that respondent's parental rights be terminated, and the court terminated his parental rights. *See* N.C.G.S. § 7B-1110(a) (2019). Respondent appeals.

Although respondent-father's notice of appeal specifies that his appeal had been noted to the Court of Appeals, rather than to this Court, we elect to treat respondent-father's brief as a certiorari petition and to issue a writ of certiorari authorizing review of respondent-father's challenges to the trial court's termination order on the merits given the seriousness of the issues that are implicated by the trial court's termination order. *In re N.D.A.*, 373 N.C. 71, 73–74, 833 S.E.2d 768, 771 (2019).

On appeal, respondent argues that the trial court erred in adjudicating that grounds existed to terminate his parental rights. Specifically, respondent challenges the trial court's conclusions that grounds existed under N.C.G.S. § 7B-1111(a)(1) and (7) to terminate his parental rights even though he remained in contact with Jennifer when permitted to do so by her therapist; that grounds existed under N.C.G.S. § 7B-1111(a)(2) when he had corrected the conditions that led to Jennifer's removal and his efforts placed him in a position to regain custody of Jennifer; and that grounds existed under N.C.G.S. § 7B-1111(a)(3) to terminate his parental rights when the findings of fact were insufficient to demonstrate that he had the ability to pay for Jennifer's cost of care.

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. N.C.G.S. § 7B-1109(e), (f) (2019). We review a trial court's adjudication under N.C.G.S. § 7B-1109 "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusion of law." *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984) (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 132 (1982)).

A trial court is authorized to order the termination of parental rights based on an adjudication of one or more statutory grounds. *See In re Moore*, 306 N.C. at 404, 293 S.E.2d at 133 (holding that an appealed order should be affirmed when any of the grounds found by the trial court is supported by findings of fact based on clear, cogent, and convincing evidence). *See also*, *In re S.E.*, 373 N.C. 360, 367, 838 S.E.2d 328, 333 (2020) (declining to address additional arguments when evidence established the ground of parent's failure to pay reasonable portion of the costs of care). Here we only address the ground of willfully failing to pay a reasonable portion of the cost of care of a juvenile who is in the custody of a county department of social services if the parent is physically and financially able to do so. N.C.G.S. § 7B-1111(a)(3) (2019). The relevant statutory time period for this ground is the six months prior to the filing of the TPR petition. *Id.*

It is undisputed that respondent failed to make any child support payments during the almost five years that Jennifer was in the DSS's custody. He also did not buy Jennifer clothing or other necessities while she was in foster care. Respondent testified that he had steady employment in the year and a half prior to the termination-of-parental-rights hearing, earning between ten and twelve dollars an hour. He further admitted that at times he "had money saved in the bank," and that at the time of the hearing he was "financially able to take care of [Jennifer]." Therefore, clear, cogent, and convincing evidence supports the trial court's conclusion that respondent willfully failed to pay a reasonable portion of Jennifer's cost of care despite his physical and financial ability to do so. Indeed, "[n]ot only was this ground proven by clear, cogent and convincing evidence, there was no evidence to the contrary." *In re Moore*, 306 N.C. at 405, 293 S.E.2d at 133.

Nevertheless, Respondent contends that the trial court's decision with respect to this ground for termination was erroneous because respondent also testified that he did not earn enough to live on and because the trial court needed to make findings regarding his living expenses before being able to conclude as a factual matter that he had the means and ability to contribute an amount more than zero to his child's cost of care. However, while there must be a finding that the parent has the ability to pay support, *see In re Ballard*, 311 N.C. 708, 716–17, 319 S.E.2d 227, 233 (1984), in the circumstances of this case, the trial court did not need to make findings regarding respondent's own living expenses. It is enough here, when respondent made no payments whatsoever to cover the costs of Jennifer's care, that the trial court found that respondent was employed with some income. Respondent's living expenses might be relevant evidence to be taken into account if he had

made some child support payments during the applicable time period and the issue was whether the amount he contributed to the cost of Jennifer's care was reasonable, but here the trial court found that he had income and made no contributions at all. *Cf. In re J.E.M.*, 221 N.C. App. 361, 364, 727 S.E.2d 398, 401 (2012) (quoting *In re Huff*, 140 N.C. App. 288, 293, 536 S.E.2d 838, 842 (2000)) (reaching the same conclusion in analogous circumstances).

Respondent was working in the six months prior to the filing of the petition, earned some income, and testified that he had the financial means to support Jennifer. He was able to pay some amount greater than zero, and it is undisputed that he failed to do so. Therefore, the trial court properly terminated respondent father's rights based on an adjudication under N.C.G.S. § 7B-1111(a)(3) that he willfully failed to pay child support in the six months prior to the filing of the termination-of-parental-rights petition. As respondent does not challenge the trial court's ultimate conclusion that termination of his parental rights to Jennifer is in her best interest, we affirm the trial court's order.

AFFIRMED.

IN THE MATTER OF K.L.M., K.A.M., AND K.L.M.

No. 365A19

Filed 14 August 2020

Termination of Parental Rights—best interests of the child—weighing of dispositional factors

In a private termination action, the trial court did not abuse its discretion in determining that termination of a father's parental rights would be in his children's best interests where the unchallenged dispositional findings included the children's young ages, the children's positive living arrangements with their mother and grandparents, the son's significant progress in overcoming the trauma of seeing his father shoot his mother in the leg, the lack of any bond between the children and the father, and the mother's demonstrated ability to meet the children's needs. The trial court's weighing of the dispositional factors was neither arbitrary nor manifestly unsupported by reason.

IN RE K.L.M.

[375 N.C. 118 (2020)]

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 13 May 2019 by Judge Robert J. Crumpton in District Court, Wilkes County. This matter was calendared for argument in the Supreme Court on 29 July 2020 but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Paul W. Freeman Jr. for petitioner-appellee mother.

Sean P. Vitrano for respondent-appellant father.

NEWBY, Justice.

Respondent appeals from the trial court's order terminating his parental rights to K.L.M. (Kevin)[1], K.A.M. (Amy), and K.L.M. (Laura) in this private termination action. We affirm.

Respondent and petitioner are the biological father and mother of Kevin, who was born in 2012, and twins Amy and Laura, who were born in 2017. Respondent and petitioner were married in February 2013 and lived together as husband and wife until their separation in March 2017. During their marriage, respondent abused drugs; committed acts of violence against petitioner, which included shooting petitioner in the leg in Kevin's presence; failed to provide for the needs of the children; and was either incarcerated, in rehabilitation, or otherwise absent from the home with his whereabouts unknown for much of the time.

On 3 December 2018, petitioner filed a petition to terminate respondent's parental rights to Kevin, Amy, and Laura on the grounds of neglect, dependency, and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(1), (6)–(7) (2019). Around the same time that petitioner filed the petition for termination, petitioner also filed a complaint for absolute divorce and custody of the children. On 9 January 2019, the trial court entered a judgment for absolute divorce that also granted legal and physical custody of the children to petitioner and ordered respondent not to have contact with petitioner or the children unless and until he seeks such contact by motion and obtains a court order granting it.

The trial court terminated respondent's parental rights on the grounds of neglect, dependency, and willful abandonment on 13 May 2019. *See* N.C.G.S. § 7B-1111(a)(1), (6)–(7). In making its determination, the trial court found the relationship between petitioner and respondent

1. Pseudonyms are used to protect the identities of the juveniles and for ease of reading.

to be "chaotic and defined in many ways by the repeated acts of violence perpetrated upon the Petitioner by the Respondent, and the Respondent's subsequent apologies and promises of changed behavior, the Petitioner's acceptance of these promises, reconciliation, and subsequent repetition of violence." The trial court described the incident during which respondent shot petitioner, respondent's abuse of drugs, and respondent's failure to provide financial and emotional support for the children. The trial court found that respondent had "demonstrated a complete indifference to the children" and "ha[d] abandoned the children."

The trial court made the following findings regarding the best interests of the children:

> 15. [Kevin] is currently six (6) years old; [Amy] is currently two (2) years old; and [Laura] is currently two (2) years old. All of the children are physically healthy and are thriving in Wilkes County, North Carolina.
>
> 16. The Petitioner and children reside with the maternal grandparents . . . . They have resided with [the maternal grandparents] since moving to Wilkes County. The children are doing well in this home and all of their needs are being met.
>
> 17. Although physically healthy, [Kevin] is participating in mental health counseling. He began this therapy to deal with the trauma surrounding the Respondent shooting the Petitioner in [Kevin's] presence. [Kevin] has greatly improved since moving to Wilkes County and participating in counseling. When he first arrived in Wilkes [County], [Kevin] was angry and withdrawn. Now, he is happy, smiling and more outgoing. He is doing well in school and has adapted readily to the consistency and predictability of his current living arrangements. He has a regular schedule and is thriving in his current environment.
>
> 18. None of the children have a bond with the Respondent. The twins have had no relationship with the Respondent at any time.
>
> 19. Adoption is not an issue in these proceedings.
>
> 20. The Petitioner is gainfully employed and is able to meet the children's material needs.

21. The Petitioner is meeting all of the children's emotional needs.

Based on the findings, the trial court concluded that grounds existed to terminate respondent's parental rights and that "[i]t [was] in the best interests of the children to terminate the Respondent's parental rights." Respondent appealed.

Respondent does not challenge the above dispositional findings; therefore, those findings are binding on appeal. *See In re E.H.P.*, 372 N.C. 388, 395, 831 S.E.2d 49, 54 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). In fact, respondent asserts that

> [t]he trial court appropriately considered and made factual findings regarding [the best interest] factors [provided by N.C.G.S. § 7B-1110](a)(1), (2), and (4): the children's ages, likelihood of adoption, and bond with Respondent. The court also appropriately considered under (a)(6) that the children lived in a stable, nurturing, and financially secure environment with Petitioner and her parents in Wilkes County.

Nevertheless, respondent challenges the trial court's conclusion that it was in the best interests of the children to terminate his parental rights, essentially arguing the trial court erred in weighing the factors. We disagree.

"Our Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage." *In re Z.A.M.*, 374 N.C. 88, 94, 839 S.E.2d 792, 796–97 (2020) (citing N.C.G.S. §§ 7B-1109, -1110 (2019)). If the trial court determines at the adjudicatory stage that one or more of the grounds in N.C.G.S. § 7B-1111(a) exists to terminate parental rights, the trial court proceeds to the dispositional stage at which point it must "determine whether terminating the parent's rights is in the juvenile's best interest[s]" based on the following criteria:

(1) The age of the juvenile.

(2) The likelihood of adoption of the juvenile.

(3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.

(4) The bond between the juvenile and the parent.

(5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.

(6) Any relevant consideration.

N.C.G.S. § 7B-1110(a). The trial court is required to consider all of the factors and make written findings regarding those that are relevant. *Id.*

"The [trial] court's assessment of a juvenile's best interest[s] at the dispositional stage is reviewed only for abuse of discretion." *In re A.R.A.*, 373 N.C. 190, 199, 835 S.E.2d 417, 423 (2019); *see also In re Z.A.M.*, 374 N.C. at 99, 839 S.E.2d at 800 (reaffirming this Court's application of an abuse of discretion standard of review to the trial court's best interests determination). "[A]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re A.R.A.*, 373 N.C. at 199, 835 S.E.2d at 423 (alteration in original) (quoting *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015)).

Respondent relies on the decision of the North Carolina Court of Appeals in *Bost v. Van Nortwick*, 117 N.C. App. 1, 449 S.E.2d 911 (1994), for the assertion that "a finding that the children are well settled in their new family unit . . . does not alone support a finding that it is in the best interest[s] of the children to terminate respondent's parental rights," *id.* at 8, 449 S.E.2d at 915. The trial court's best interests determination here, however, was not based solely on a finding that Kevin, Amy, and Laura were settled in a new family unit. In addition to finding that the children were doing well in the home with petitioner and their maternal grandparents, the trial court considered the young ages of the children, the children's lack of a bond with respondent, Kevin's success in therapy in overcoming the trauma caused by witnessing respondent shoot petitioner in his presence, the benefits to Kevin from the consistency of the current living arrangements, and petitioner's ability to meet the children's material and emotional needs. The trial court made its determination regarding the children's best interests in this case after weighing the combination of these facts, along with the trial court's finding that adoption was not an issue.

Moreover, unlike the father in *Bost*, the children in this matter have no bond with respondent, and respondent has never acted consistent with his declarations that he wanted to be involved in the children's lives and was willing to make the necessary changes to do so. The trial court made additional, unchallenged findings that respondent (1) had failed in past attempts to stop using drugs despite stints in in-patient

rehabilitation; (2) had not contacted the children since December 2017; (3) had failed to provide for the family's needs, even when he was not incarcerated; (4) had shown no interest in the children since the parties' separation; and (5) "is not currently able to provide care for the children and will be incapable of providing care for the children for the foreseeable future." Lastly, unlike *Bost*, the guardian *ad litem* that was appointed to represent the interests of the juveniles in this case advocated for the termination of respondent's parental rights. *See id.* at 9–13, 449 S.E.2d at 916–18.

In our recent decision in *In re C.J.C.*, 374 N.C. 42, 839 S.E.2d 742 (2020), a private termination case, this Court explained that the likelihood of adoption "is only one factor which the trial court must consider." *Id.* at 49, 839 S.E.2d at 748.

> In our view, the trial court's findings demonstrate that it considered the factors set forth in N.C.G.S. § 7B-1110(a) and determined that [the child's] young age, the child's lack of any bond with respondent, and the child's need for consistency—combined with respondent's lack of involvement with the child—supported a finding that termination of respondent's parental rights was in [the child's] best interests.

Id. at 49, 839 S.E.2d at 747. Thus, we held that the trial court's conclusion that termination was in the child's best interests was neither arbitrary nor manifestly unsupported by reason and affirmed the termination order. *Id.* at 50, 839 S.E.2d at 748.

As in *In re C.J.C.*, the trial court's findings in this case concerning the young ages of the children, the children's well-being in their current living arrangements with petitioner and their maternal grandparents, the lack of any bond between the children and respondent, Kevin's success in overcoming the trauma caused by respondent, and respondent's lack of interest and involvement in the children's lives demonstrate that the trial court considered the factors in N.C.G.S. § 7B-1110(a), and the trial court's findings support its conclusion that it was in the best interests of Kevin, Amy, and Laura to terminate respondent's parental rights. The trial court's determination that termination of respondent's parental rights was in the juveniles' best interests was neither arbitrary nor manifestly unsupported by reason. Accordingly, the order terminating respondent's parental rights is affirmed.

AFFIRMED.

IN RE L.E.W.

[375 N.C. 124 (2020)]

IN THE MATTER OF L.E.W.

No. 390A19

Filed 14 August 2020

1. Termination of Parental Rights—permanency planning order—standard of proof—misstated—harmless error

Before terminating a mother's parental rights to her daughter, the trial court did not commit prejudicial error by misstating the applicable standard of proof in a permanency planning order that eliminated reunification with the mother from the child's permanent plan. Under the misstated standard, the trial court's decision to eliminate reunification from the permanent plan rested upon findings of fact that required the petitioner (the Department of Social Services) to present stronger proof than the law actually required; therefore, the trial court's error worked in the mother's favor.

2. Termination of Parental Rights—permanency planning order—reunification with parent—eliminated—sufficiency of findings

Before terminating a mother's parental rights to her daughter, the trial court did not err by entering a permanency planning order eliminating reunification with the mother from the child's permanent plan. Not only did the trial court's findings of fact address each of the factors stated in N.C.G.S. § 7B-906.2(d) for evaluating the likely success of future reunification efforts, but the court also expressly found that the mother and the child's father—who shared a continuing pattern of domestic violence and often neglected to feed their child—acted in a manner inconsistent with the child's health and safety.

3. Termination of Parental Rights—permanency planning order—visitation—reduced—proper

Before terminating a mother's parental rights to her daughter, the trial court did not abuse its discretion by entering a permanency planning order reducing the amount of visitation the mother was entitled to have with the child. In addition to properly eliminating reunification with the mother from the child's permanent plan, the court found that the mother neglected to take full advantage of her existing visitation rights, frequently missing or arriving late to visits with her daughter.

4. Termination of Parental Rights—grounds—willful failure to make reasonable progress

The trial court properly terminated a mother's parental rights to her daughter based upon a willful failure to make reasonable progress toward correcting the conditions that led to the child's removal from the family home (N.C.G.S. § 7B-1111(a)(2)). The trial court found that the mother failed to maintain stable housing and employment, frequently missed scheduled visits with her daughter, and failed to attend most of her individual and group therapy sessions despite continuing to be involved in incidents of domestic violence with the daughter's father since the child's removal from the home.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered on 1 April 2019 by Judge Robert J. Crumpton in District Court, Alleghany County, and on appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 16 July 2019 by Judge Jeanie R. Houston in District Court, Alleghany County. This matter was calendared for argument in the Supreme Court on 29 July 2020 but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Anné C. Wright and John Benjamin "Jak" Reeves for petitioner-appellee Alleghany County Department of Social Services.

Erin K. Otero, GAL Appellate Counsel, for appellee Guardian ad Litem.

Deputy Parent Defender Annick Lenoir-Peek for respondent-appellant mother.

ERVIN, Justice.

Respondent-mother Christine W. appeals from orders eliminating reunification from the permanent plan for her daughter L.E.W.[1] and terminating her parental rights in the child. After careful consideration of the arguments advanced in respondent-mother's brief in light of the record and the applicable law, we hold that the challenged permanency planning and termination of parental rights orders should be affirmed.

1. L.E.W. will be referred to throughout the remainder of this opinion as "Luna," which is a pseudonym used to protect the identity of the juvenile and for ease of reading.

I. Factual Background

The Alleghany County Department of Social Services became involved with respondent-mother and respondent-father Brandon W. in February 2017, prior to Luna's birth, based upon reports alleging domestic violence between and substance abuse involving the parents. Following an investigation into these reports, the parents entered into an in-home services agreement with DSS on 30 March 2017.

Luna was born on 28 April 2017. In June 2017, DSS received reports that the parents were continuing to engage in acts of domestic violence and were failing to properly feed Luna. In an attempt to address these concerns, the parents entered into a safety plan with DSS in which they agreed to feed Luna every two hours and to attend regular appointments at which Luna's weight would be checked.

On 26 June 2017, Luna was diagnosed with failure to thrive. On 3 July 2017, the parents failed to bring Luna to an appointment to check her weight despite the fact that multiple attempts had been made to have the parents keep that appointment. On 5 July 2017, DSS filed a petition alleging that Luna was a neglected juvenile and obtained the entry of an order authorizing it to take Luna into non-secure custody.

On 5 December 2017, Judge Houston entered an order adjudicating Luna to be a neglected and dependent juvenile,[2] placing Luna in the legal and physical custody of DSS, granting supervised visitation to the parents, and ordering the parents to comply with an Out of Home Family Services Agreement into which they had entered with DSS. After a permanency planning review hearing held on 3 July 2018, Judge Crumpton entered an order on 31 July 2018 in which he set the permanent plan for Luna as termination of parental rights with a concurrent plan of reunification.

On 27 September 2018, DSS filed a petition seeking to have both parents' parental rights in Luna terminated on the grounds of neglect, willful failure to make reasonable progress toward correcting the conditions that had led to Luna's removal from the family home, failure to pay a reasonable portion of the cost of the care that had been provided to Luna, dependency, and abandonment. N.C.G.S. § 7B-1111(a)(1)–(3), (6)–(7) (2019). On 5 March 2019, Judge Crumpton conducted a permanency

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2. As an aside, we note that the trial court lacked the authority to adjudicate Luna to be a dependent juvenile because dependency was not alleged in the initial juvenile petition. *See* N.C.G.S. § 7B-802 (2019) (providing that "[t]he adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition").

planning hearing, which led to the entry of an order on 1 April 2019 that eliminated reunification with the parents from Luna's permanent plan, relieved DSS from any obligation to attempt to effectuate reunification between Luna and the parents, and changed Luna's permanent plan to a primary plan of termination of parental rights coupled with a concurrent plan of guardianship. On 29 April 2019, respondent-mother filed a notice preserving her right to seek appellate review of Judge Crumpton's permanency planning order.

After a hearing held on 1 April 2019, Judge Houston entered an order on 16 July 2019 in which she found that both parents' parental rights in Luna were subject to termination based upon each of the grounds for termination set out in the termination petition and that it would be in Luna's best interests for the parents' parental rights in Luna to be terminated. As a result, the trial court terminated the parents' parental rights in Luna.[3]

On 5 August 2019, respondent-mother noted an appeal from Judge Houston's termination order to this Court pursuant to N.C.G.S. §§ 7A-27(a)(5) and 7B-1001(a1)(1). On 17 December 2019, DSS and the guardian ad litem filed a motion seeking to have respondent-mother's appeal from the 1 April 2019 permanency planning review order dismissed on the grounds that no reference to that order had been made in respondent-mother's notice of appeal. On 20 December 2019, respondent-mother filed a petition seeking the issuance of a writ of certiorari authorizing appellate review of the 1 April 2019 permanency planning order. On 9 January 2020, this Court entered orders granting the dismissal motion and allowing respondent-mother's certiorari petition. As a result, we are reviewing both the permanency planning and the termination orders.

II. Substantive Legal Analysis

A. Permanency Planning Review Order

1. Standard of Proof

[1] As an initial matter, respondent-mother contends that Judge Crumpton misstated the applicable standard of proof in the 1 April 2019 permanency planning order. More specifically, respondent-mother contends that Judge Crumpton erroneously stated in the challenged permanency planning order that "the court finds that the following findings of

3. Respondent-father has not challenged the permanency planning order or Judge Houston's decision to terminate his parental rights in Luna on appeal before this Court.

fact have been proven by clear, cogent, and convincing evidence." We conclude that respondent-mother is not entitled to relief from the trial court's permanency planning order on the basis of this argument.

As this Court has stated:

> "The essential requirement[ ] at . . . the review hearing[ ] is that sufficient evidence be presented to the trial court so that it can determine what is in the best interest of the child." In light of this objective, neither the parent nor the county department of social services bears the burden of proof in permanency planning hearings, and the trial court's findings of fact need only be supported by sufficient competent evidence.

In re L.M.T., 367 N.C. 165, 180, 752 S.E.2d 453, 462 (2013) (alterations in original) (citations omitted). As a result, respondent-mother is correct in pointing out that the standard of proof set out in the challenged permanency planning order conflicts with the standard of proof applicable to permanency planning proceedings as articulated in this Court's prior decisions.

Although respondent-mother asserts that the "confusion" reflected in the trial court's misstatement of the applicable standard of proof adversely affected her chances for a more favorable outcome at the permanency planning hearing, we believe that the trial court's error worked in favor of, rather than against, respondent-mother's chances for a more favorable outcome given that the decision to eliminate reunification from Luna's permanent plan and to reduce respondent-mother's visitation with Luna rested upon findings of fact that required DSS to present stronger proof than the law actually required. As the Court of Appeals has clearly held in cases subject to Chapter 7B of the North Carolina General Statutes, "to obtain relief on appeal, an appellant must not only show error, but that . . . the error was material and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action." *In re B.S.O.*, 234 N.C. App. 706, 713, 760 S.E.2d 59, 65 (2014) (alteration in original) (quoting *Starco, Inc. v. AMG Bonding and Ins. Servs.*, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996)). Thus, we hold that Judge Crumpton's misstatement of the applicable standard of proof in the 1 April 2019 permanency planning order constituted harmless error that does not entitle respondent-mother to relief from the challenged order.

2. Elimination of Reunification from Luna's Permanent Plan

[2] Secondly, respondent-mother argues that Judge Crumpton erred by failing to make the factual findings required by N.C.G.S. § 7B-906.2 in eliminating reunification with the parents from Luna's permanent plan. More specifically, respondent-mother argues that Judge Crumpton erred in the course of eliminating reunification from Luna's permanent plan because "[n]one of the findings of fact made the ultimate required finding that reunification efforts would be futile or inconsistent with Luna's needs." We do not find respondent-mother's argument persuasive.

As we have previously stated, appellate review of a trial court's permanency planning review order "is limited to whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusions of law," *In re L.M.T.*, 367 N.C. at 168, 752 S.E.2d at 455 (alteration in original) (quoting *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010)), with "[t]he trial court's findings of fact [being] conclusive on appeal if supported by any competent evidence." *Id.* "At a permanency planning hearing, '[r]eunification shall be a primary or secondary plan unless,' *inter alia*, 'the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety.' " *In re J.H.*, 373 N.C. 264, 268, 837 S.E.2d 847, 850 (2020) (alteration in original) (quoting N.C.G.S. § 7B-906.2(b) (2019)). As part of that process, the trial court is required to make written findings "which shall demonstrate the degree of success or failure toward reunification," including:

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C.G.S. § 7B-906.2(d) (2019). Although "use of the actual statutory language [is] the best practice, the statute does not demand a verbatim recitation of its language." *In re L.M.T.*, 367 N.C. at 167, 752 S.E.2d at 455. Instead, "the order must make clear that the trial court considered the evidence in light of whether reunification would be futile or would be

inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." *Id.* at 167–68, 752 S.E.2d at 455 (cleaned up). In *In re L.M.T.*, we upheld a permanency planning order as "embrac[ing] the substance of the statutory provisions requiring findings of fact that further reunification efforts 'would be futile' or would be inconsistent with the juvenile's health, safety, and need for a safe permanent home within a reasonable period of time" based upon findings that the parents had created an injurious environment for the child and that the parents had engaged in substance abuse, domestic violence, and deceptive activities directed at the court and a conclusion that the relevant Department of Social Services should be relieved of reunification and visitation efforts. *Id.* at 169, 752 S.E.2d at 456.

In the challenged permanency planning order, Judge Crumpton found as a fact that:

> 5. The minor child was diagnosed as "failure to thrive" due to the neglect of the parents. Upon going into DSS custody, the child immediately began gaining weight. The parents continue to ignore requests of the department to properly feed the child at visits. The parents seem to think the child is over-eating although the child appears to now be healthy.
>
> 6. The parents admitted to several incidents of domestic violence which they referred to as "arguments[.]" These incidents seem volatile and the parents seem dismissive of them. On one occasion, law enforcement was called. On another, the mother was seeking medical treatment and the father made her leave due to a fight rather than getting treatment.
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> . . . .
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> 13. The evidence heard was that the parents have complied with portions of their plan, but it has not been completed. . . .
>
> 14. The mother moved away in May 2018 to Louisiana and stopped working her case plan. Prior to doing so, she dismissed a pending domestic violence order against the father. The mother moved back to North Carolina a few months later and indicated she wanted to work her case plan and also took out a new [domestic violence order] against the father. The department is concerned

that substantial efforts have not been made to alleviate the concerns that originally caused the removal of the minor child.

15. The Court remains extremely concerned about domestic violence affecting the minor child and the parents' ability to provide adequate food for the minor child.

16. Since the last hearing, the mother has made some efforts to work her plan. However, the Court remains concerned about the lack of progress over such a substantial amount of time. The Court understands the difficulty caused by her moving away, but this was her choice to move and not work her plan. Since moving back, the mother has again moved to Virginia. This has caused her difficulties with finding work. The department has been unable to confirm the mother's housing and has requested an [Interstate Compact on the Placement of Children home study] which has not been completed.

17. The mother is attending her [D]aymark appointments sporadically. She was recommended for the women's trauma group. Since 11/14/2018 to present, she could have attended 12 sessions but has only attended 7. The mother is not employed despite being licensed as a CNA in [North Carolina]. The mother formerly had a good job earning over $12 per hour but quit. The mother does not have proof of housing. She indicates that she has housing but does not have to pay for it. She also testified that her landlord gives her money for expenses. The mother is ordered to pay child support but has not made a payment since November of 2018. The mother is often late to visits and missed the most recent [Children's Development and Services Agency meeting] for the child.

18. The mother testified that she goes to physical therapy three times per week for back pain but is not sure how she hurt her back. She does not have a car. The mother says she cannot get a job but did not explain any efforts to obtain employment. The mother is permitted to have phone calls with the foster family but indicates she does not utilize them because they can

> be used against her. The mother has missed visits, but claims it was due to physical therapy or the wea[th]er. She indicates that she has thought about moving back to [North Carolina]. She has a smart phone.
>
> . . . .
>
> 21. Pursuant to [N.C.G.S. §] 7B-906.2, the Court finds that the parents are not making adequate progress under their case plan. However, the Court does acknowledge that the parents remain available to the Court, and therefore finds that a concurrent plan is appropriate. The parents continue to act in a manner inconsistent with the health and safety of the juvenile.

Based upon these findings of fact, Judge Crumpton ordered that "[t]he Department shall hereinafter be relieved of reasonable efforts at this time" and that "[t]he Permanent Plan for the minor child shall be termination of parental rights," that "[t]he concurrent plan shall be guardianship," and that "[a] termination of parental rights petition has been filed."

A careful examination of Judge Crumpton's findings of fact[4] establishes that he addressed each of the factors specified in N.C.G.S. § 7B-906.2(d) by determining that respondent-mother had not been making adequate progress satisfying the components of her case plan, that respondent-mother had remained in contact with DSS and the court, and that respondent-mother was acting in a manner that was inconsistent with Luna's health and safety. Aside from the fact that there was no necessity for Judge Crumpton to have made findings of fact couched in the relevant statutory language, *In re L.M.T.*, 367 N.C. at

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4. Respondent-mother argues in her brief that "[t]he evidence did not support the trial court's determination that the trial court remained concerned about domestic violence affecting the minor child" and that "there was no evidence to support a finding that [respondent-mother] was unable to provide adequate food for Luna." However, Judge Crumpton stated in the challenged permanency planning order that he was, in fact, "extremely concerned about domestic violence affecting the minor child and the parents' ability to provide adequate food for the minor child." We are unable to see how Judge Crumpton's statement of the extent to which he was concerned about a particular issue does not suffice to show the existence of that concern. In addition, Judge Crumpton "incorporated" "previous orders of this Court" "by reference" in its 2 November 2018 permanency planning order, in which Judge Crumpton found, as he did in the challenged permanency planning order, that "[t]he parents have not followed through with the feeding schedule and have failed to show or been late to several weight checks," "continue to ignore requests of the department to properly feed the child at visits," and "seem to think the child is over-eating although the child appears to now be healthy." As a result, the challenged findings of fact have adequate record support.

167–68, 752 S.E.2d at 455, and the fact that the findings that we upheld in *In re L.M.T.*—which focused upon the fact that the parents had created an injurious environment for the juvenile and had engaged in substance abuse, domestic violence, and deceptive conduct, *id.* at 169, 752 S.E.2d at 456—cannot be distinguished in any meaningful way from the findings that Judge Crumpton made in this case, which focused upon the trial court's continued concerns about domestic violence between the parents, respondent-mother's failure to consistently attend meetings of the women's trauma group, and her failure to provide proof of housing or to explain her continued unemployment, Judge Crumpton expressly found that "[t]he parents continue to act in a manner inconsistent with the health and safety of the juvenile." In view of the fact that the relevant language from N.C.G.S. § 7B-906.2 is couched in the disjunctive and the fact that the trial court found that respondent-mother was acting "in a manner that is inconsistent with the health and safety of the juvenile," we have no difficulty in holding that Judge Crumpton actually made an ultimate finding of the type that respondent-mother claims to have been omitted. As a result, given the statutory requirement that a permanency planning order that eliminates reunification from the child's permanent plan "must address the statute's concerns," *id.* at 168, 752 S.E.2d at 455, by showing "that the trial court considered the evidence in light of whether reunification would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time," *id.* at 167–68, 752 S.E.2d at 455 (cleaned up), and given that the findings of fact contained in the challenged permanency planning order satisfy that legal standard, we hold that respondent-mother's challenge to Judge Crumpton's decision to eliminate reunification with respondent-mother from Luna's permanent plan lacks merit.

3. Visitation

[3] In her final challenge to the 1 April 2019 permanency planning order, respondent-mother argues that Judge Crumpton erred by reducing the amount of visitation that she was entitled to have with Luna from two weekly visits, one of which was an unsupervised visit of three hours in duration and the other of which was a supervised visit of one hour in duration, to two monthly visits, both of which would be of one hour in duration, with DSS having the "discretion to increase the duration or to make them unsupervised." According to respondent-mother, Judge Crumpton abused his discretion by taking this action "[w]ithout finding why these visits were detrimental to the child or needed to be changed," particularly given that there "were no concerns regarding recent

unsupervised visits," which "had been on-going, including the Friday before the termination hearing." Once again, we are not persuaded by respondent-mother's argument.

"An order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home shall provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation." N.C.G.S. § 7B-905.1(a). "The [visitation] plan shall indicate the minimum frequency and length of visits and whether the visits shall be supervised." N.C.G.S. § 7B-905.1(b). At review and permanency planning hearings, "the court shall consider . . . [several] criteria and make written findings regarding those that are relevant," including "[r]eports on visitation that has occurred and whether there is a need to create, modify, or enforce an appropriate visitation plan in accordance with [N.C.]G.S. [§] 7B-905.1." N.C.G.S. § 7B-906.1(d)(2). We agree with the Court of Appeals that appellate courts "review[ ] the trial court's dispositional orders of visitation for an abuse of discretion," *In re C.S.L.B.*, 254 N.C. App. 395, 399, 829 S.E.2d 492, 495 (2017) (quoting *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007)), with an abuse of discretion having occurred "only upon a showing that [the trial court's] actions are manifestly unsupported by reason." *Id.* (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

Judge Crumpton found as a fact in the challenged permanency planning order that "[t]he mother is often late to visits" and "has missed visits," with respondent-mother attributing these missed visits to the need to participate in physical therapy for an unexplained back injury or the weather. In addition, Judge Crumpton noted that respondent-mother had failed to make "adequate progress under [her] case plan," that "termination of parental rights shall be considered," and that "[t]he parents continue to act in a manner inconsistent with the health and safety of the juvenile" before concluding that "[t]he Permanent Plan for the minor child shall be termination of parental rights" and that "[t]he concurrent plan shall be guardianship." In light of the deficiencies in the manner in which respondent-mother took advantage of her existing opportunities to visit with Luna and Judge Crumpton's decision to eliminate reunification with respondent-mother from Luna's permanent plan, we are unable to say that Judge Crumpton abused his discretion by reducing the extent to which respondent-mother was entitled to visit with Luna. As a result, we conclude that respondent-mother's challenge to the visitation component of the 1 April 2019 permanency planning order lacks merit.

B. Termination of Parental Rights Order

[4] In her order terminating respondent-mother's parental rights in Luna, Judge Houston concluded that respondent-mother's parental rights in Luna were subject to termination on the grounds of neglect, N.C.G.S. § 7B-1111(a)(1), willful failure to make reasonable progress toward correcting the conditions that had led to Luna's removal from the family home, N.C.G.S. § 7B-1111(a)(2), failure to pay a reasonable portion of the cost of Luna's care despite having the ability to do so, N.C.G.S. § 7B-1111(a)(3), dependency, N.C.G.S. § 7B-1111(a)(6), and abandonment, N.C.G.S. § 7B-1111(a)(7).[5] In challenging the lawfulness of the termination order before this Court, respondent-mother argues that Judge Houston erred by finding that any of the statutory grounds for terminating her parental rights in Luna existed. As a result of our determination that Judge Houston did not err by determining that respondent-mother's parental rights in Luna were subject to termination based upon her willful failure to make reasonable progress toward correcting the conditions that had led to Luna's removal from the family home pursuant to N.C.G.S. § 7B-1111(a)(2), we hold that Judge Houston did not err by finding the existence of at least one ground for termination in this case.[6]

According to N.C.G.S. § 7B-1111(a)(2), a parent's parental rights in a juvenile are subject to termination if "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." A trial court should not determine "that a parent has failed to make 'reasonable progress . . . in correcting those conditions which led to the removal of the

5. We note that Judge Houston stated that respondent-mother's parental rights in Luna were subject to termination on the basis of abandonment as authorized by N.C.G.S. § 7B-1111(a)(7) in the body of the termination order without making any reference to that ground for termination in its conclusions of law. We need not address this apparent inconsistency in the termination order given our determination that Judge Houston did not err by concluding that respondent-mother's parental rights in Luna were subject to termination for willful failure to make reasonable progress toward correcting the conditions that led to Luna's removal from the family home pursuant to N.C.G.S. § 7B-1111(a)(2).

6. In light of our determination that Judge Houston did not err by finding that respondent-mother's parental rights in Luna were subject to termination for willful failure to make reasonable progress toward correcting the conditions that led to Luna's removal from the family home as authorized by N.C.G.S. § 7B-1111(a)(2), we will refrain from addressing respondent-mother's challenges to the remaining grounds for termination set out in Judge Houston's termination order.

juvenile' simply because of his or her 'failure to fully satisfy all elements of the case plan goals.' " *In re B.O.A.*, 372 N.C. 372, 385, 831 S.E.2d 305, 314 (2019) (alteration in original) (citation omitted). However, "a trial court has ample authority to determine that a parent's 'extremely limited progress' in correcting the conditions leading to removal adequately supports a determination that a parent's parental rights in a particular child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2)." *Id.* (citation omitted). Moreover, as the Court of Appeals has correctly noted, the willfulness of a parent's failure to make reasonable progress toward correcting the conditions that led to a child's removal from the family home "is established when the [parent] had the ability to show reasonable progress, but was unwilling to make the effort." *In re Fletcher*, 148 N.C. App. 228, 235, 558 S.E.2d 498, 502 (2002). A trial court's determination that grounds exist to terminate one's parental rights in his or her child is reviewed on appeal for the purpose of 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. at 379, 831 S.E.2d at 310 (citation omitted).

In determining that respondent-mother's parental rights in Luna were subject to termination based upon her willful failure to make reasonable progress toward correcting the conditions that had led to Luna's removal from the family home, Judge Houston found that, in accordance with her case plan, respondent-mother was required to "learn appropriate developmental care to ensure [Luna] continues to thrive"; "[a]ttend and participate effectively in substance abuse group in order to learn skills and support needed to achieve and maintain sobriety"; "[a]ttend individual therapy, mood and anxiety group . . . in order to deal with life's stressors and to be able to acquire knowledge on how to manage and control her mental health"; "[f]eed[Luna] the amount of formula specified by Foster Parents, be on time to visits, and demonstrate skills from parenting classes"; "[be] involved and [ ] attend CDSA appointments and meetings" and "[r]emain active in those needed services in order to know how to care for [Luna's] development needs when back in the home"; "[m]aintain employment and stable housing in order to provide [Luna] with a safe, stable home"; and "[a]cquire appropriate, healthy resolution skills" and "utilize the needed resources to be able to control [her] anger and use the skills learned by eliminating domestic violence in the home." According to Judge Houston, even though respondent-mother had completed parenting classes and substance abuse group sessions by 13 April 2018 and even though respondent-mother was participating in mood and anxiety group therapy as of that date, respondent-mother had

"moved away due to domestic violence with the Respondent Father and ceased services until July of 2018." As a result of her decision to leave the area, Judge Houston found that respondent-mother "had to complete a new assessment with Daymark," which recommended that she "attend Women's Trauma group" on a weekly basis. However, respondent-mother "only attended seven out of twelve trauma group sessions since November of 2018." In addition, Judge Houston found that respondent-mother had missed scheduled visits with Luna on 12 February 2018, 16 March 2018, 3 August 2018, 14 December 2018, 25 January 2019, and 13 February 2019 and was late to her scheduled visit on 17 August 2018, resulting in the cancellation of that visit. Moreover, Judge Houston found that the parents "were regularly five to fifteen minutes late to their scheduled visits." Judge Houston further found that respondent-mother had failed to schedule or attend CDSA appointments and meetings in December 2017, January 2018, and March 2018 and had failed to contact CDSA at all after 28 January 2019. Judge Houston's findings reflected that respondent-mother moved to Louisiana to live with her mother in May 2018, moved to Virginia in June 2018, and was unemployed at the time of the termination hearing. Finally, Judge Houston found that respondent-mother had only completed six of thirteen sessions of the Women's Trauma group and appeared to have been involved in incidents of domestic violence with respondent-father on 21 September 2017, 15 December 2017, 22 December 2017, 24 December 2017, 25 December 2017, 26 December 2017, 30 December 2017, and 30 April 2018. As a result, given that Judge Houston's findings establish that respondent-mother had failed to attend about half of the Women's Trauma group sessions since November 2018, had missed a material number of Mood and Anxiety group sessions, had failed to appear at most of her individual therapy sessions, had failed to consistently attend her visits with Luna in a timely manner, had failed to consistently participate in the CDSA process, had failed to maintain stable housing and employment, and continued to be involved in incidents of domestic violence with respondent-father until 30 April 2018, we have no hesitation in concluding that Judge Houston's findings of fact amply support her determination that respondent-mother's parental rights in Luna were subject to termination based upon a willful failure to make reasonable progress toward correcting the conditions that had resulted in Luna's removal from the family home as authorized by N.C.G.S. § 7B-1111(a)(2).[7]

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7. Although respondent-mother argues that a number of Judge Houston's findings of fact were, in actuality, conclusions of law or were drawn from earlier orders not subject to the clear and convincing evidence standard of proof applicable in termination of parental rights proceedings, N.C.G.S. § 7B-1111(b), the discussion of Judge Houston's findings

In seeking to persuade us to reach a different result, respondent-mother argues that "[t]here were no concerns over [respondent-mother's] ability to care for her daughter during supervised or unsupervised visits" and that "a parent can only receive unsupervised visits if [he or she] can provide a safe home," citing N.C.G.S. § 7B-903.1(c) (providing that, "[i]f a juvenile is removed from the home and placed in the custody or placement responsibility of a county department of social services, the director shall not allow unsupervised visitation with or return physical custody of the juvenile to the parent, guardian, custodian, or caretaker without a hearing at which the court finds that the juvenile will receive proper care and supervision in a safe home"). In addition, respondent-mother argues that "[f]ive missed visits" does not demonstrate that respondent-mother "was neglectful" and that, prior to 28 January 2019, respondent-mother had consistently attended CDSA." Similarly, respondent-mother argues that "[t]here were no concerns with substance abuse since [respondent-mother] never tested positive for illegal substances"; that DSS did not pay for the services that respondent-mother failed to complete; that, "at times, [respondent-mother's] work schedule and physical therapy for her back interfered with those appointments"; and that Judge Houston "failed to establish how missing these appointments to address her own trauma had an effect on [respondent-mother's] ability to parent Luna." Finally, respondent-mother argues that she "had addressed the domestic violence issue at the time of the termination hearing." As a result, respondent-mother contends that, "[w]hile [she] may not have addressed all the portions of her case plan, at the time of the termination hearing, she was able to parent Luna without domestic violence and [to] appropriately car[e] for her," with "[a]ny failure to complete her case plan [amounting to] elevating form over substance since there was no showing that these failures had [any] effect on [respondent-mother's] ability to care for Luna by appropriately feeding her and [staying] free of domestic violence."

A careful review of Judge Houston's findings relating to respondent-mother's compliance with the provisions of her case plan satisfies us that Judge Houston did not err by determining that respondent-mother

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contained in the text of this opinion is drawn from a portion of the termination order which respondent-mother has not challenged as being devoid of the necessary record support or as being legally deficient on other grounds. As a result, since "[u]nchallenged findings of fact made at the adjudicatory stage . . . are binding on appeal," *In re D.W.P.*, 373 N.C. 327, 330, 838 S.E.2d 396, 400 (2020) (citation omitted), the findings upon which our decision concerning the lawfulness of Judge Houston's decision to conclude that respondent-mother's parental rights in Luna were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) rests are properly before the Court for purposes of appellate review.

did not make reasonable progress toward correcting the conditions that had led to Luna's removal from the family home. Judge Houston's findings establish that respondent-mother failed to adequately participate in the Women's Trauma group, the Mood and Anxiety group, and individual therapy as required by her case plan. Respondent-mother contends that these portions of her case plan had no relation to her ability to properly care for Luna. However, these portions of respondent-mother's case plan appear to have been intended to address the domestic violence that had characterized respondent-mother's relationship with respondent-father. As a result, respondent-mother's failure to complete these portions of her case plan supports an inference that she had failed to adequately address the domestic violence concerns that constituted one of the principal bases for Luna's removal from the family home. Moreover, the fact that respondent-mother voluntarily left her employment in order to enhance her ability to comply with the provisions of her case plan overlooks the fact that obtaining and maintaining employment was, in and of itself, a component of that plan. Similarly, respondent-mother does not challenge the validity of Judge Houston's findings concerning the nature and extent of her visitation with Luna or contend that she satisfied the requirement that she obtain and maintain satisfactory housing in which she and Luna could live. Finally, the fact that the last incident of domestic violence between respondent-father and respondent-mother occurred on 30 April 2018 does not mean that respondent-mother has adequately addressed the domestic violence issue given her failure to complete the portions of her case plan that were intended to provide her with the tools that were necessary to avoid becoming entangled in a violent relationship with someone else in the future and given that respondent-father had been incarcerated and in institutional care for mental health concerns during a portion of the time after 30 April 2018. Thus, Judge Houston had ample basis for concluding that, even though respondent-mother had, in fact, made some progress toward compliance with the provisions of her case plan, she had failed to make reasonable progress toward correcting the conditions that had led to Luna's removal from the family home despite having had the ability to do so. As a result, given that the existence of a single ground for termination is sufficient to support the termination of a parent's parental rights, *In re B.O.A.*, 372 N.C. at 380, 831 S.E.2d at 311 (stating that "a finding by the trial court that any one of the grounds for termination enumerated in N.C.G.S. § 7B-1111(a) exists is sufficient to support a termination order"), and given that respondent-mother has not challenged the lawfulness of Judge Houston's determination that the termination of her parental rights in Luna would be in the child's best interests, the challenged termination order should be affirmed.

III. Conclusion

For the reasons set forth above, we conclude that Judge Crumpton did not commit prejudicial error by misstating the applicable standard of proof, eliminating reunification as a component of the permanent plan for Luna, or reducing the amount of visitation that respondent-mother was entitled to have with Luna in the 1 April 2019 permanency planning order. We also conclude that Judge Houston did not err by finding that respondent-mother's parental rights in Luna were subject to termination based upon her willful failure to make reasonable progress toward correcting the conditions that had led to Luna's removal from the family home. As a result, the 1 April 2019 permanency planning order and the 16 July 2019 termination order are affirmed.

AFFIRMED.

ORLANDO RESIDENCE, LTD.
v.
ALLIANCE HOSPITALITY MANAGEMENT, LLC, ROLF A. TWEETEN, AXIS HOSPITALITY, INC., AND KENNETH E. NELSON

No. 113A19

Filed 14 August 2020

1. Civil Procedure—crossclaims—dismissal of original action—dismissal of crossclaims not required

The Business Court erred by concluding that a defendant's crossclaims against a co-defendant were automatically subject to dismissal simply because plaintiff's claims were being dismissed. The dismissal of an original action does not, by itself, require the dismissal of crossclaims that meet the requirements of Civil Procedure Rule 13(g) (with the exception of certain types of crossclaims that require the continued litigation of the original claim in order to remain viable).

2. Collateral Estoppel and Res Judicata—res judicata—identity element—crossclaims—failure to obtain ruling in prior action

Several of defendant's crossclaims related to his percentage ownership in co-defendant-company were subject to dismissal based on res judicata where those crossclaims required a determination of

the total number of membership units in co-defendant-company, for which defendant failed to obtain a ruling in a prior action.

3. Civil Procedure—joinder—crossclaims—qualifying claims dismissed—remaining claims must be dismissed

Where defendant asserted 18 crossclaims against a co-defendant, and the only crossclaims that met the requirements of Civil Procedure Rule 13(g) were barred by res judicata, the remaining crossclaims were properly dismissed. The Supreme Court adopted the federal approach—that if a qualifying claim asserted by a defendant is dismissed, then all claims joined under Rule 18 must also be dismissed.

4. Civil Procedure—dismissal with prejudice—discretion of trial court—protracted litigation

The trial court did not abuse its discretion by dismissing defendant's crossclaims with prejudice—rather than without prejudice—where Civil Procedure Rule 41(b) vests trial courts with such discretion and dismissal with prejudice brought some measure of finality to the protracted litigation involving defendant's debts to plaintiff and his membership interests in co-defendant-company.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order entered on 20 December 2018 by Judge James L. Gale, Senior Business Court Judge, in Superior Court, Wake County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 11 December 2019.

No brief for plaintiff Orlando Residence, Ltd.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Gray Wilson and Jackson W. Moore Jr., for defendant-appellees Alliance Hospitality Management, LLC, Rolf A. Tweeten, and Axis Hospitality, Inc.

Kenneth Nelson, defendant-appellant, pro se.

DAVIS, Justice.

In this case, we address several issues relating to the ability of a defendant to assert crossclaims against a co-defendant pursuant to the North Carolina Rules of Civil Procedure. Based on our conclusion that the dismissal of the defendant's crossclaims here was proper, albeit on

different grounds than those relied upon by the Business Court, we modify and affirm the decision of the Business Court.

Factual and Procedural Background

This appeal arises from the latest lawsuit in protracted litigation between Kenneth Nelson; Alliance Hospitality Management, LLC (Alliance); and Orlando Residence, Ltd. (Orlando). Alliance is a Georgia company that provides hotel management services with its principal place of business in North Carolina. Nelson is a former employee of Alliance who possesses an ownership interest in the company. Axis Hospitality, Inc. (Axis) is an Illinois corporation that is the majority owner of Alliance. Axis is wholly owned and managed by an individual named Rolf Tweeten. Orlando is a judgment creditor of Nelson.[1]

In order to fully analyze the issues before us in this appeal, it is necessary to review in some detail the extensive factual and procedural history between the parties.

I. Nelson's Ownership Interest in Alliance

In 2007, Axis purchased a 51% interest in Alliance. Around this same time, Tweeten hired Nelson as a consultant to help him acquire the remainder of Alliance. In 2008, Tweeten reached an oral agreement with Nelson that granted him a limited ownership interest in Alliance. Nelson was also made a director of Alliance and later became Chief Financial Officer of the company. He served in that role until 31 January 2011.

On 25 February 2011, Nelson filed a lawsuit (the Nelson Action) in Superior Court, Wake County, against Alliance, Axis, and Tweeten (collectively, the Alliance Defendants) in which he asserted claims for (1) breach of fiduciary duty; (2) constructive fraud; (3) judicial dissolution of Alliance; (4) a declaratory judgment regarding the extent of Nelson's ownership in Alliance's "membership interest units"; and (5) wrongful termination.[2] All of Nelson's claims were dismissed prior to trial with the exception of the fourth claim seeking a declaratory judgment with regard to Nelson's ownership interest in Alliance. Nelson's declaratory judgment claim asserted that he owned 10 of the existing 61 membership units in Alliance, thereby giving him a 16.4% ownership interest. The Alliance

1. Despite the fact that it originally instituted this action, Orlando has not participated in this appeal, which solely involves the dismissal of crossclaims asserted by Nelson against his co-defendants.

2. The matter was designated a complex business case by the Chief Justice on 1 June 2011 and transferred to the North Carolina Business Court.

Defendants, conversely, contended that Nelson had been granted only a 10% interest.

A trial was held on the declaratory judgment claim beginning on 16 March 2015, and at the close of the evidence, the jury was tasked with answering—along with an additional question not relevant to this appeal—the following question: "Did Alliance's board of directors issue 10 membership units to Kenneth E. Nelson?" The jury answered in the affirmative. The jury was not asked, however, to determine the total number of membership units existing in Alliance, thereby leaving unanswered the precise percentage of Nelson's ownership interest in Alliance. On 27 March 2015, the Business Court entered an order declaring Nelson to be "the holder of 10 membership units in Alliance . . . ." The Business Court further ordered that Alliance's Board of Directors "adopt a resolution, or otherwise amend the corporate records, to reflect that Kenneth E. Nelson owns 10 membership units." Nelson appealed the Business Court's pre-trial dismissal of his damages claims, and the Court of Appeals affirmed the Business Court's ruling. *See Nelson v. Alliance Hosp. Mgmt., LLC*, 2016 N.C. App. LEXIS 412 (N.C. Ct. App. 2016) (unpublished).

II. Orlando's Enforcement of Foreign Judgments Against Nelson in North Carolina

As a result of a failed business venture dating back to the late 1980s, Orlando secured two money judgments against Nelson[3] during the years preceding the filing of the present lawsuit. The first judgment was issued by the Chancery Court for Davidson County, Tennessee on 7 October 2004 in the amount of $797,615. In an effort to enforce this judgment against Nelson in North Carolina, Orlando filed a motion for a "charging order" in Superior Court, Wake County. On 12 May 2011, the superior court issued such an order, finding that Orlando's judgment had not been completely satisfied and stating, in part, that "any distribution, allocations, or payments in any form otherwise due from Alliance . . . to Kenneth E. Nelson up to $121,127.85 . . . shall instead be paid to Orlando Residence, Ltd."

The second judgment was entered by a federal court in the District of South Carolina on 15 August 2012 in the amount of $4,000,000. Seeking to enforce this judgment against Nelson in North Carolina, on

3. The first of these judgments was actually entered against Nashville Lodging Company, a corporation controlled by Nelson that he was found to have used to facilitate fraudulent conveyances and avoid Orlando's collection efforts. *See Orlando Residence, Ltd. v. GP Credit Co., LLC*, 553 F.3d 550, 553 (7th Cir. 2009).

11 September 2012 Orlando filed the judgment in Superior Court, Wake County, and once again sought a charging order. On 14 February 2013, the superior court issued a charging order providing that "any distributions, allocations, or payments in any form otherwise due from Alliance Hospitality Management, LLC, to Kenneth E. Nelson up to $4,000,000 plus post judgment interest, shall not be paid to Nelson, but shall instead be paid to Orlando Residence, Ltd. . . . "

On 3 September 2015, Orlando filed—under the same case number utilized in the second charging order proceeding—a motion for civil contempt against Alliance in Superior Court, Wake County, for its alleged failure to make distribution payments in the appropriate amounts as required pursuant to the charging orders. In this motion, Orlando asserted that between 12 May 2011—the date of the first charging order—and 1 September 2015, Alliance had paid Orlando only $716,708.61 of the $7,167,086 in total distributions that Alliance had disbursed to its owners during that time frame. Orlando contended that Alliance's calculation of the amounts of Nelson's distributions was based on Alliance's erroneous position that Nelson held only a 10% membership interest in Alliance. Orlando maintained that, in actuality, Alliance had a total of 61 membership units—10 of which were owned by Nelson—and that, as a result, Orlando was entitled to receive 16.4% of past and future Alliance distributions pursuant to the charging orders.

A hearing was held on the motion for contempt on 9 November 2015. The superior court issued an order denying Orlando's motion on 24 November 2015, ruling that "there has been no judicial determination . . . that there were 61 total membership units in Alliance or that Nelson owned 16.4% of Alliance . . . . The only judicial determination that has been made is the jury's verdict that Nelson holds 10 membership units in Alliance." The superior court concluded that "Alliance acted appropriately to distribute the $716,708.62[4] to [Orlando] that corresponded to a 10% ownership interest by Nelson" and that "Alliance has not failed to comply with a court order . . . ."

III. The Present Action

On 15 March 2017, Orlando filed the present lawsuit in Superior Court, Wake County, against the Alliance Defendants and Nelson[5] seeking

4. Orlando's motion asserted that it had been paid $716,708.6*1*, but the trial court's order stated that the amount that had been paid as of that date was $716,708.6*2*.

5. Orlando's complaint did not assert any claims directly against Nelson and instead designated him as a "nominal defendant . . . solely for purposes of North Carolina Rule of Civil Procedure 19(a) as a person who may be united in interest with [Orlando]."

"recovery of funds Alliance wrongfully transferred to Tweeten and/or Axis in violation of two charging orders previously entered." The complaint alleged that the charging orders required distributions to be calculated on the basis of Nelson holding a 16.4% membership interest in Alliance rather than merely a 10% interest. In its complaint, Orlando asserted claims for (1) civil contempt; (2) violation of the Uniform Fraudulent Transfers Act; (3) constructive trust; (4) conversion; (5) accounting; and (6) a declaratory judgment that "there are 61 units outstanding in Alliance, that Nelson owns 16.4% of Alliance, and that Alliance was and in the future is required to pay 16.4% of all distributions to [Orlando] until such time as [Orlando's] judgments against Nelson are satisfied." The case was designated a mandatory complex business case and transferred to the Business Court on 16 March 2017.

On 3 May 2017, the Alliance Defendants filed a motion to dismiss the claims contained in Orlando's complaint based on lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure and failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). In this motion, the Alliance Defendants argued that Orlando's claims should be dismissed on the grounds that (1) Orlando lacked standing to pursue claims concerning the internal corporate governance of Alliance; (2) certain claims asserted by Orlando were barred by the doctrines of res judicata and collateral estoppel; and (3) the statute of limitations also served to bar a number of Orlando's claims.

Prior to the filing of a responsive pleading by the Alliance Defendants, on 4 April 2017, Nelson, appearing pro se, filed a document entitled "Answer, Defenses, and Crossclaims of Kenneth E. Nelson," in which he asserted eighteen crossclaims against the Alliance Defendants seeking damages and various forms of equitable relief. Specifically, Nelson asserted claims for (1) conversion against Tweeten, Alliance, and Axis; (2) wrongful taking against Tweeten, Alliance, and Axis; (3) common law conspiracy against Tweeten; (4) statutory conspiracy under Wis. Stat. § 134.01 against Tweeten; (5) conspiracy to slander title against Tweeten; (6) aiding and abetting slander of title against Tweeten; (7) breach of fiduciary duty against Tweeten; (8) constructive fraud against Tweeten and Axis; (9) a constructive trust against Tweeten and Axis; (10) an equitable accounting against Tweeten, Alliance, and Axis; (11) unjust enrichment against Tweeten, Alliance, and Axis; (12) *quantum meruit* against Tweeten, Alliance, and Axis; (13) breach of contract and breach of the duty of good faith and fair dealing against Tweeten; (14) breach of contract and breach of the duty of good faith and fair

dealing against Axis; (15) a derivative action for constructive fraud against Tweeten and Axis; (16) a derivative action for breach of fiduciary duty against Tweeten; (17) alternatively, a direct action for breach of fiduciary duty against Tweeten; and (18) alternatively, a direct action for constructive fraud against Tweeten and Axis. In addition, Nelson filed a motion requesting that he not be identified and treated as merely a "nominal defendant."

On 30 May 2017, the Alliance Defendants moved to dismiss Nelson's crossclaims pursuant to Rules 12(b)(1) and (6). In their motion, they contended, in part, that with the exception of his first, second, and ninth crossclaims, Nelson's crossclaims were not related to the subject matter of Orlando's complaint and were therefore procedurally improper. The Alliance Defendants also asserted that Nelson's crossclaims were barred by res judicata, collateral estoppel, and the statute of limitations.

The Business Court entered an order on 20 December 2018 addressing the pending motions. First, the court granted the Alliance Defendants' motion to dismiss the claims asserted by Orlando. The court ruled that Orlando's claims constituted an impermissible collateral attack on the 24 November 2015 order issued by the Superior Court, Wake County, determining that Alliance had complied with the charging orders in making its distributions to Orlando.

Second, the Business Court dismissed with prejudice all of Nelson's crossclaims. Initially, the Business Court expressed its belief that fifteen of Nelson's crossclaims "bear no relation to Orlando's claims and so are not properly brought as crossclaims pursuant to Rule 13(g)" of the North Carolina Rules of Civil Procedure. The Business Court ultimately ruled that *all* of Nelson's crossclaims were subject to dismissal, stating the following:

> The Court first notes that, in light of the dismissal of Orlando's claims, none of Nelson's crossclaims are properly before this Court. A related underlying transaction or occurrence is a prerequisite to the bringing of crossclaims. *See* N.C. Gen. Stat. § 1A-1, Rule 13(g).
>
> . . . .
>
> The Court notes that Nelson unsuccessfully sought to interject many of these claims or the facts regarding them into the Nelson Action. However, the Court need not wade into the waters of claim preclusion or estoppel to conclude that Nelson's claims are in any event not proper in

> this action. *Rather, those claims are not proper because the right to assert them depends on Orlando's Complaint surviving, which it has not.*

(Emphasis added).[6] On 17 January 2019, Nelson gave notice of appeal to this Court pursuant to N.C.G.S. § 7A-27(a)(2) seeking review of the Business Court's dismissal of his crossclaims against the Alliance Defendants.

Analysis

[1] The sole issue in this appeal is whether the Business Court properly dismissed Nelson's eighteen crossclaims. For the reasons set out below, we hold that the dismissal of Nelson's crossclaims was appropriate but based on different grounds than those relied upon by the Business Court.

"This Court reviews de novo legal conclusions of a trial court, including orders granting or denying a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6)." *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 332, 828 S.E.2d 467, 471 (2019). In his appeal, Nelson argues that the Business Court incorrectly ruled that a crossclaim asserted by one defendant against a co-defendant automatically ceases to be viable once the plaintiff's original claims against the defendants are dismissed. We agree.

Rule 13(g) of the North Carolina Rules of Civil Procedure sets out the requirements for the filing of crossclaims and states as follows:

> Crossclaim against coparty. — A pleading may state as a crossclaim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such crossclaim may include a claim that the party against whom it is asserted is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.

N.C.G.S. § 1A-1, Rule 13(g) (2019).

In its order dismissing Nelson's crossclaims, the Business Court—as quoted above—determined that the crossclaims "are not proper because the right to assert them depends on Orlando's Complaint surviving,

6. The Business Court also denied Orlando's motion seeking leave to amend its complaint.

which it has not." This Court has not previously had occasion to consider whether a defendant's crossclaims against a co-defendant are no longer viable once the plaintiff's original claims against the defendants have been dismissed. However, the Court of Appeals addressed this precise issue 35 years ago in *Jennette Fruit & Produce Co. v. Seafare Corp.*, 75 N.C. App. 478, 331 S.E.2d 305 (1985).

In *Jennette*, the plaintiff sued multiple defendants, including Seafare Corporation (Seafare), two individuals (the Staffords), and Trenor Corporation (Trenor). The plaintiff sought monetary damages from Seafare and further sought to set aside a conveyance of real property from Seafare to the Staffords based on the plaintiff's assertion that the conveyance was made without consideration and with the intent to defraud the plaintiff. Thereafter, the Staffords had conveyed the property to Trenor. Seafare filed crossclaims against the Staffords and Trenor. *Id.* at 479, 331 S.E.2d at 306.

Following the filing of Seafare's crossclaims, the plaintiff voluntarily dismissed its claims against all defendants. The trial court subsequently dismissed Seafare's crossclaims without prejudice based on its determination "that the dismissal of the plaintiff's claims against the crossclaiming defendants requires the dismissal of said crossclaims." *Id.* at 479–480, 331 S.E.2d at 306. Seafare appealed to the Court of Appeals, which held that Seafare could continue to litigate its crossclaims despite the plaintiff's dismissal of the original action. In reaching this conclusion, the Court of Appeals held as follows:

> We perceive no valid or compelling reason to dismiss a crossclaim over which the courts of this state have jurisdiction merely because the plaintiff's original claim against the crossclaiming defendant has been dismissed. To hold otherwise would needlessly force a defendant who has filed a proper crossclaim concerning a matter governed by state law to refile its claim as a new action. This would require additional time and expense, including court costs and counsel fees. Further, absent adoption of "relation-back" principles which could unnecessarily complicate the litigation, it could result in the time-barring of claims once timely filed. Such a holding would elevate form over substance. It would also be inconsistent with the purpose of Rule 13(g) to enlarge the scope of permissible crossclaims, which pre-Rules law permitted only for indemnification in a tort action.

> The aim of procedural rules is facilitation, not frustration, of decisions on the merits. The canon of interpretation of the Rules is one of liberality, and the general policy of the Rules is to disregard technicalities and form and determine the rights of litigants on the merits. To allow litigation of properly filed crossclaims to proceed regardless of whether a plaintiff's original claim remains extant will facilitate resolution of the crossclaims on their merits, while to disallow such is to regard technicalities and form without serving a substantive purpose. We thus hold that, unless a crossclaim is dependent upon plaintiff's original claim (as would be, e.g., a crossclaim for indemnity or contribution) or is purely defensive, a plaintiff's dismissal of its claims against all defendants does not require dismissal of crossclaims properly filed in the same action.

Id. at 483, 331 S.E.2d at 307–308 (cleaned up) (citations omitted).

We agree with the Court of Appeals' analysis in *Jennette*. Nothing in the plain language of Rule 13(g) expressly states, or otherwise suggests, that a plaintiff's original claims must continue to exist in order for a crossclaimant to obtain an adjudication of the crossclaims that it has properly asserted. The crossclaim is a procedural mechanism crafted "to avoid multiple suits and to encourage the determination of the entire controversy among the parties before the court with a minimum of procedural steps." *Selective Ins. Co. v. NCNB Nat'l Bank*, 324 N.C. 560, 565, 380 S.E.2d 521, 525 (1989) (quoting C. Wright & A. Miller, *Federal Practice and Procedure* § 1431 at 161 (1971)). To require the automatic dismissal of a defendant's crossclaims upon the dismissal of the plaintiff's original action would run counter to the objective of efficiently resolving all of the parties' related claims while they are present before the court. Accordingly, we hold that—with the exception of crossclaims such as claims for indemnity or contribution that necessarily require the continued litigation of the plaintiff's original claims in order to remain viable—the dismissal of the original action does not, by itself, mandate the dismissal of a crossclaim so long as the crossclaim meets the Rule 13(g) prerequisites for bringing such a claim.

In light of our ruling on this issue, it is clear that the Business Court erred in concluding that Nelson's crossclaims were automatically subject to dismissal simply because Orlando's claims were being dismissed. The Alliance Defendants assert, however, that the Business Court reached the correct result in dismissing Nelson's crossclaims even if its basis for doing so was incorrect. In so contending, they rely on the

principle previously recognized by this Court that "[w]here a trial court has reached the correct result, the judgment will not be disturbed on appeal even where a different reason is assigned to the decision." *Eways v. Governor's Island*, 326 N.C. 552, 554, 391 S.E.2d 182, 183 (1990); *see also Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) ("If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered."). Thus, we must determine whether—as the Alliance Defendants contend—some other valid basis exists for the Business Court's dismissal of Nelson's crossclaims.

[2] In making this determination, we begin by examining whether Nelson's crossclaims met the requirements of Rule 13(g). In so doing, we must first identify the "transaction or occurrence that is the subject matter . . . of the original action" and "any property that is the subject matter of the original action." N.C.G.S. § 1A-1, Rule 13(g). Here, the "original action" was Orlando's lawsuit against the Alliance Defendants. This lawsuit was exclusively concerned with the issue of whether Alliance had underpaid Orlando by making distributions under the charging orders premised on Nelson holding a 10%—rather than a 16.4%— interest in Alliance.

Next, we must determine whether Nelson's crossclaims are sufficiently related to Orlando's original action. The Business Court concluded that fifteen of Nelson's crossclaims "bear no relation to Orlando's claims . . . ." We agree with the Business Court that only three of Nelson's crossclaims relate directly to the claims asserted by Orlando in its complaint. Nelson's first crossclaim asserts that the Alliance Defendants converted 6.4% of his interest in Alliance by failing to issue distributions to him of 16.4% of the total amount of money disbursed to Alliance's owners. Similarly, crossclaim 2 alleges that the Alliance Defendants have engaged in a wrongful taking of Nelson's additional 6.4% interest in Alliance. Finally, crossclaim 9 seeks the imposition of a constructive trust as to 6.4% of the total membership interests in Alliance and 6.4% of all Alliance distributions made since 1 January 2011.

The Alliance Defendants assert that (1) crossclaims 1, 2, and 9 are all subject to dismissal based on the doctrine of res judicata; and (2) because these were the only three of Nelson's eighteen crossclaims that met the requirements of Rule 13(g), the remaining fifteen crossclaims must likewise be dismissed. We address these arguments *seriatim*.

Res judicata "provides that a prior adjudication on the merits in a prior suit bars a subsequent, identical cause of action between the same

parties or their privies," *State ex rel. Lewis v. Lewis*, 311 N.C. 727, 730, 319 S.E.2d 145, 147–48 (1984), and also prevents relitigation of claims that "in the exercise of reasonable diligence, could have been presented for determination in the prior action." *Smoky Mountain Enters. v. Rose*, 283 N.C. 373, 378, 196 S.E.2d 189, 192 (1973). This doctrine was "developed by the courts for the dual purposes of protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation." *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993). "The essential elements of *res judicata* are: (1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits." *State ex rel. Utils. Comm'n. v. Thornburg*, 325 N.C. 463, 468, 385 S.E.2d 451, 453–54 (1989) (quoting *State ex rel. Utils. Comm'n. v. Public Staff*, 322 N.C. 689, 692, 370 S.E.2d 567, 569 (1988)).

The Alliance Defendants' invocation of res judicata principles here is based upon the Nelson Action. In the Nelson Action, Nelson sued the Alliance Defendants and sought, among other things, a declaratory judgment defining Nelson's ownership interest in Alliance. The jury determined that Alliance "issue[d] 10 membership units to Kenneth E. Nelson," and the trial court entered a judgment declaring Nelson to be an owner of 10 membership units in Alliance.

The first and third elements of res judicata are clearly satisfied. It is undisputed that a final judgment was rendered in the Nelson Action. Moreover, Nelson and the Alliance Defendants were all parties to the action. Nelson argues, however, that the second element of res judicata —an identity of the causes of action in both cases—has not been met because there was no ruling in the Nelson Action as to the total number of membership units in Alliance or as to the specific percentage of Nelson's ownership interest in Alliance. We disagree.

As discussed above, crossclaims 1, 2, and 9 seek relief on the theory that Nelson actually owns 16.4% of Alliance and was therefore entitled to distributions from Alliance reflecting this percentage. The record makes clear that the extent of Nelson's ownership in Alliance was a relevant issue in the Nelson Action based on the parties' contentions in that lawsuit. In his claim for declaratory relief, Nelson expressly sought a judgment that he owned 10 of Alliance's 61 membership units. For reasons that are not clear from the record, however, the jury was not asked to decide the question of what specific percentage ownership interest Nelson held in Alliance or how many total membership units existed.

The record reflects that after the jury rendered its verdict, Nelson's counsel requested that the court's final judgment include a statement that "Axis Hospitality, Inc. owns [the remaining] 51 membership units" in Alliance. The Alliance Defendants responded by noting that it was Nelson's counsel who had drafted the jury issues and that "the jury was [not] asked to, and made no finding concerning, the number of units owned by Axis." The Alliance Defendants argued that the judgment "should reflect the jury's verdict but should not include matters not decided by the jury" and should not "expand on the jury's verdict in the Final Judgment." Ultimately, the Business Court entered a final judgment simply declaring that "Nelson is the holder of 10 membership units in Alliance" without making any reference to the total number of membership units in Alliance or Nelson's percentage ownership interest in the company.

Thus, crossclaims 1, 2, and 9—all of which necessarily require a determination of the total number of membership units in Alliance in order to calculate Nelson's percentage ownership interest—present issues that *could* have been adjudicated in the Nelson Action but were not. As the party seeking the declaratory judgment in the Nelson Action, it was Nelson's obligation to obtain a ruling on those issues, but he failed to do so. Nor does the record reflect that in his appeal in the Nelson Action he made any argument that the Business Court had erred in failing to instruct the jury on those questions or that the court had otherwise committed error by not ruling on those issues itself. Accordingly, we conclude that the second element of res judicata is also satisfied and that crossclaims 1, 2, and 9 were therefore properly dismissed.[7]

[3] Having determined that res judicata bars crossclaims 1, 2, and 9—the only crossclaims asserted by Nelson that met the criteria of Rule 13(g)

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7. Although Nelson has not raised this issue, we take this opportunity to note that as a general matter a declaratory judgment action's preclusive effect is limited to issues "actually litigated by the parties and determined by a declaratory judgment" and therefore exists only in the context of *issue* preclusion (collateral estoppel) as opposed to *claim* preclusion (res judicata). 18A Wright & Miller, *Federal Practice and Procedure* § 4446 (2d ed. 2002). However, as our Court of Appeals has correctly noted, "[f]ederal courts . . . have consistently held that the general rule limiting the preclusive effect of declaratory judgments to issue preclusion 'applies only if the prior action *solely* sought declaratory relief.' " *Barrow v. D.A.N. Venture Props. of N.C., LLC*, 232 N.C. App. 528, 532, 755 S.E.2d 641 (2014) (emphasis added) (quoting *Laurel Sand and Gravel, Inc. v. Wilson*, 519 F.3d 156, 164 (4th Cir. 2008)). We see no reason why these basic principles should be applied differently in the courts of our state. It is clear that Nelson asserted additional claims seeking different types of relief in the Nelson Action along with his claim for a declaratory judgment. Thus, we are satisfied that the application of the doctrine of claim preclusion to the Nelson Action is appropriate.

—we must next determine the effect of that ruling on Nelson's remaining 15 crossclaims. Rule 18(a) of the North Carolina Rules of Civil Procedure states that "[a] party asserting a claim for relief as an original claim, counterclaim, *cross claim*, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party." N.C.G.S. § 1A-1, Rule 18(a) (emphasis added). Nelson contends that because one or more of his crossclaims did, in fact, relate to the subject matter of Orlando's original claims, thereby satisfying Rule 13(g), he was permitted to join all of his other crossclaims as additional claims under Rule 18(a). As a result, he asserts, the remaining fifteen claims should be allowed to go forward even if crossclaims 1, 2, and 9 are dismissed on res judicata grounds.

As quoted above, Rule 18(a)—as a general proposition—allows a party that has properly asserted a claim for relief against another party to join as many additional claims as it has against that other party. We believe, however, that implicit in Rule 18(a) is the notion that in order for a crossclaimant to be permitted to maintain such additional joined claims against a co-defendant as provided for under that Rule, the predicate crossclaim asserted by the crossclaimant in accordance with Rule 13(g) must survive the pleading stage. A leading treatise has noted that pursuant to Rule 18(a) of the Federal Rules of Civil Procedure—the federal rule on joinder—in order to take advantage of the more expansive joinder rules available in federal courts "a party must assert what may be called a 'qualifying claim,' " and "[u]ntil the party does so, the party is not a claimant, and may not invoke the claim joinder provision of Rule 18." 4 Moore's Federal Practice § 18.02[2][a]. (3d ed. 2014).[8] As such, "it follows that if the qualifying claim asserted by a defendant is dismissed, all claims joined under Rule 18 must also be dismissed." *Id.* § 18.02[2][c]; *see, e.g.*, *Friedman v. Hartmann*, 787 F. Supp. 411, 423 (S.D.N.Y. 1992) (dismissing additional claims brought under Rule 18(a) on the basis that the underlying qualifying claim failed to state a claim upon which relief could be granted and therefore could not serve as the basis for the joinder of the unrelated claims).

In applying these principles here, we conclude that the dismissal of Nelson's remaining fifteen crossclaims was proper. As discussed above,

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8. Federal Rule of Civil Procedure 18(a) is essentially identical to N.C. R. Civ. P. 18(a). We have frequently recognized that although this Court is not bound by the decisions of federal courts with respect to the Rules of Civil Procedure, "[d]ecisions under the federal rules are . . . pertinent for guidance and enlightenment in developing the philosophy of the North Carolina rules." *Turner v. Duke Univ.*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989).

all three of his crossclaims that met the requirements of Rule 13(g)—his qualifying claims—fail as a matter of law based on res judicata. Although we acknowledge that a purpose of Rule 18(a) is to provide for the liberal joinder of claims, the ability to join claims under this Rule is not limitless. We therefore adopt the federal approach by rejecting an interpretation of Rule 18(a) that would permit claims asserted by a crossclaimant against a co-defendant that are unrelated to the plaintiff's original action to remain viable once the crossclaimant's qualifying claim or claims against the co-defendant as required by Rule 13(g) have been dismissed at the pleading stage. A ruling to the contrary would be inconsistent with the purpose underlying Rule 13(g)'s prerequisite for the assertion of crossclaims in the first place.

[4] Finally, we address Nelson's contention that even assuming the dismissal of his crossclaims was, in fact, appropriate, the dismissal should have been without prejudice. Rule 41(b) of the North Carolina Rules of Civil Procedure, which governs the involuntary dismissal of actions, states that—subject to three exceptions not applicable here—"[u]nless the court in its order for dismissal otherwise specifies, a dismissal under this section and *any dismissal not provided for in this rule* . . . operates as an adjudication upon the merits." N.C.G.S. § 1A-1, Rule 41(b) (emphasis added). This Court has held that this Rule vests trial courts with the discretion to dismiss claims without prejudice. *Whedon v. Whedon*, 313 N.C. 200, 213, 328 S.E.2d 437, 445 (1985) ("The trial court's authority to order an involuntary dismissal without prejudice is therefore exercised in the broad discretion of the trial court and the ruling will not be disturbed on appeal in the absence of a showing of abuse of discretion.") A discretionary ruling by the trial court will be overturned for abuse of discretion "only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, 370 N.C. 235, 241, 805 S.E.2d 664, 669 (2017).

Based on our thorough review of the lengthy record in this case, we are unable to say that the Business Court's decision to dismiss Nelson's crossclaims with prejudice constituted an abuse of discretion. For over thirty years, Nelson—and, at times, his wife and business entities that he controlled—has been engaged in various legal proceedings involving his debts to Orlando. *See Orlando Residence LTD v. GP Credit Co., LLC*, 553 F.3d 550, 553–54 (7th Cir. 2009). In 2009, the United States Court of Appeals for the Seventh Circuit stated that "[t]he time has come to put an end to the defendants' stubborn efforts to prevent Orlando from obtaining the relief to which it is entitled." *Id.* at 559. At the suggestion of the

Seventh Circuit, the United States District Court for the Eastern District of Wisconsin entered a "bill of peace" order enjoining Nelson, his wife, and a business entity found to be the alter ego of Nelson from filing any further legal actions or claims against Orlando without prior approval of the court given Nelson's "well-established" history of attempts to "evade Orlando's collection efforts." *Orlando Residence LTD v. GP Credit Co.*, 609 F. Supp. 2d 813, 817 (E.D. Wis. 2009).

Moreover, for almost a decade, Nelson and the Alliance Defendants have been engaged in a seemingly never-ending process of litigation over Nelson's membership interests and rights with respect to Alliance. It was not unreasonable for the Business Court to determine that Nelson's crossclaims should be dismissed with prejudice in an effort to bring some measure of finality between the parties. Accordingly, we conclude that the Business Court did not abuse its discretion.

Conclusion

For the reasons set out above, we hold that the dismissal of Nelson's crossclaims was proper.

MODIFIED AND AFFIRMED.

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

STATE OF NORTH CAROLINA
v.
JOHN THOMAS COLEY

No. 2A19

Filed 14 August 2020

Criminal Law—jury instructions—self-defense—defense of habitation—use of deadly force

At a trial for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury, the trial court committed prejudicial error by refusing to instruct the jury on self-defense and the defense of habitation. Viewed in the light most favorable to defendant, the evidence showed that defendant (who had a broken leg and used a wheelchair) reasonably believed that using deadly force was necessary to protect himself against an intruder who had already attacked him earlier that night at a neighbor's house, followed him home, broken into his home twice to violently assault him, and was breaking into the home for the third time when defendant shot him.

Appeal pursuant to N.C.G.S. § 7A 30(2) from the unpublished decision of a divided panel of the Court of Appeals, 263 N.C. App. 249, 822 S.E.2d 762 (2018), finding error in and reversing judgments entered on 25 September 2017 by Judge Richard S. Gottlieb in Superior Court, Guilford County, and ordering a new trial. Heard in the Supreme Court on 5 November 2019.

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

Kimberly P. Hoppin for defendant-appellee.

MORGAN, Justice.

The sole issue before this Court is whether the trial court erred by declining to deliver defendant's requested jury instructions on self-defense and the defense of habitation. We hold that the evidence, when viewed in the light most favorable to defendant, was sufficient to require the trial court to give defendant's requested instructions to the jury. Accordingly, we affirm the decision of the Court of Appeals reversing

defendant's convictions, vacating the trial court's judgments, and granting defendant a new trial.

Factual and Procedural Background

The evidence presented at trial tended to show that Derrick Garris "stayed at [defendant's] house off and on" during the early months of 2016. Although the relationship between Garris and defendant was initially cordial, Garris eventually suspected that defendant was working with law enforcement in connection with the detection of criminal activity. On the evening of 7 June 2016, defendant was sitting outside of a neighbor's house with a group of friends when Garris approached defendant and punched him, causing defendant to fall out of his chair. At the time, defendant was recovering from a broken leg and his mobility required the use of crutches and a wheelchair. After Garris hit defendant, defendant got up and began walking home. Garris followed defendant.

When defendant arrived at his residence, Garris grabbed defendant and threw him against the door of the home. After defendant opened the door, Garris seized defendant again and hurled him over two chairs. Defendant bounced off of the chairs and landed on the floor. Garris then snatched up defendant and flung him against a recliner. During this altercation, Garris repeatedly accused defendant of "snitch[ing] on [his] brothers" for trafficking in guns. Defendant denied making such statements to law enforcement officers. At trial, when asked on direct examination about "what happens to snitches," defendant testified that "it could go from being killed, beaten with bats. . . . there's no limit to what could happen to you." Garris eventually left defendant's residence but quickly returned, accompanied by a friend, Djimon Lucas. Defendant testified at trial that at this point, he was "[s]cared, fearful" and "didn't know what was going on at the time." As defendant attempted to explain the earlier events to Lucas, Garris struck defendant a couple more times and then departed the house again.

By the time defendant had climbed from the floor into his wheelchair, he saw Garris once more entering defendant's house. Defendant testified at trial that he "never knew what he left to go get, as if he might have . . . went and got another weapon." Defendant stated that he feared that "[Garris] was going to jump on [him] again or possibly even kill [him]." As Garris burst into defendant's home for a third time, defendant reached down beside his wheelchair, retrieved a gun, and shot Garris, injuring him. Defendant was ultimately indicted for the offenses of attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by a felon.

Defendant had given notice at trial of his intent to rely upon a theory of self-defense. During the jury charge conference conducted after the presentation of all of the evidence, defendant requested jury instructions on self-defense and the defense of habitation. The trial court, however, declined to deliver defendant's requested instructions to the jury and instead directed the jury to consider only whether defendant was guilty of attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by a felon. No form of a self-defense instruction was presented to the jury by the trial court. Defendant objected and preserved the jury instruction issue for appeal.

Upon the conclusion of deliberations, the members of the jury found defendant not guilty of the offenses of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. The jury instead found defendant guilty of assault with a deadly weapon inflicting serious injury—a lesser-included offense of assault with a deadly weapon with intent to kill inflicting serious injury—and possession of a firearm by a felon. Following the jury's verdicts, the trial court sentenced defendant to a term of imprisonment of twenty-six to forty-four months for the assault with a deadly weapon inflicting serious injury offense, together with a consecutive term of thirteen to twenty-five months of incarceration for the offense of possession of a firearm by a felon. Defendant appealed his convictions to the Court of Appeals based upon the trial court's failure to give his requested self-defense and defense-of-habitation instructions to the jury.

On appeal, defendant argued that the trial court erred by (1) denying his request to instruct the jury on self-defense, (2) failing to instruct the jury on the "stand-your-ground" provision, and (3) denying his request to instruct the jury on the defense of habitation. A divided panel of the Court of Appeals agreed. In reaching its decision, the Court of Appeals majority determined that "[d]efendant had an objectively reasonable belief [that] he needed to use deadly force to repel another physical attack to his person" and prevent death or great bodily harm to his person. *State v. Coley*, 263 N.C. App. 249, 256, 822 S.E.2d 762, 767 (2018). The Court of Appeals majority further concluded that in the event that defendant's requested jury instructions had been properly delivered to the jury, there was a reasonable possibility that the jury would have reached a different result. *Id.* at 258, 822 S.E.2d at 768. The majority therefore held that the trial court committed error by failing to give instructions to the jury, as requested by defendant, on the law of self-defense with the stand-your-ground provision and the law of the defense of habitation because the

evidence was sufficient to support the instructions submitted by defendant when the evidence is viewed in the light most favorable to him. Accordingly, the Court of Appeals reversed defendant's convictions, vacated the trial court's judgments, and granted defendant a new trial with complete self-defense instructions. *Id.* The dissenting judge at the Court of Appeals opined that defendant's warning shot at Garris was an act that exceeded the level of force that was reasonably necessary to protect defendant from death or serious bodily harm, thus precluding a jury instruction on self-defense. *Id.* at 261, 822 S.E.2d at 770 (Zachary, J., dissenting). The dissenting judge also considered the trial court to be correct in declining to give defendant's requested jury instruction on the defense of habitation, viewing defendant's testimony about the warning shot and considering Garris to be a lawful occupant of defendant's residence as obviating the necessity for the delivery of such an instruction. *Id.* at 263, 822 S.E.2d at 771.

We agree with the Court of Appeals majority in its resolution of the matters presented in this case, as this Court concludes that the decision of the lower appellate court is sound and correct.

Analysis

"The jury charge is one of the most critical parts of a criminal trial." *State v. Watson*, 367 N.C. 721, 730, 766 S.E.2d 312, 318 (2014). "It is the duty of the trial court to instruct on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). This Court has consistently held that "where competent evidence of self-defense is presented at trial, the defendant is entitled to an instruction on this defense, as it is a substantial and essential feature of the case, and the trial judge must give the instruction even absent any specific request by the defendant." *State v. Morgan*, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986) (emphasis omitted) (citations omitted); *see also*, *e.g.*, *State v. Deck*, 285 N.C. 209, 215, 203 S.E.2d 830, 834 (1974) ("When supported by competent evidence, self-defense unquestionably becomes a substantial and essential feature of a criminal case."). In determining whether a defendant has presented competent evidence sufficient to support a self-defense instruction, we take the evidence as true and consider it in the light most favorable to the defendant. *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010). Once a showing is made that the defendant has presented such competent evidence, "the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence." *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974). "[A] defendant entitled to *any* self-defense instruction is entitled to a *complete* self-defense instruction,

which includes the relevant stand-your-ground provision." *State v. Bass*, 371 N.C. 535, 542, 819 S.E.2d 322, 326 (2018).

In North Carolina, the right to use deadly force to defend oneself is provided both by statute and case law. Pursuant to the applicable statutory law, there are two circumstances in which individuals are justified in using deadly force, thus excusing them from criminal culpability under the theory of self-defense. Firstly, section 14-51.3 of the General Statutes of North Carolina provides, in pertinent part, the following:

> (a) A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, *a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if* either of the following applies:
>
> (1) *He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.*
>
> (2) Under the circumstances permitted pursuant to G.S. 14-51.2.
>
> (b) A person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force . . . .

N.C.G.S. § 14-51.3 (2019) (emphases added). Secondly, N.C.G.S. § 14.51.2(b) states the following:

> The lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:
>
> (1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace, or if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace.

(2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

N.C.G.S. § 14-51.2(b) (2019).

Under either statutory provision a person does not have a duty to retreat but may stand his ground against an intruder. *State v. Lee*, 370 N.C. 671, 675, 811 S.E.2d 563, 566 (2018); *see also Bass*, 371 N.C. at 541, 819 S.E.2d at 325–26 ("Both sections provide that individuals using force as described . . . have no duty to retreat before using defensive force.") Consequently, when an individual who was not the aggressor is located in his home when the assault on him occurred, he "may stand his ground and defend himself from attack when he reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself or another." *Bass*, 371 N.C. at 541, 819 S.E.2d at 326. "The reasonableness of his belief is to be determined by the jury from the facts and circumstances as they appeared to him at the time" he committed the forceful act against his adversary. *See State v. Gladden*, 279 N.C. 566, 572, 184 S.E.2d 249, 253 (1971).

Applying these statutory and case law principles to the present case, defendant's evidence shows that Garris was the aggressor toward defendant from the very beginning of the interaction between the two of them when Garris confronted defendant while defendant was seated outside of the neighbor's home, striking defendant with such force as to knock defendant out of his chair. Without a violent response to Garris, defendant arose from the ground and, with his previously injured broken leg, retreated to his nearby home on foot. Garris followed defendant and, when defendant arrived at his home, Garris once again employed force against defendant by grabbing defendant and throwing him against the door of the residence. Garris then forcibly entered defendant's home as he continued to inflict assaultive punishment upon defendant in light of Garris's expressed belief that defendant had been a "snitch[ed]" to law enforcement concerning Garris's brothers. Defendant held a fearful belief concerning the potential for physical violence that he felt was wreaked upon "snitches" as Garris briefly left defendant's residence, but immediately returned with another individual. During this second uninvited and unlawful entry into defendant's residence by Garris, defendant was pummeled by Garris. After Garris departed from defendant's home and defendant, who was injured, had repositioned himself from the floor back into his wheelchair, defendant observed the third entry of Garris into defendant's home. Due to the force that Garris had been using

and the harm that had been occurring toward defendant in his home through the increasingly violent and unpredictable actions of Garris, when Garris rushed into the residence of defendant on the third occasion, defendant shot Garris.

Viewing the evidence at trial in the light most favorable to defendant in order to determine whether the evidence was competent and sufficient to support the jury instructions on self-defense and the defense of habitation, we conclude that defendant was entitled to both instructions. In assessing the provisions of N.C.G.S. § 14-51.3 governing the right of a person such as defendant to justifiably utilize force against another person such as Garris when and to the extent that the person in defendant's position reasonably believed that the conduct was necessary to defend oneself against another's imminent use of unlawful force, this Court determines that defendant in the instant case presented competent and sufficient evidence to warrant the self-defense instruction. This includes the use of deadly force without a duty to retreat in any place that he had the lawful right to be when he holds a reasonable belief that such force is necessary to prevent imminent death or great bodily harm to himself or herself. Similarly, in reviewing the elements of N.C.G.S. § 14-51.2(b) regarding the presumption of a lawful occupant of a home—such as defendant in his residence—to have held a reasonable fear of imminent death or serious bodily harm to himself or herself when using defensive force that is intended or likely to cause death or serious bodily harm to another person, such as Garris here, if such person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, the lawful occupant's home and the person using the defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred, we conclude that the evidence presented at trial was competent and sufficient to support defendant's requested instruction on the defense of habitation.

The dissenting judge at the Court of Appeals in this case focuses primarily upon defendant's testimony at trial that he fired a warning shot at Garris as rationale for the dissenting judge's view that the trial court correctly declined to instruct the jury on self-defense and the defense of habitation. The dissenting judge deems defendant's act as exceeding the response to Garris's conduct which was reasonably necessary to protect defendant from death or serious bodily harm, thereby precluding a jury instruction on self-defense, while also precluding a jury instruction on the defense of habitation because defendant's testimony at trial about a warning shot rebuts the statutory presumption of "reasonable fear of

imminent death or serious bodily harm" when using defensive force in one's home. The dissenting judge relies upon the Court of Appeals opinion in *State v. Ayers*, 261 N.C. App. 220, 819 S.E.2d 407 (2018), *disc. review denied*, 372 N.C. 103, 824 S.E.2d 407 (2019), for the conclusion that the warning shot demonstrates that defendant "did not 'inten[d] to strike the victim with the blow' " so as to preclude defendant from the right to a self-defense instruction. *Coley*, 263 N.C. App. at 260, 822 S.E.2d at 769 (Zachary, J., dissenting) (alteration in original) (quoting *Ayers*, 261 N.C. App. at 225, 819 S.E.2d at 411). Likewise, the dissenting judge cites the Court of Appeals opinion of *State v. Cook*, 254 N.C. App. 150, 802 S.E.2d 575 (2017), for the premise that the statutory defense of habitation with its presumption of reasonable fear does not apply when a defendant testifies that he fired a warning shot and did not intend to shoot the attacker because such words disprove the presumption that the defendant was in reasonable fear of imminent harm. *Coley*, 263 N.C. App. at 262–63, 822 S.E.2d at 770. Finally, the dissenting judge also submits that defendant did not have a right to a jury instruction on the defense of habitation because Garris was a lawful occupant of defendant's home in light of Garris's occasional residency there, Garris's possession of a key to defendant's residence, and the presence of some of Garris's personal possessions inside of defendant's home. *Id.* at 262–63, 822 S.E.2d at 770–71.

The dissenting judge's perspective ignores the principle that we set out in *Dooley* that although there may be contradictory evidence from the State or discrepancies in the defendant's evidence, nonetheless the trial court must charge the jury on self-defense where there is evidence that the defendant acted in self-defense. Indeed, as expressly noted by the Court of Appeals majority in its decision, when viewing defendant's testimony as true, competent evidence was presented from which a jury could reasonably infer that defendant intended to "strike the blow" when he aimed and fired his gun at Garris. Ultimately, just as the Court of Appeals majority correctly observed that "[p]resuming [that] a conflict in the evidence exists as to whether Garris had a right to be in the home, it is to be resolved by the jury, properly instructed," *id.* at 257, 822 S.E.2d at 767, it is appropriately within the purview of the jury to resolve any conflicts in the evidence presented at trial and to render verdicts upon being properly instructed by the trial court based upon the evidence which competently and sufficiently supported the submission of such instructions to the jury for collective consideration.

We agree with the majority opinion of the Court of Appeals that the trial court erred by failing to instruct the jury on self-defense and

on the defense of habitation. We further agree with the lower appellate court's conclusion that the trial court's failure to properly instruct the jury constituted error that was prejudicial to defendant. Subsection 15A-1443(a) states, in pertinent part, that a defendant is prejudiced by an error 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 out of which the appeal arises. N.C.G.S. § 15A-1443(a) (2019); *see also State v. Ramos*, 363 N.C. 352, 355, 678 S.E.2d 224, 227 (2009). In this regard, the Court of Appeals majority astutely observes in its opinion that "[d]efendant was acquitted by the jury on all charges involving an intent to kill," which was a criminal offense element that served as a factor in the trial court's denial of the requested jury instructions at trial. *Coley*, 263 N.C. App. at 258, 822 S.E.2d at 768.

Conclusion

Based on the aforementioned reasons, we affirm the decision of the Court of Appeals that there was sufficient evidence presented at trial to support the submission of defendant's requested instructions to the jury on self-defense and the defense of habitation. We also affirm the determination of the lower appellate court to reverse the convictions of defendant, to vacate the judgments against defendant, and to grant a new trial to defendant with complete self-defense instructions, based upon our determination that there is a reasonable possibility that had the trial court not committed prejudicial error in its presentation of instructions to the jury, a different result would have been reached at the trial.

AFFIRMED.

STATE v. COX

[375 N.C. 165 (2020)]

STATE OF NORTH CAROLINA
v.
JAMES A. COX

No. 94PA19

Filed 14 August 2020

Conspiracy—criminal—robbery with a dangerous weapon—sufficiency of evidence—felonious intent

Where defendant (with the help of two other people) broke into a woman's home and ordered her at gunpoint to return the money he had previously paid her for illegal drugs, the trial court properly denied defendant's motion to dismiss a charge of criminal conspiracy to commit robbery with a dangerous weapon because there was substantial evidence of felonious intent. Although defendant believed he had a bona fide claim of right to the money, the law did not permit him to "engage in self-help" to forcibly recover personal property from an illegal transaction. Additionally, because there was sufficient evidence of felonious intent, the trial court properly refused to dismiss a charge for felony breaking and entering based on the same incident.

Appeal pursuant to N.C.G.S. § 7A-31 from the published decision of a unanimous panel of the Court of Appeals, 264 N.C. App. 217, 825 S.E.2d 266 (2019), finding error and reversing a judgment entered on 16 January 2018 by Judge William W. Bland in the Superior Court, Onslow County. Heard in the Supreme Court on 4 May 2020.

Joshua H. Stein, Attorney General, by Daniel P. O'Brien, Special Deputy Attorney General, for the State.

Glenn Gerding, Appellate Defender, and Andrew DeSimone, Assistant Appellate Defender, for defendant-appellee.

MORGAN, Justice.

In this case we must determine whether the trial court erroneously denied defendant's motion to dismiss the charge of conspiracy to commit robbery with a dangerous weapon and the charge of felonious breaking or entering at the close of all of the evidence. In light of our conclusion that the State presented sufficient evidence at defendant's trial to show that defendant possessed the requisite felonious intent necessary

to support defendant's convictions of each of these charged offenses, we find no error in the trial court's ruling. Accordingly, we reverse the decision of the Court of Appeals and reinstate these convictions.

Factual and Procedural Background

At trial, the State's evidence tended to show that on 8 August 2015, defendant and his girlfriend Ashley Jackson went to the home of Richard Linn. Prior to this date, defendant had given $20.00 to Linn so that Linn could purchase, *inter alia*, Percocet tablets on behalf of Jackson. These tablets constituted a prescription medication which neither defendant nor Linn could legally possess. After receiving the $20.00 amount of funds from defendant, Linn contacted Angela Leisure to obtain the controlled substances sought by defendant, added some of Linn's own money to defendant's $20.00 amount, and ultimately gave Leisure an amount of funds between $50.00 and $60.00 for the purchase of drugs. While Leisure had operated as a regular "go-between" for Linn in his past efforts to acquire illicit controlled substances, on this occasion, Leisure neither obtained the illegal drugs which were requested by Linn nor returned any of the drug purchase money to him.

Upon arriving at Linn's residence on 8 August 2015, defendant displayed a gun to Linn and demanded that Linn accompany defendant and Jackson in going to Leisure's house "to talk with her about their money." Defendant, Jackson, and Linn went to Leisure's home by vehicle. When they arrived, Leisure's boyfriend Daniel McMinn was standing outside of Leisure's residence. Defendant, Jackson, and Linn entered Leisure's home, followed by McMinn. Once inside, Jackson pulled Leisure's hair, punched her, and forced her to the floor, demanding "their money." McMinn started to call the police, but he stopped when defendant displayed a handgun "in a threatening way." After a few minutes, Linn told Jackson to stop her assault on Leisure, saying: "I think she's had enough." As defendant, Jackson, and Linn departed Leisure's residence, defendant kicked a hole in the front door of Leisure's home and fired a shot into the residence, striking a mirrored door inside the home. Defendant, Jackson, and Linn did not obtain money or any personal property from Leisure's home.

Based on the events of 8 August 2015, defendant was arrested and charged with first-degree burglary, conspiracy to commit robbery with a dangerous weapon, and discharging a weapon into an occupied property.

Following the State's presentation of its evidence at trial, defendant moved to dismiss the charges against him for insufficiency of the evidence. After the motion was denied, defendant presented evidence in his

defense, including his own testimony. Defendant testified that he went to Linn's home on 8 August 2015 to give Linn $20.00 to purchase pain relievers for Jackson, and that later in the day, Linn had asked defendant to transport Linn to Leisure's home because Leisure had taken the $20.00 but then would not answer Linn's telephone calls. According to defendant, Linn said that Linn would get defendant's money back during an in-person encounter with Leisure. In his testimony, defendant claimed that neither he, Jackson, or Linn had a weapon during the encounter on 8 August 2015 and stated that it was Jackson rather than defendant who had kicked the front door at Leisure's home. At the close of all of the evidence, defendant renewed his motion to dismiss the charges against him. The trial court denied the motion.

After instructing the jury regarding the charges and the pertinent law in the case, the trial court further provided the jury with written copies of the jury instructions. After deliberating for approximately two hours, the jury submitted two questions to the trial court, each relating to the conspiracy to commit robbery charge: (1) "Can we get clarification of 'while the defendant knows that the defendant is not entitled to take the property,' " [with regard to the definition in the jury instructions on Conspiracy to Commit Robbery with a Dangerous Weapon] and (2) "Is it still Robbery to take back . . . one owns [sic] property?" After conferring with all counsel, and specifically without any objection from defendant, the trial court declined to answer the jury's questions and instead referred the jury to the written jury instructions which the trial court had previously provided to it.

On 16 January 2018, the jury returned guilty verdicts against defendant on the charges of conspiracy to commit robbery with a dangerous weapon, felonious breaking or entering, and discharging a weapon into an occupied property. The trial court sentenced defendant to a consolidated term of 60–84 months of incarceration for the offenses of conspiracy to commit robbery with a dangerous weapon and discharging a weapon into an occupied property. For the felonious breaking or entering offense, defendant received a suspended sentence of incarceration of 6–17 months and was placed on supervised probation for a term of 24 months. Defendant appealed to the Court of Appeals.

The Court of Appeals reversed defendant's conviction for conspiracy to commit robbery with a dangerous weapon. Although on appeal defendant did not contest his conviction for discharging a weapon into an occupied property, nonetheless the lower appellate court remanded the case in which defendant was convicted of discharging a weapon into an occupied property for resentencing because it was consolidated

for judgment with the conspiracy to commit robbery with a dangerous weapon conviction, which the Court of Appeals decided to reverse. The court below also reversed defendant's conviction for felonious breaking or entering and remanded the matter in order for the trial court to arrest judgment with respect to this felony conviction and to enter judgment against defendant for misdemeanor breaking or entering. In reversing defendant's conviction for the offense of conspiracy to commit robbery with a dangerous weapon, the Court of Appeals relied upon our decision in *State v. Spratt*, 265 N.C. 524, 144 S.E.2d 569 (1965) and its predecessor cases in concluding here that defendant could not be guilty of conspiracy to commit robbery with a dangerous weapon because defendant did not have the required felonious intent when attempting to take property from Leisure under a bona fide claim of right to the money which she had been given on defendant's behalf. Concomitantly, the Court of Appeals held that the lack of felonious intent on the part of defendant negated his ability to be convicted of the offense of felonious breaking or entering; however, since misdemeanor breaking or entering is a lesser-included offense of felonious breaking or entering, and since the lesser offense contains all of the elements of the greater offense except for felonious intent, the lower appellate court reasoned that the jury's determination that defendant had committed an offense of breaking or entering would, under these circumstances, be converted to the commission of a misdemeanor breaking or entering offense by defendant.

The State sought a temporary stay of the operation of the mandate of the Court of Appeals, which we allowed on 22 March 2019. On 9 April 2019, the State filed a petition for discretionary review, seeking to be heard by this Court on the issue of whether the Court of Appeals erred by reversing defendant's convictions for the offenses of conspiracy to commit armed robbery and felonious breaking or entering on the basis of insufficiency of the evidence. On 17 April 2019, defendant filed a response to the State's petition for discretionary review, as well as his conditional petition for discretionary review. On 14 August 2019, we allowed the State's petition for discretionary review, issued a writ of supersedeas, and denied defendant's conditional petition for discretionary review.

Analysis

The test for sufficiency of the evidence in a criminal prosecution is well-established. "[T]he trial court must consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference. If there is substantial evidence of each element

of the offense charged or lesser included offenses, the trial court must deny defendant's motion to dismiss as to those charges supported by substantial evidence and submit them to the jury for its consideration; the weight and credibility of such evidence is a question reserved for the jury." *State v. Williams*, 330 N.C. 579, 584, 411 S.E.2d 814, 818 (1992) (citations omitted).

Criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. *State v. Arnold*, 329 N.C. 128, 142, 404 S.E.2d 822, 830 (1991). Therefore, in the present case, the State had the burden to present substantial evidence tending to show that defendant and Jackson agreed to commit each element of robbery with a dangerous weapon against Leisure.

For the offense of robbery with a dangerous weapon, the State must prove three elements: (1) the unlawful taking or attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; (3) whereby the life of a person is endangered or threatened. *State v. Wiggins*, 334 N.C. 18, 35, 431 S.E.2d 755, 765 (1993); N.C.G.S. § 14-87(a) (2019). The taking or attempted taking must be done with felonious intent. *State v. Norris*, 264 N.C. 470, 472, 141 S.E.2d 869, 871 (1965) (citing *State v. Lawrence*, 262 N.C. 162, 163–68, 136 S.E.2d 595, 597–600 (1964)). "Felonious intent is an essential element of the crime of robbery with firearms and has been defined to be the intent to deprive the owner of his goods permanently and to appropriate them to the taker's own use." *State v. Brown*, 300 N.C. 41, 47, 265 S.E.2d 191, 196 (1980).

In the present case, the Court of Appeals has been persuaded by defendant's contention, citing our holding in *Spratt*, that a person cannot be guilty of robbery if he or she forcibly takes personal property from the actual possession of another under a bona fide claim of right or title to the property, since such a bona fide claim negates the requisite felonious intent required for the offense of robbery with a dangerous weapon. The State, however, argues that the law does not permit a person to use violence to collect on a perceived debt for illegal drugs.

In the opinion which it rendered in this case, the Court of Appeals exercised studious review of our decisions in *Spratt* and *Lawrence*, as well as other appellate decisions which it considered to involve issues which are similar to those which exist in the present case. The lower appellate court went on to conclude that it "remain[ed] bound to follow and apply *Spratt*" in the resolution of this case.

In *Spratt*, the defendant entered a convenience store, brought items of merchandise to the cashier's counter for apparent purchase, and when the cashier opened the cash register at the counter to conduct the transaction, defendant put his hand in the cash register drawer in which money was located. Defendant wielded a pistol, told the cashier "it was a stickup," demanded the money, and reached for it. The cashier was able to foil defendant's effort to obtain the money from the store's cash register, and defendant left without the money. Defendant was charged with the offense of attempt to commit armed robbery and was found by a jury to be guilty of the charged crime. In this Court's issued opinion in which no error was found in defendant's conviction upon his appeal, we discussed the concept of felonious intent, noting that it is an essential element of the offense of attempt to commit armed robbery. In this Court's discussion of felonious intent in *Spratt*, we cited *Lawrence* for the proposition that

> where the evidence relied on by defendant tends to admit the taking but to deny that it was with felonious intent, it is essential that the court fully define the 'felonious intent' contended for by the State and also explain defendant's theory as to the intent and purpose of the taking, in order that the jury may understandingly decide between the contentions of the State and defendant on that point . . . . For instance, as in *Lawrence*, defendant may contend that his conduct in taking the property amounts only to a forcible trespass.

265 N.C. at 526, 144 S.E.2d at 571 (citation omitted).

In the course of our discussion of the role of the element of felonious intent in different criminal offenses and our rumination about the courts' assessment of the element of felonious intent in light of different theories of criminal culpability in *Spratt*, we offered the following observation which the Court of Appeals mistakenly treats in the instant case as our dispositive holding in *Spratt*:

> A defendant is not guilty of robbery if he forcibly takes personal property from the actual possession of another under a bona fide claim of right or title to the property, or for the personal protection and safety of defendant and others, or as a frolic, prank or practical joke, or under color of official authority.

Id. at 526–27, 144 S.E.2d at 571.

The defendant in *Lawrence*—the case which *Spratt* primarily relies on in its discussion of felonious intent—was the operator of a motor vehicle who offered a ride to the prosecuting witness Wimbley, a member of the United States Marine Corps who was dressed in civilian clothes on this occasion, as Wimbley walked along the street after his own motor vehicle experienced mechanical failure. Wimbley accepted the offer of a ride and joined the defendant and a passenger in the vehicle. During the journey, the defendant and Wimbley bought some whiskey with all three individuals consuming some of it. Later, the defendant stopped the vehicle on a dead-end road with defendant and his original passenger both striking Wimbley with their fists. The defendant said to Wimbley, "You owe me something," to which Wimbley replied, "What do I owe you . . . I would be glad to pay you." The defendant then said, "That's okay, I'll get it myself," and then forcibly seized Wimbley's wallet and removed money from it. The defendant was charged with the offenses of robbery and felonious assault. A jury found the defendant guilty of robbery. On appeal, this Court determined that the defendant was entitled to a new trial because the trial court erred by instructing the jury to determine if there was an unlawful taking rather than giving a legal explanation of the term "felonious taking" and directing the jury to apply it to the facts. *Lawrence*, 262 N.C. at 168, 136 S.E.2d at 600. This conclusion was reached upon our evaluation of the defendant's contention in *Lawrence* that his actions amounted only to a forcible trespass, a crime which required an unlawful taking but no felonious intent, which he had the right to have a jury to consider upon proper instructions. *Id.*

This review of the respective facts, analyses, and outcomes of the two cases decided by this Court upon which the Court of Appeals expressly relies in its decision in the present case—*Spratt* and *Lawrence*—serves to place them in proper context and assist in determining how they apply in this case. While we recognized in *Spratt* the pivotal nature of felonious intent as an element of the offense of attempt to commit armed robbery, the defendant in *Spratt*, in attempting to take money from a convenience store's cash register while employing a firearm, was not attempting to forcibly take personal property from the actual possession of another under a bona fide claim of right or title to the property—as defendant contends that defendant was undertaking in the instant case in attempting to obtain money that he considered to belong to him from Leisure. This distinction between *Spratt* and the current case renders *Spratt* inapplicable here, including the passage from our opinion in *Spratt* which this Court intended to be illustrative and which the Court of Appeals construed here to be dispositive. *Lawrence*, the predecessor of *Spratt*, is distinguishable from, and hence inapplicable to, the

present case in that, although the element of felonious intent constituted an issue in *Lawrence* just as it does in the present case, the position adopted by defendant in *Lawrence* rested on an alternative and lesser measure of criminal culpability regarding the intent which he harbored concerning the money, while the position adopted by defendant in the instant case fully rests on a total lack of criminal culpability regarding the intent which he harbored concerning the money. Significantly neither *Spratt*, nor *Lawrence*, nor any other case in this state has heretofore authorized a party to legally engage in "self-help" by virtue of the exercise of a bona fide claim of right or title to property which is the subject of an illegal transaction. Here, defendant was involved with other individuals in an effort to regain money which was the subject of an illegal transaction involving the purchase of controlled substances.[1] In this regard, the Court of Appeals has erroneously extended beyond existing legal bounds the right of a party to engage in "self-help" and to forcibly take personal property from the actual possession of another under a bona fide claim or right to the property. Accordingly, with regard to the trial court's denial of defendant's motion to dismiss the charge of conspiracy to commit robbery with a dangerous weapon, we conclude that the trial court did not err.

We likewise hold that the trial court reached a correct ruling with respect to defendant's motion to dismiss the charge of felonious breaking or entering. "The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein." *Williams*, 330 N.C. at 585, 411 S.E.2d at 818. As already discussed, the trial court properly denied defendant's motion to dismiss the charge of conspiracy to commit robbery with a dangerous weapon because the record contained evidence tending to show that defendant possessed the requisite felonious intent to support the charge. Since both of the issues presented to this Court concern whether defendant possessed the same requisite felonious intent necessary to support both of his convictions, we conclude that the trial court also properly denied defendant's motion to dismiss the charge of felonious breaking or entering.

Conclusion

For the reasons stated, we find no error in defendant's convictions of the offense of conspiracy to commit armed robbery with a dangerous

1. Indeed, the nature of defendant's transaction and agreement with Leisure means that determining the existence of a bona fide claim would likely require the application of commercial law principles to an illegal drug deal. We cannot imagine that the common law tradition or the General Assembly would require such an approach.

weapon and the offense of felonious breaking or entering. Due to the existence of sufficient evidence regarding felonious intent, the trial court properly denied defendant's motions to dismiss the charges against him. Accordingly, we reverse the decision of the Court of Appeals and order defendant's convictions to be reinstated.

REVERSED.

STATE OF NORTH CAROLINA
v.
MARCUS REYMOND ROBINSON

No. 411A94-6

Filed 14 August 2020

Constitutional Law—North Carolina—double jeopardy—Racial Justice Act—death sentence vacated—judgment not appealed

In a case involving the Racial Justice Act (RJA)--which, before its repeal, allowed a defendant to challenge a death sentence on the basis that racial bias infected the prosecution--review of the trial court's judgment and commitment order resentencing defendant to life imprisonment without the possibility of parole was precluded pursuant to double jeopardy principles. Although the State did seek appellate review of the trial court's accompanying order finding that defendant was entitled to relief under the RJA (an order which was previously vacated by the Supreme Court on non-substantive grounds), its failure to petition for and obtain review of the separate judgment and commitment order rendered that judgment final.

Justice HUDSON concurring in result.

Justice NEWBY dissenting.

Justice ERVIN dissenting.

Justice DAVIS joins in this dissenting opinion.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order denying defendant's motion for appropriate relief filed pursuant

to the Racial Justice Act entered on 25 January 2017 by Judge W. Edwin Spainhour in Superior Court, Cumberland County. Heard in the Supreme Court on 26 August 2019.

Joshua H. Stein, Attorney General, by Danielle Marquis Elder, Senior Deputy Attorney General, and Jonathan P. Babb, Special Deputy Attorney General, for the State-appellee.

Cassandra Stubbs, Donald Beskind, David Weiss, and Brian Stull for defendant-appellant.

James E. Coleman Jr. for Charles Becton, Charles Daye, Valerie Johnson, Irving L. Joyner, Floyd B. McKissick Jr., Cressie H. Thigpen Jr., and Fred J. Williams, amici curiae.

Jeremy M. Falcone, Paul F. Khoury, Robert L. Walker, and Madeline J. Cohen for Former State and Federal Prosecutors, amicus curiae.

Carlos E. Mahoney, Jin Hee Lee, and W. Kerrel Murray for NAACP Legal Defense and Educational Fund, Inc., amicus curiae.

Janet Moore for National Association for Public Defense, amicus curiae.

James E. Williams Jr., Burton Craige, and Bidish Sarma for North Carolina Advocates for Justice, amicus curiae.

Grady Jessup for North Carolina Association of Black Lawyers, amicus curiae.

Cynthia F. Adcock for North Carolina Council of Churches, amicus curiae.

Lisa A. Bakale-Wise and Irving Joyner for North Carolina State Conference of the NAACP, amicus curiae.

Professors Robert P. Mosteller & John Charles Boger, amicus curiae.

Robert P. Mosteller for Retired Members of the North Carolina Judiciary, amicus curiae.

Joseph Blocher for Social Scientists, amicus curiae.

BEASLEY, Chief Justice.

On 6 August 2009 the North Carolina General Assembly, recognizing the egregious legacy of the racially discriminatory application of the death penalty in this state, enacted the Racial Justice Act (the RJA or the Act). The goal of this historic legislation was simple: to abolish racial discrimination from capital sentencing. That is, to ensure that no person in this state is put to death because of the color of their skin.

Once implemented, the RJA worked as intended. Immediately, proceedings initiated pursuant to the Act revealed pervasive racial bias in capital sentencing in North Carolina. For defendant Marcus Reymond Robinson, the first condemned inmate to have a hearing pursuant to the RJA, the trial court found that he successfully proved that racial discrimination infected his trial and sentencing.

After Robinson proved his entitlement to relief under the RJA, the General Assembly amended the statute to increase the burden of proof, thereby making it more difficult for claimants to prove racial bias and obtain relief. Nonetheless, the trial court held that the next three claimants met the higher standard and demonstrated that racial bias had infected their capital proceedings as well.

With 100% of claimants successfully proving their entitlement to relief and with more than 100 additional RJA claims filed, the vast majority of death row inmates were on the precipice of an opportunity to individually demonstrate that the proceedings in which they were sentenced to death were fundamentally flawed by racial animus. Rather than allowing these proceedings to follow their course, the General Assembly repealed the Act. The repeal was made retroactive: Robinson and the three other defendants who had already proven that their capital sentences were based on racially biased proceedings were returned to death row to await execution.

Today, we are not asked to pass on the wisdom of repealing a statutory mechanism for rooting out the insidious vestiges of racism in the implementation of our state's most extreme punishment.[1] That decision is for the General Assembly. Instead, this Court must decide whether the North Carolina Constitution allows for that repeal to be retroactive. We hold that it does not.

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1. Nor are we asked to review the underlying facts of Robinson's offenses and his ultimate conviction of first-degree murder. Given the nature of the appeal before this Court, this Court's ruling on Robinson's claim under the Racial Justice Act does not negate or diminish his criminal culpability.

I.

The Racial Justice Act prohibited capital punishment if race was a significant factor in the decision to seek or impose the death penalty. North Carolina Racial Justice Act, S.L. 2009-464, § 1, 2009 N.C. Sess. Laws 1213, 1214 [hereinafter Original RJA] (codified at N.C.G.S. §§ 15A-2010, -2011 (2009)) (repealed 2013). Defendants could use statistical evidence to meet their evidentiary burden and show that race was a significant factor in the county, the prosecutorial district, the judicial division, or the state at the time their sentence was imposed. *Id.*, § 1, 2009 N.C. Sess. Laws at 1214.

Defendants could show that race was a significant factor by demonstrating evidence of one or more of the following: that death sentences were sought or imposed significantly more frequently upon persons of one race; that death sentences were sought or imposed more frequently based on the race of the victim; or that race was a significant factor in decisions to exercise peremptory strikes during jury selection. *Id.* The State could offer rebuttal evidence, including its own statistical evidence. *Id.* If race was found to be a significant factor, defendants were legally ineligible to receive the death penalty; instead, they were sentenced to life imprisonment without the possibility of parole. *Id.*

The RJA was legislation unique to this state, most notably in its allowance of statistical evidence to prove racial discrimination. The Supreme Court of the United States has previously rejected the use of statewide statistical evidence in constitutional challenges to Georgia's death penalty scheme, finding that state legislatures "are better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions.' " *McCleskey v. Kemp*, 481 U.S. 279, 319, 107 S. Ct. 1756, 1781 (1987) (quoting *Gregg v. Georgia*, 428 U.S. 153, 186, 96 S. Ct. 2909, 2931 (1976)). The General Assembly, however, recognized the difficulty of proving systemic discrimination absent statistical evidence. During the debates over the Act in the North Carolina Senate, Senator Doug Berger explained why the use of statistics was necessary, arguing that "[r]ace discrimination is very hard to prove. Rarely, particularly in today's time, do people just outright say, 'I am doing this because of the color of your skin.' "[2]

The RJA was the first law in the country to allow for a finding of racial discrimination during jury selection without requiring proof

2. Sen. Doug Berger, Floor Debate on Racial Justice Act (May 14, 2009), https://archive.org/details/NorthCarolinaSenateAudioRecordings20090514/North_Carolina_Senate_Audio_Recordings_20090514.mp3

of intentional discrimination. The ability to serve on a jury is one of the many ways African-Americans have struggled to participate in our democratic processes. An understanding of the history and evolution of racial discrimination is necessary in order to understand why the RJA was passed. After the Civil War, the Supreme Court of the United States barred statutes that excluded African-Americans from serving as jurors. *Strauder v. West Virginia*, 100 U.S. 303 (1879). Recognizing that "[t]he very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine," the Supreme Court held that the Equal Protection Clause barred the exclusion of jurors based on their race. *Id.* at 308. Discrimination still occurred in practice as local jurisdictions excluded African-Americans from being in jury venires, preventing them from being in the jury pool.

The Supreme Court of the United States addressed this newest form of discrimination by prohibiting "any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers" that led to the exclusion of African-American jurors. *Carter v. Texas*, 177 U.S. 442, 447, 20 S. Ct. 687, 689 (1900); *see also State v. Peoples*, 131 N.C. 784, 790, 42 S.E. 814, 816 (1902) ("How can the forcing of [an African-American defendant] to submit to a criminal trial by a jury drawn from a list from which has been excluded the whole of his race, purely and simply because of color . . . be defended? Is not such a proceeding a denial to him of equal legal protection? There can be but one answer, and that is that it is an unlawful discrimination.").

Following these decisions, neither statutes nor local practices could legally exclude African-Americans from jury service. After the Civil War and Reconstruction, however, racism and legal segregation remained rampant in North Carolina and across the South. Facially race-neutral statutes, such as poll taxes and literacy tests, and the "separate but equal" fallacy were instituted to legally discriminate against African-Americans. In the early 1900s, African-Americans were excluded from jury service in North Carolina through laws requiring that jurors: (1) had paid taxes the preceding year; (2) were of good moral character; and (3) possessed sufficient intelligence. *See Peoples*, 131 N.C. at 788, 42 S.E. at 815; Benno C. Schmidt Jr., *Juries, Jurisdiction and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 Tex. L. Rev. 1401, 1406 (1983) ("The problem of jury discrimination encompasses the half-century from the end of Reconstruction to the New Deal, during which the systematic exclusion of [B]lack men from Southern juries was about as plain as any legal discrimination could be short of proclamation in state statutes or confession by state officials.")

The same racially oppressive beliefs that fueled segregation manifested themselves through public lynchings, the disproportionate application of the death penalty against African-American defendants, and the exclusion of African-Americans from juries. Given the racially oppressive practices and beliefs that permeated every level of American society during the Jim Crow era, the constitutionally protected right of African-American defendants to be tried by a jury of their peers became increasingly important. The Supreme Court of the United States recognized that facially neutral statutes could violate the Fourteenth Amendment because "equal protection to all must be given—not merely promised." *Smith v. Texas*, 311 U.S. 128, 130, 61 S. Ct. 164, 165 (1940). The Supreme Court recognized that putting the fate of African-American defendants in the hands of all-white juries contradicted "our basic concepts of a democratic society and a representative government." *Id.*

As progress was made toward ensuring equal representation in juries, discrimination shifted from the composition of the venire to the composition of the jury itself. Peremptory challenges became the next tool for limiting African-Americans from serving as jurors because there were previously no African-American jurors on the jury panel against whom peremptory challenges could be used. In North Carolina, the number of authorized peremptory challenges increased from six to fourteen during this period.[3]

In 1986 the Supreme Court of the United Sates recognized the persistent impact of racial discrimination and the exclusion of jurors of color during jury selection and established a three-part test to challenge discriminatory peremptory challenges. *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986). Although the Supreme Court's ruling in *Batson* and subsequent decisions sought to eliminate discrimination through the use of peremptory challenges, this Court has *never* held that a prosecutor intentionally discriminated against a juror of color.[4] The RJA

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3. *See* An Act to Amend the Laws Relating to Criminal Procedure, ch. 711, § 1, 1977 N.C. Sess. Laws 711; An Act to Amend G.S. 9-21(b) to Increase from Six to Nine the Peremptory Challenges Allowed the State in Capital Cases, 1971 N.C. Sess. Laws 56.

4. The North Carolina Court of Appeals has held that there was a *Batson* violation in only one case, where the prosecutor failed to offer any explanation for using peremptory challenges to strike two jurors. *State v. Wright*, 189 N.C. App. 346, 352–54, 658 S.E.2d 60, 64–65 (2008)). In two cases, the Court of Appeals held that the defendant had met their prima facie showing, but the underlying *Batson* challenge was unsuccessful upon remand. *See State v. McCord*, 158 N.C. App. 693, 696–99, 582 S.E.2d 33, 35–37 (2003); *State v. Sessoms*, 119 N.C. App. 1, 4–7, 458 S.E.2d 200, 202–04 (1995). The only "successful" *Batson* challenges have involved challenges alleging African-American defendants discriminated

was the General Assembly's recognition of *Batson*'s ineffectiveness in this state.

II.

Robinson was convicted of first-degree murder and sentenced to death in 1994 in Superior Court, Cumberland County. On direct appeal, this Court found no error in his conviction and death sentence. *State v. Robinson*, 342 N.C. 74, 463 S.E.2d 218 (1995), *cert. denied*, 517 U.S. 1197 (1996). Robinson's claims for post-conviction relief were denied in state and federal court. *State v. Robinson*, 350 N.C. 847, 539 S.E.2d 646 (1999); *Robinson v. Polk*, 444 F.3d 225 (4th Cir. 2006), *cert. denied* 549 U.S. 1003 (2006). Robinson's claims under the RJA do not negate or diminish his guilt or the impact of his crimes on the victim's family, the victim's friends, and the community. Rather, the Act ensured that even those who commit the most serious offenses are entitled to a trial and sentencing free from racial discrimination.

Robinson filed a timely Motion for Appropriate Relief pursuant to the RJA on 6 August 2010. His hearing was scheduled thirteen months later on 6 September 2011. The State requested and the trial court granted a continuance of the hearing for an additional four months but later denied the State's third motion to continue on 30 January 2012. Robinson's hearing, which lasted thirteen days, involved testimony by seven expert witnesses and the introduction of over 170 exhibits.

Robinson's claim under the RJA relied heavily on a study of jury selection conducted by researchers at Michigan State University College of Law. Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 Iowa L. Rev. 1531 (2012) [hereinafter MSU Study]. The MSU Study examined jury selection in at least one proceeding for every inmate on death row in North Carolina as of 1 July 2010. This comprehensive study found that overall, African-American jurors were 2.26 times more likely than all other jurors to be struck by the State. The State struck 52.6% of eligible African-American venire members, while only striking 25.7% of all other eligible venire members. The researchers also performed a fully-controlled regression analysis, controlling for non-race factors that could potentially have caused the juror to be struck. Even after taking into account all of these other factors, the results remained the same—African-American jurors

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against white jurors. *See State v. Hurd*, 246 N.C. App. 281, 294, 784 S.E.2d 528, 537 (2016); *State v. Cofield*, 129 N.C. App. 268, 277–80, 498 S.E.2d 823, 830–32 (1998).

were more than two times as likely to be struck as all other jurors. The MSU Study also showed similar disproportionate disparities in the county and judicial district of Robinson's trial.[5] In stark contrast to these findings, this Court has *never* ruled that the State intentionally discriminated against a juror of color in violation of *Batson*. Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, 94 N.C. L. Rev. 1957, 1961-62 (2016).[6]

In support of the findings from the MSU Study, Robinson also presented evidence obtained through discovery. After introducing evidence that prosecutors across North Carolina attended a "Top Gun" training, which taught them how to articulate facially race-neutral reasons for striking African-American jurors, Robinson presented transcripts from a capital case in Cumberland County in which the prosecutor used those exact reasons to justify striking an African-American juror. The trial court noted that "[i]nstead of training on how to comply with *Batson v. Kentucky*, and its mandate to stop discrimination in jury selection, North Carolina prosecutors received training in 1995 and 2011 about how to circumvent *Batson*." Robinson also obtained hand-written notes made by a prosecutor during jury selection in another Cumberland County capital case. These notes showed that an African-American juror with a criminal history was called a "thug," while a white juror with a criminal record was a "fine guy." An African-American juror was a "blk wino," while a white juror with a conviction for driving while impaired was a "country boy—ok."

Robinson also presented expert testimony about the role of implicit bias during jury selection. Robinson's experts testified about how race can influence decision-making at a subconscious level. One of Robinson's experts, Dr. Samuel Sommers, explained how "race often has an effect on judgments that we don't articulate when we are asked about those

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5. In Cumberland County, African-American jurors were struck at a rate of 52.7% compared to 20.5% for all other jurors. Cumberland County was a part of Second Judicial District from 1990 to 1999. In that district, African-American jurors were struck at a rate of 51.5%, compared to 25.1% for all other jurors. From 2000 to 2010 in the current Superior Court Division 4, African-American jurors were struck at a rate of 62.4%, compared to 21.9% for all other jurors.

6. This Court recently published two *Batson* decisions, *State v. Hobbs*, 374 N.C. 345, 841 S.E.2d 492 (2020) and *State v. Bennett*, 843 S.E.2d 222 (2020). Although this Court ultimately remanded both matters for a new *Batson* hearing, we did not find that the State intentionally discriminated against a juror in violation of *Batson*.

judgments." Rather than seeking to understand the role of implicit bias in their decision-making, prosecutors attended training to ensure that their race-based reasons for excluding jurors would not be subject to judicial scrutiny.

Robinson presented specific instances across the state where the race-neutral explanations given by prosecutors were pretextual or overtly based on race. Robinson presented evidence that an African-American juror was struck from the jury because of his membership in a historic African-American civil rights organization, the NAACP, and that another juror was struck from the jury because she graduated from a historically black college and university, North Carolina A&T State University. Robinson further showed how African-American jurors were struck after being asked explicitly race-based questions, such as whether an African-American juror would be the "subject of criticism" by their "black friends" if they were to return a verdict of guilty. In multiple cases, prosecutors targeted African-American jurors by asking the jurors different questions than other jurors, such as whether their child's father was paying child support. African-American jurors were also struck for patently irrational reasons, such as membership in the armed forces. Robinson also showed more than thirty examples of prosecutors striking African-American jurors for objectionable characteristics yet passing on other similarly situated jurors.

The trial court, in its meticulously detailed findings, laid out how Robinson had shown that race was a significant factor during jury selection in his case. The trial court concluded that race was a significant factor in the decisions of prosecutors to exercise peremptory challenges to strike African-American jurors in Cumberland County, the former Second Judicial District, and the State of North Carolina as a whole from 1990 to 2010 and resentenced Robinson to life imprisonment without the possibility of parole.

Following Robinson's hearing, the General Assembly amended the RJA, limiting the scope of statistical evidence for future hearings. An Act to Amend Death Penalty Procedures, S.L. 2012-136, §§ 1–10, 2012 N.C. Sess. Laws 471 [hereinafter Amended RJA] (repealed 2013). The Amended RJA also included a provision that applied the amendment to any trial court orders vacated or overturned upon appellate review, which could only apply to Robinson's case. Amended RJA, S.L. 2012-136, § 8, 2012 N.C. Sess. Laws at 473. After the overwhelming statistical evidence of systemic racial discrimination presented by Robinson, the General Assembly limited the use of that evidence in future proceedings.

On 1 October 2012, an evidentiary hearing under the Amended RJA was held for three additional defendants: Christina Walters, Quintel Augustine, and Tilmon Golphin. On 13 December 2012, the trial court entered an order granting relief for the three defendants after finding that they had established race as a significant factor in the State's use of peremptory challenges during jury selection.

After Robinson, Walters, Augustine, and Golphin showed that their death sentences were sought or imposed on the basis of race, the General Assembly repealed the RJA. Act of June 13, 2013, S.L. 2013-154, § 5.(a), 2013 N.C. Sess. Laws 368, 372 [hereinafter RJA Repeal]. The RJA Repeal was signed by the Governor on 19 June 2013. The repeal was retroactive and voided all pending motions for appropriate relief. *Id.*, 5.(d), 2013 N.C. Sess. Laws at 372. However, the RJA Repeal did not apply to a trial court order resentencing a defendant to life imprisonment without parole if that order is affirmed upon appellate review. *Id.*

The State petitioned this Court for a writ of certiorari, which this Court allowed on 11 April 2013, arguing that the trial court had abused its discretion by failing to grant the State's third motion to continue. We agreed and vacated the trial court's order granting Robinson's motion for appropriate relief without addressing the merits of the underlying claim or the constitutional and statutory challenges to the RJA. *State v. Robinson*, 368 N.C. 596, 597, 780 S.E.2d 151, 152 (2015).[7]

A joint hearing was held in the Superior Court, Cumberland County, on 29 November 2016 on the motions for appropriate relief filed by Robinson, Walters, Augustine, and Golphin. The sole question considered by the trial court was whether the defendants' claims were rendered void by the RJA Repeal. The trial court found that the defendants' rights had not vested and that the RJA Repeal was not an ex post facto law, but the trial court did not reach the defendants' claims that the RJA Repeal violated the double jeopardy protections of the state and federal constitutions. The trial court erred by failing to consider Robinson's constitutional arguments. As discussed in Section III of this opinion, a proper analysis of Robinson's double jeopardy protections focuses on whether the trial court's order granting relief under the RJA constituted an acquittal of the death penalty. Because such an acquittal would

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7. This Court also vacated the orders granting relief to Walters, Augustine, and Golphin, finding that the trial court erred by joining the cases for an evidentiary hearing and that the error recognized in *State v. Robinson*, 368 N.C. 596, 780 S.E.2d 151 (2015), infected the trial court's decision. *State v. Augustine*, 368 N.C. 594, 594, 780 S.E.2d 552, 552 (2015).

categorically bar reimposition of the death penalty, it is a threshold matter to be addressed prior to any inquiries into the effect of legislation enacted subsequent to the acquittal. The trial court concluded that the RJA Repeal retroactively voided the defendants' claims and dismissed each of the defendants' motions for appropriate relief.

Robinson filed a Petition for Writ of Certiorari on 30 May 2017, asking this Court to consider whether the retroactive application of the RJA Repeal violates the double jeopardy protections enshrined in our state constitution. We allowed the petition on 1 March 2018, and today we hold that the retroactivity provision constitutes such a violation.[8]

III.

Robinson argues that the RJA Repeal's retroactive application to those who previously received a sentence of life imprisonment without the possibility of parole after a hearing under the RJA violates the constitutional prohibition against double jeopardy. We agree. Once Robinson's death sentence was vacated under the RJA, Article I, Section 19 of the North Carolina Constitution barred the reinstatement of his capital sentence.

The prohibition against double jeopardy is a "fundamental and sacred principle of the common law, deeply imbedded in our criminal jurisprudence." *State v. Crocker*, 239 N.C. 446, 449, 80 S.E.2d 243, 245 (1954). It is an integral part of the Law of the Land clause, which guarantees that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19; *State v. Sanderson*, 346 N.C. 669, 676, 488 S.E.2d 133, 136 (1997) (citing *Crocker*, 239 N.C. 446, 80 S.E.2d 243) (noting that the prohibition against double jeopardy is embodied in the Law of the Land Clause of the North Carolina Constitution).[9] This clause has appeared in every

8. Robinson also argues that the retroactivity provision is (1) an ex post facto law; (2) in violation of his vested rights; (3) a bill of attainder; (4) an arbitrary application of the death penalty; and (5) in violation of the separation of powers. Because this Court holds that the double jeopardy protections afforded under the North Carolina Constitution's Law of the Land Clause bar Robinson from being resentenced to death, we do not address Robinson's other constitutional arguments.

9. The Law of the Land Clause, which dates back to Chapter 39 of the Magna Carta, originally appeared in Section 12 of the Declaration of Rights in 1776 and read "[t]hat no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land." *See* Magna Carta ch. 39 (1215); *see also* John V. Orth & Paul M. Newby, *The North Carolina State Constitution* 68 (2d ed. 2013).

version of the North Carolina Constitution. *See* N.C. Const. of 1776, Declaration of Rights, § 12; N.C. Const. of 1886, art. I, § 17; N.C. Const. art. I, § 19.

A prohibition against double jeopardy was also included in the Bill of Rights of the Constitution of the United States in 1791 and applies to the states through the Fourteenth Amendment. U.S. Const. amend. V; *Benton v. Maryland*, 395 U.S. 784, 796, 89 S. Ct. 2056, 2063 (1969). Our Court held that incorporation "added nothing to our law" because North Carolina's prohibition against double jeopardy "has always been an integral part of the law of North Carolina." *State v. Battle*, 279 N.C. 484, 486, 183 S.E.2d 641, 643 (1971). North Carolina's prohibition against double jeopardy, found in our Law of the Land Clause, predates any protections afforded under the Constitution of the United States. *See Crocker*, 239 N.C. at 449, 80 S.E.2d at 245 (finding that double jeopardy protections are an integral part of the Law of the Land Clause of our state constitution); *State v. Prince*, 63 N.C. 529, 531 (1869) (noting that the prohibition against double jeopardy "is a sacred principle of the [English] common law"); *State v. Garrigues*, 2 N.C. 241, 242 (1795) (disallowing the retrial of a defendant for the same offense after a hung jury).

In interpreting the double jeopardy protections of our state's Law of the Land Clause, we have often been guided by the decisions of the Supreme Court of the United States. *See Sanderson*, 346 N.C. 669, 488 S.E.2d 133. However, "[q]uestions concerning the proper construction and application of the North Carolina Constitution can be answered with finality only by this Court." *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998). This Court has "the responsibility to protect the state constitutional rights of the citizens," and this obligation "is as old as the State." *Corum v. Univ. of N.C. Through Bd. of Governors*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992). Thus, although we base our holding on the North Carolina Constitution, we may treat as persuasive the Supreme Court of the United States' reasoning regarding the double jeopardy protections afforded by the Constitution of the United States; we do so in this case. *See State ex rel. Martin v. Preston*, 325 N.C. 438, 450, 385 S.E.2d 473, 479 (1989) (observing that although this Court is not bound by the Supreme Court of the United States when interpreting state laws and our constitution, the reasoning used may be persuasive); *Bulova Watch Co., Inc. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974) (noting that "in the construction of the provision of the State Constitution, the meaning given by the Supreme Court of the United States to even an identical term in the Constitution of the United States is, though highly persuasive, not binding upon this Court").

Double jeopardy protections apply only if there has been some event, such as an acquittal, that terminates the original jeopardy. *Richardson v. United States*, 468 U.S. 317, 325, 104 S. Ct. 3081, 3086 (1984). If jeopardy is terminated by an acquittal, the State is barred from appealing any decision that might subject the defendant to another trial for the same offense. *See State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986). An acquittal is "any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." *Evans v. Michigan*, 568 U.S. 313, 318, 133 S. Ct. 1069, 1074–75 (2013). The prohibition on review of acquittals is one of the most fundamental rules in the history of double jeopardy. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S. Ct. 1349, 1354 (1977); *see also Evans*, 568 U.S. at 318, 133 S. Ct. at 1074; *Fong Foo v. United States*, 369 U.S. 141, 143, 82 S. Ct. 671, 672 (1962); *Green v. United States*, 355 U.S. 184, 188, 78 S. Ct. 221, 224 (1957). Accordingly, acquittals are final and unreviewable, even if based in error. *Ball v. United States*, 163 U.S. 662, 671, 16 S. Ct. 1192, 1195 (1896).

This is true even when the error made by the trial court is patent and unambiguous. In *Fong Foo*, the trial court, *sua sponte* in the middle of trial, directed the jury to acquit the defendant, which it did. *Fong Foo*, 369 U.S. at 141–42, 82 S. Ct. at 671. As an explanation, the trial court alleged that the prosecutor had behaved improperly and that the witnesses had been unconvincing. The Court of Appeals for the First Circuit held that the trial court had no power to grant the mid-trial acquittal, and it subsequently directed the trial court to vacate the judgment and remanded the case for a new trial. *Id.* at 142, 82 S. Ct. at 671.

The Supreme Court of the United States reversed, holding that the case "terminated with the entry of a final judgment of acquittal," which "could not be reviewed without putting (the petitioners) twice in jeopardy"—an act flatly prohibited by the Fifth Amendment. *Id.* at 143, 82 S. Ct. at 672 (quoting *Ball*, 163 U.S. at 671, 16 S. Ct. at 1195). The Court acknowledged that it was reasonable to believe that the acquittal should be set aside because it "was based upon an egregiously erroneous foundation," but to set it aside would, nevertheless, violate the constitution. *Id.* The Supreme Court has "applied *Fong Foo*'s principle broadly." *Evans*, 568 U.S. at 318, 133 S. Ct. at 1074.

An acquittal, whether granted by the jury, the trial court, or an appellate court, is non-reviewable. *See Arizona v. Rumsey*, 467 U.S. 203, 210, 104 S. Ct. 2305, 2309 (1984) (noting that the fact the sentencer was the trial court rather than the jury did not limit double jeopardy protections); *Burks v. United States*, 437 U.S. 1, 17, 98 S. Ct 2141, 2150 (1978) (stating

that the "purposes of the [Double Jeopardy] Clause would be negated" if double jeopardy did not prohibit retrial after an appellate court's finding of insufficient evidence); *United States v. Morrison*, 429 U.S. 1, 3, 97 S. Ct. 24, 26 (1976) (concluding that the trial court's finding of guilt is equivalent to a jury verdict of guilt for double jeopardy purposes).

Double jeopardy protections also extend to capital sentencing proceedings. *Sanderson*, 346 N.C. at 676, 488 S.E.2d at 136. Unlike other sentencing proceedings when the sentencer has "unbound discretion to select an appropriate punishment from a wide range" and the prosecutor "simply recommend[s] what [he or she believes] to be an appropriate punishment," capital sentencing proceedings bear "the hallmarks of the trial on guilt or innocence." *Bullington v. Missouri*, 451 U.S. 430, 438–39, 101 S. Ct. 1852, 1858 (1981). Those proceedings present the sentencer with a choice between two alternatives, provide statutory standards to guide their decision-making, and require the prosecutor to prove certain additional facts in order to justify a particular sentence. *Id.*

In capital sentencing proceedings, a defendant is acquitted of the death penalty for purposes of double jeopardy when a life sentence is imposed after a finding that the State's evidence was insufficient to prove the existence of a single aggravating circumstance. *Rumsey*, 476 U.S. at 211, 104 S. Ct. at 2310. A life sentence "based on findings sufficient to establish legal entitlement to the life sentence[ ] amounts to an acquittal on the merits." *Id.* Therefore, the relevant inquiry to determine whether imposition of a life sentence was an acquittal for purposes of double jeopardy is "whether the sentencing judge or the reviewing court has 'decid[ed] that the prosecution has not proved its case' for the death penalty." *Poland v. Arizona*, 476 U.S. 147, 154, 106 S. Ct. 1749, 1754 (1986) (alteration in original) (quoting *Bullington*, 451 U.S. at 443, 101 S. Ct. at 1860).

Our jurisprudence confirms that this is the proper inquiry. In *Sanderson*, we clarified that double jeopardy protections do not attach to each and every aggravating circumstance not sufficiently proved by the State, but rather attach in whole when the State has failed to prove the existence of any aggravating circumstance. *Sanderson*, 346 N.C. at 679, 488 S.E.2d at 138. This is because in the capital sentencing phase the State's burden is not to prove the existence of every aggravating circumstance—akin to proving every essential element of a crime—but to prove the existence of at least one. N.C.G.S. § 15A-2000(c)(1) (2019). If the State fails to prove the existence of at least one aggravating circumstance, then the defendant is acquitted of the death penalty, jeopardy terminates, and the State may not seek to reimpose capital punishment. *Id.*

A defendant is acquitted of the charges against him when the State fails to carry its burden to prove the essential elements of an offense. *Evans*, 568 U.S. at 318, 133 S. Ct. at 1074–75. He may also be acquitted when the State proves every essential element of the crime, but the defendant successfully proves the existence of an excuse or justification in the form of an affirmative defense that negates his criminal liability.

In *Burks*, the defendant's principal defense at trial was the affirmative defense of insanity. *Burks*, 437 U.S. at 2, 98 S. Ct. at 2143. On appeal, he admitted that the State had proven the necessary elements to convict him of the offense but argued that the State had not presented sufficient evidence to overcome his affirmative defense. *Id.* at 3, 98 S. Ct. at 2413. The Court of Appeals for the Sixth Circuit agreed, finding insufficient evidence that the State had "effectively rebu[tted]" the testimony of the defendant's three expert witnesses regarding his affirmative defense. *Id.* at 4, 98 S. Ct. at 2143. The defendant's judgment was vacated, and the case was remanded so the trial court could determine whether he should receive a directed verdict or a new trial. *Id.* Defendant appealed, arguing that the appellate court's ruling constituted an acquittal, regardless of whether it was entered before or after the verdict. *Id.* at 5, 98 S. Ct. at 2144. The Supreme Court of the United States agreed and held that "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient." *Id.* at 18, 98 S. Ct. at 2150–51.

The same principles apply here because claims for relief under the RJA were similar in kind to an affirmative defense. Though the State carried its burden at trial by proving the existence of at least one aggravating circumstance, the Act allowed Robinson to be acquitted of the death penalty by presenting evidence that racial discrimination infected his trial and capital sentencing proceedings. The Act provided the State an opportunity to present rebuttal evidence, but the trial court found the State's rebuttal evidence to be insufficient. Just as in *Burks*, the fact that this "acquittal" was made by a reviewing court after the original trial in Robinson's case does not negate or limit his double jeopardy protections.

Once the trial court found that Robinson had proven all of the essential elements under the RJA to bar the imposition of the death penalty, he was acquitted of that capital sentence, jeopardy terminated, and any attempt by the State to reimpose the death penalty would be a violation of our state's constitution.

We conclude that the trial court's order resentencing Robinson to life in prison was an acquittal for purposes of double jeopardy. The

sentence was imposed after a hearing bearing "the hallmarks of the trial on guilt or innocence" and was based on findings sufficient to establish that Robinson was legally entitled to the imposition of a life sentence. *See Bullington*, 451 U.S. at 438–39, 101 S. Ct. at 1858. In finding that Robinson had proven his entitlement to relief under the RJA, the trial court acquitted him of the death penalty.

The RJA required the trial court to determine whether Robinson had proven his claim that his sentence of death was sought or imposed on the basis of his race. The Act established both the type and scope of evidence that Robinson could use to meet his burden. Original RJA, § 1, 2009 N.C. Sess. Laws at 1214. The trial court's order included findings of fact that established, in great detail, that Robinson had presented sufficient evidence to establish that race played a significant factor in the State's decision to seek or impose the death penalty and that his sentence was obtained on the basis of race. The trial court's order also included findings of fact establishing that the State had not offered evidence sufficient to rebut this determination. These findings established that Robinson was legally entitled to a life sentence under the Act. Therefore, the trial court did not merely impose a life sentence, it acquitted Robinson of the death penalty based on findings he was legally entitled to receive a life sentence under the Act.

Death penalty acquittals receive double jeopardy protection because of "both the trial-like proceedings at issue and the severity of the penalty at stake." *Monge v. California*, 524 U.S. 721, 733, 118 S. Ct. 2246, 2253 (1998) (emphasis omitted). The death penalty is the most serious punishment the state can impose, and the interests protected by our Law of the Land Clause are consequently at their zenith. This Court has previously recognized that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual." *State v. Courtney*, 372 N.C. 458, 462, 831 S.E.2d 260, 264 (2019) (quoting *Green v. United States*, 355 U.S. 184, 187–88, 78 S. Ct. 221, 223 (1957)). To allow it to do so creates an "unacceptably high risk that the [State], with its superior resources, [will] wear down a defendant." *Bullington*, 451 U.S. at 445, 101 S. Ct. at 1861. The State must also not be allowed to use its superior resources and power to make repeated attempts to have a defendant sentenced to death, especially after that defendant has followed the procedures created by the state, has proven all that was required to be proved, and has been awarded relief under the statutory scheme designed by the state.[10]

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10. Justice Ervin's dissenting opinion argues that Robinson is entitled to a new hearing, based on this Court's decision in *State v. Ramseur*, but it fails to recognize the

The General Assembly passed legislation barring death sentences obtained on the basis of race. Robinson filed a timely motion for appropriate relief and presented sufficient evidence to show that he was entitled to a sentence of life imprisonment without parole. The State failed to present sufficient rebuttal evidence. After Robinson was granted relief, the General Assembly limited the use of the very statistical evidence that he had relied upon. After Walters, Augustine, and Golphin also showed that their sentences were sought or obtained on the basis of race, the General Assembly repealed the legislation altogether. The State is not only seeking another attempt at imposing a death sentence, it is seeking another attempt after having created a process which provided relief upon a showing of racial discrimination. If our constitution does not permit the State to use its power and resources over and over to obtain a conviction or impose the death penalty, it certainly does not allow the state to use that same power and resources to eliminate the remedy after a defendant has successfully proven his entitlement to that relief.

Double jeopardy protections provide certainty for defendants so that once acquitted of the death penalty, they have finality such that they may not later be resentenced to death. It also provides that same closure to the families of victims so that they are not asked to endure additional legal proceedings, never sure whether the current proceeding will, in fact, be the last. Additional proceedings beyond the hearing on Robinson's motion for appropriate relief would fail to protect either interest.

The Law of the Land Clause and the protections it affords against double jeopardy are older than this state. Those protections exist to protect defendants against the abuse of the State's virtually unlimited power to pursue prosecutions and the interests that they protect—a defendant's very life and liberty—are the weightiest interests that our

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significance of subjecting Robinson to an additional RJA hearing in its double jeopardy analysis. Citing to the case of *United States v. Wilson*, 420 U.S. 332, 95 S. Ct. 1013 (1975), the dissent argues that double jeopardy considerations do not prevent the government's ability to appeal an acquittal because reversal would simply reinstate the original verdict. However, if this matter were remanded for an additional hearing, the trial court would not be able to merely reinstate the original verdict. Instead, it would conduct a full RJA hearing, subjecting Robinson to an additional RJA proceeding. In the case of *Rumsey*, the Supreme Court expressly rejected the applicability of *Wilson* in the context of capital sentencing proceedings. *Rumsey*, 467 U.S. at 211, 104 S. Ct. at 2310. It reasoned that double jeopardy was not implicated in *Wilson* because, on remand, the trial court would "simply order the jury's guilty verdict reinstated" and the defendant would not be subjected to a second trial. *Id*. at 211-212, 104 S. Ct. at 2310. The Supreme Court noted that that if it were to remand the matter, the trial court would hold an additional capital sentencing hearing and would not merely reinstate the original verdict. *Id*. at 212, 104 S. Ct. at 2310.

state and federal constitutions serve to protect. We hold that the State is barred from reimposing a death sentence under Article I, Section 19 of our state constitution, and Robinson's sentence of life imprisonment without the possibility of parole must be reinstated.[11]

IV.

A valid judgment of a competent court is "the real and only authority for the lawful imprisonment of a person who pleads or is found guilty of a criminal offense." *In re Swink*, 243 N.C. 86, 90, 89 S.E.2d 792, 795 (1955). A judgment is final when there is no statutory basis for appeal and no petition for writ of certiorari has been filed. *State v. Green*, 350 N.C. 400, 408, 514 S.E.2d 724, 729 (1999).

The North Carolina Rules of Appellate Procedure allow for review of judgments and orders through a writ of certiorari, but review of a judgment or an order must be sought by the party seeking review. N.C. R. App. P. 21(a)(1). The distinction between seeking review of a judgment and seeking review of an order is also present in Rule 4, which governs appeals in criminal cases. *See* N.C. R. App. P. 4(b) ("The notice of appeal . . . shall designate the judgment or order from which appeal is taken . . . ."); *see also State v. Miller*, 205 N.C. App. 724, 725, 696 S.E.2d 542, 543 (2010) (holding that the court lacked jurisdiction to hear the defendant's appeal of his judgment because the defendant appealed only the trial court's order denying his motion to suppress, not the trial court's final judgment).

Here, the State failed to petition this Court for review of the judgment through a writ of certiorari. When the trial court entered its order granting Robinson's motion for appropriate relief on 20 April 2012, it also entered a separate judgment and commitment order resentencing

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11. We briefly address the impact of this Court's 18 December 2015 order vacating the trial court's order resentencing Robinson. The State filed a petition for writ of certiorari, which this Court allowed, asking this Court to review whether the trial court erred in: (1) its interpretation of the Racial Justice Act; (2) its findings of fact and conclusions of law; and (3) its failure to grant the State's third motion to continue. This Court ultimately determined that the trial court "abused its discretion by denying petitioner's third motion for a continuance" and remanded the matter for "reconsideration of respondent's motion for appropriate relief." *State v. Robinson*, 368 N.C. 596, 596–97, 780 S.E.2d 151, 151–52 (2015). We issued a similar order in the cases of Walters, Augustine, and Golphin. *See State v. Augustine*, 368 N.C. 594, 780 S.E.2d 552 (2015). Having now determined that defendant was acquitted of the death penalty under the Racial Justice Act, we conclude that any error by the trial court did not alter the essential character of the acquittal and our previous order does not impact our ultimate conclusion that Section 1, Article 19 of the North Carolina Constitution bars the reinstatement of defendant's capital sentence.

him to life in prison, pursuant to N.C.G.S. § 15A-1301. On 10 July 2012, the State filed a petition for writ of certiorari, which this Court allowed, that sought review of the order granting Robinson's motion for appropriate relief but not the trial court's judgment and commitment order vacating Robinson's death sentence and resentencing him to life in prison. No notice of appeal or petition for writ of certiorari was filed by the State as to the judgment or commitment order. Further, we note that parties must petition for review of post-conviction proceedings in death penalty cases within sixty days after delivery of the transcript of the hearing on the motion for appropriate relief to the petitioning party, a deadline that elapsed years ago. N.C. R. App. P. 21(f). Therefore, the State has failed to seek review of and now cannot seek timely review of the judgment sentencing Robinson to life in prison.

Furthermore, the State lacked the statutory authority to seek review of the judgment; it is, therefore, final and not subject to appellate review. The General Assembly has granted the State the statutory authority to seek appellate review in limited circumstances, and we construe those statutes narrowly. *State v. Elkerson*, 304 N.C. 658, 669, 285 S.E.2d 784, 791 (1982).

As a threshold matter, the General Assembly did not grant the State the power to appeal through the RJA. *See* Original RJA, §§ 1–2, 2009 N.C. Sess. Laws at 1213–15. The Act did provide that the procedures and hearing "shall follow and comply with G.S. 15A-1420, 15A-1421, and 15A-1422." *Id.*, § 1, 2009 N.C. Sess. Laws at 1215. Section 15A-1422 of the North Carolina General Statutes provides the State the right to seek review of a trial court's ruling on a motion for appropriate relief, but review is limited to those filed pursuant to N.C.G.S. § 15A-1415. N.C.G.S. § 15A-1422(c) (2019). Robinson's motion for appropriate relief was not filed pursuant to N.C.G.S. § 15A-1415. Rather, it was filed pursuant to the Act. Therefore, we find that the State lacked the statutory authority to appeal Robinson's judgment pursuant to N.C.G.S. § 15A-1422.

The State's only other statutory right to appeal is contained in N.C.G.S. § 15A-1445, which provides the State a right to appeal in the following circumstances, unless prohibited by the rule against double jeopardy:

> (1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.
>
> (2) Upon the granting of a motion for a new trial on the ground of newly discovered or newly available evidence but only on questions of law.

(3) When the State alleges that the sentence imposed:

> (a) Results from an incorrect determination of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;
>
> (b) Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level;
>
> (c) Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or
>
> (d) Imposes an intermediate punishment pursuant to G.S. 15A-1340.13(g) based on findings of extraordinary mitigating circumstances that are not supported by evidence or are insufficient as a matter of law to support the dispositional deviation.

N.C.G.S. § 15A-1445(a)(1)–(3) (2019). None of these provisions grant the State the statutory authority to appeal the trial court's judgment sentencing Robinson to life in prison. Therefore, the State lacked and continues to lack the statutory authority to appeal life sentences entered pursuant to the RJA.

Because the retroactivity provision of the RJA Repeal violates the double jeopardy protections of the North Carolina Constitution, because the State failed to appeal the judgment of the trial court, and because the State lacked the statutory authority to appeal that judgment in any event, we vacate the trial court's order dismissing Robinson's claim under the RJA and remand for the reinstatement of a sentence of life imprisonment without parole.

VACATED AND REMANDED.

Justice HUDSON concurring in result.

While I agree with the majority that this case is controlled by double jeopardy principles stemming from the Law of the Land Clause of the North Carolina Constitution, I prefer to rely on the analysis of Part IV of the majority opinion. I do not agree that the trial court's lengthy order

entered on 20 April 2012 was final; the State was permitted to and did seek review of it by filing a petition for writ of certiorari as provided by the Racial Justice Act. For the reasons set forth in Part IV of the majority opinion, however, I agree that the separate judgment and commitment order in which defendant Robinson was sentenced to life imprisonment without the possibility of parole, entered on that same date, was and remains a final judgment of which appellate review was neither sought nor obtained. Therefore, double jeopardy precludes further review of the judgment. Accordingly, I respectfully concur in the result.

Justice NEWBY dissenting.

As a monarch, King Louis XVI once famously said, "*C'est légal, parce que je le veux*" ("It is legal because it is my will.").[1] Today, four justices of this Court adopt the same approach to the law, violating the norms of appellate review and disregarding or distorting precedent as necessary to reach their desired result. Apparently, in their view, the law is whatever they say it is.

In essence the majority opinion presents three novel and unsupported theories of double jeopardy:

1) In the majority opinion Part III, it argues that this Court lacked the authority to vacate the 2012 RJA order, despite our order explicitly vacating it based on our holding that the trial court procedure was fundamentally flawed. Thus, the 2012 RJA order was not vacated and any attempt at appellate review violates double jeopardy principles.

2) In the majority opinion Part IV, it argues that, while this Court had the authority to review the 2012 RJA order and the corresponding amended judgment and commitment order (the amended J & C), the State failed to seek review of the amended J & C. In its petition for writ of certiorari which this Court granted, the State only sought review of the underlying 2012 RJA order. While the 2012 RJA order which was the basis for the amended J & C was vacated, our order did not vacate the corresponding amended J & C. The amended J & C is thus a final order.

3) In the majority opinion Part IV, it argues that, while this Court had the authority to review the 2012 RJA order, it did not have the authority to review the corresponding amended J & C.

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1. Jay Winik, *The Great Upheaval: America and the Birth of the Modern World, 1788–1800* 108 (HarperCollins 2007).

The only theory of the majority opinion that has four votes is the second theory. Justice Hudson's opinion concurring in the result notes that, while she believes the State had the authority to seek review of the 2012 RJA order and corresponding amended J & C, it only specifically sought review of the 2012 RJA order. Because the State failed to seek review of the corresponding J & C, it became a final judgment. Even though four justices agree on only one of the theories, because that theory is set out in her opinion, and for ease of reading, I refer to Chief Justice Beasley's opinion as the "majority opinion."

The votes of the four justices prevent defendant's execution for murder. It appears, however, that three justices may have a larger purpose: to establish that our criminal justice system is seriously—and perhaps irredeemably—infected by racial discrimination. To accomplish that purpose, the three adopt findings of fact made by the trial court in an order previously vacated by this Court, the 2012 RJA order. Their reliance on a vacated order is totally at odds with fundamental legal principles and this Court's many precedents holding that vacated orders are null and void. What makes their action even more remarkable—and indefensible—is that we vacated that order because the trial court denied the State adequate time to respond to the complex statistical evidence presented by defendant in support of his motion for appropriate relief under the Racial Justice Act. A one-sided version of the "facts" seems to suit their purpose.

The only order properly before this Court is the one the trial court entered after we vacated the 2012 RJA order and remanded the case, the 2017 remand order. The 2017 remand order dismissed defendant's RJA MAR upon finding that the General Assembly's repeal of the RJA applied to defendant's case. Because confining itself to the 2017 remand order would deprive it of the opportunity to attack the motives of prosecutors, jurors, and even judges, three justices try to revive the vacated order through a misapplication of double jeopardy law that fully deserves to be labeled judicial activism; the court is legislating changes in the law from the bench.

None of the majority opinion's theories implicate the constitutional prohibition against double jeopardy because none call into question the facts supporting defendant's conviction or the imposition of his capital sentence.

Although I dissented from this Court's holding in *State v. Ramseur*, 843 S.E.2d 106 (N.C. 2020), that case plainly controls the outcome here. It holds that the General Assembly's repeal of the RJA does not apply

retroactively. Based on the trial court order which is actually before us, according to *Ramseur* and our 2015 order, we should be returning this case to the trial court for a full hearing on the merits of defendant's RJA claim at a proceeding where the State has a fair chance to respond. Instead of doing the legally correct thing, the majority opinion picks its preferred destination and reshapes the law to get there. Inasmuch as today's decision cannot be justified on any legal basis, I respectfully dissent.

I.

a. Defendant's Crime and Punishment

In 1994 a jury convicted defendant of the murder of seventeen-year-old Erik Tornblom, who would have been a senior at Douglas Byrd High School. *State v. Robinson*, 342 N.C. 74, 78–80, 463 S.E.2d 218, 221–22 (1995) (*Robinson I*). Defendant and his accomplice, seventeen-year-old Roderick Williams, shot Tornblom in the face with a sawed-off shotgun after he agreed to give them a ride in his car. *Id.* at 79, 463 S.E.2d at 221. Before leaving the crime scene, defendant and Williams stole Tornblom's wallet and divided the twenty-seven dollars from it between them. *Id.* at 79, 463 S.E.2d at 221–22. Defendant admitted to law enforcement that they shot Tornblom even though he "kept begging and pleading for [defendant and Williams] not to hurt him, because he didn't have any money." *Id.* at 79, 463 S.E.2d at 221. Two days before the murder, defendant told his aunt that "he was going to burn him a whitey"; defendant repeated this statement three times. *Id.* at 80, 463 S.E.2d at 222. At trial a witness testified that, the day after the murder, defendant admitted that he had robbed a white man the night before and had shot him in the head. *Id.*[2]

Defendant pled guilty to the charges of first-degree kidnapping, robbery with a dangerous weapon, possession of a weapon of mass destruction, felonious larceny, and possession of a stolen vehicle. *Id.* at 78, 463 S.E.2d at 221. The State tried defendant capitally on the count of first-degree murder. *Id.* On the murder charge, the jury found defendant guilty both on the basis of premeditation and deliberation and under the felony murder rule. *Id.* Defendant filed a pretrial motion, citing *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986), but neither the State nor

2. Despite the heinous nature of this crime, and the crimes committed by the defendants listed in footnote 7, the majority opinion hollowly asserts that its judicial elimination of the capital sentence "do[es] not negate or diminish [defendant's] guilt or the impact of his crimes on the victim's family, the victim's friends, and the community."

the defense raised a *Batson* objection during jury selection. *See Batson*, 476 U.S. at 79, 106 S. Ct. at 1712 (holding that the Equal Protection Clause forbids a prosecutor from challenging potential jurors solely on account of their race and setting the factual threshold for a defendant to establish a prima facie case of purposeful discrimination in jury selection).

At the sentencing phase of the trial, the trial court presented the jury with the statutory aggravating circumstances supported by the evidence, *see Robinson I*, 342 N.C. at 85–86, 463 S.E.2d at 225; the jury was required to find that one or more of those aggravating circumstances existed beyond a reasonable doubt and outweighed any mitigating circumstances before recommending the death penalty, *see* N.C.G.S. § 15A-2000(c)(1)–(3) (2019). In recommending the death penalty, the jury unanimously found as aggravating circumstances that the murder was committed while defendant was engaged in the commission of first-degree kidnapping and robbery with a firearm and that the murder was especially heinous, atrocious, or cruel. *Robinson I*, 342 N.C. at 88–89, 463 S.E.2d at 227; *see* N.C.G.S. § 15A-2000(e)(5), (9) (2019). Consistent with the jury's recommendation, and as required by statute, the trial court entered a death sentence. *Id.*; *see, e.g.*, N.C.G.S. § 15A-2000 (2019).

On direct appeal, this Court unanimously found no error either in the trial or in the sentencing proceeding for the first-degree murder conviction and affirmed defendant's sentences, including the death sentence. *Robinson I*, 342 N.C. at 91, 463 S.E.2d at 228. Defendant raised no claims of racial discrimination on appeal. This decision included a proportionality review, in which this Court found the punishment consistent with other capital sentences given the circumstances of the crime. *Id.* at 88–91, 463 S.E.2d at 227–28. The Supreme Court of the United States denied further review. *Robinson v. North Carolina*, 517 U.S. 1197, 116 S. Ct. 1693 (1996). Defendant exhausted both state and federal post-conviction review and received a full evidentiary hearing in state court on his motion for appropriate relief (MAR). Defendant was scheduled to be executed on 26 January 2007, but his execution has been stayed.[3]

b. The 2012 RJA Order

Defendant committed his crimes in 1991, before the original RJA was enacted in 2009. On 11 August 2009 the RJA became law, which

3. On 22 January 2007, defendant filed a civil action in Superior Court, Wake County and obtained injunctive relief of his execution on the grounds that use of lethal injection to execute him would violate the Eighth Amendment.

allowed defendant and other death row inmates one year to file a motion pursuant to the Act. North Carolina Racial Justice Act, S.L. 2009-464, § 2, 2009 N.C. Sess. Laws 1213, 1215 [hereinafter the RJA] (codified at N.C.G.S. § 15A-2010 (2009)) (repealed 2013). Defendant filed a motion pursuant to the RJA (RJA MAR) on 6 August 2010. Defendant offered as his primary evidence a statistical study conducted by professors at the Michigan State University College of Law between 2009 and 2011, assessing jury selection statistics from across North Carolina. At the start of the hearing, the State moved for a third continuance because it needed more time to collect additional data from prosecutors throughout the state in order to address the study. *See State v. Robinson*, 368 N.C. 596, 597, 780 S.E.2d 151, 152 (2015) (*Robinson II*). The trial court denied that motion. *Id.* The trial court conducted a hearing and entered an order dated 20 April 2012 with a corresponding amended J & C. In its 2012 RJA order, the trial court stated: "[H]aving determined that Robinson is entitled to appropriate relief as to [his RJA claims], [the court] concludes that Robinson is entitled to have his sentence of death vacated, and Robinson is resentenced to life imprisonment without the possibility of parole." The amended J & C was entered based solely on this ruling in the 2012 RJA order.[4] This Court allowed the State's petition for writ of certiorari to review the 2012 RJA order (including the amended J & C entered with it).[5]

After careful review, on 18 December 2015, this Court vacated the 2012 RJA order, including the corresponding amended J & C. *Robinson II*, 368 N.C. at 597, 780 S.E.2d at 152. In our order, we stated:

> Central to [defendant's] proof in this case is a statistical study that professors at the Michigan State University College of Law conducted between 2009 and 2011. [Defendant] gave [the State] all of the data used for the study in May 2011 and a report summarizing the study's findings in July 2011. [Defendant] then provided the final version of the study to [the State] in December 2011, approximately one month before the hearing on [defendant's]

4. Four justices hold that the State failed to seek review of this amended J & C.

5. Before this Court could review the trial court's order, however, the legislature repealed the statutory provisions upon which defendant's RJA MAR relied. Act of June 13, 2013, S.L. 2013-154, § 5.(a), 2013 N.C. Sess. Laws 368, 372 [hereinafter the RJA Repeal]. On 19 June 2013, the RJA was repealed in its entirety. RJA Repeal, §§ 5.(a), 6, 2013 N.C. Sess. Laws at 372. On its face, the RJA Repeal legislation was to apply retroactively, though it exempted any judgments granting relief under the RJA that were affirmed on appeal and became final orders before the repeal's effective date. *Id.*, § 5.(d), 2013 N.C. Sess. Laws at 372.

> motion began. At the start of the hearing, [the State] moved for a third continuance because it needed more time to collect additional data from prosecutors throughout the state and to address [defendant's] study. The trial court denied the motion.

Id. at 596, 780 S.E.2d at 151. We determined that the trial court should have allowed the State's motion to continue:

> Section 15A-952 of the Criminal Procedure Act requires a trial court ruling on a motion to continue in a criminal proceeding to consider whether a case is "so unusual and so complex" that the movant needs more time to adequately prepare. N.C.G.S. § 15A-952(g)(2) (2013). [Defendant's] study concerned the exercise of peremptory challenges in capital cases by prosecutors in Cumberland County, the former Second Judicial Division, and the State of North Carolina between 1990 and 2010. The breadth of [defendant's] study placed [the State] in the position of defending the peremptory challenges that the State of North Carolina had exercised in capital prosecutions over a twenty-year period. [The State] had very limited time, however, between the delivery of [defendant's] study and the hearing date. Continuing this matter to give [the State] more time would have done no harm to [defendant], whose remedy under the Act was a life sentence without the possibility of parole. *See* N.C.G.S. § 15A-2012(a)(3). *Under these exceptional circumstances*, *fundamental fairness required that [the State] have an adequate opportunity to prepare for this unusual and complex proceeding.* Therefore, the trial court abused its discretion by denying [the State's] third motion for a continuance.

Id. (emphasis added). This Court further concluded that "[t]he trial court's failure to give [the State] adequate time to prepare resulted in prejudice." *Id.* at 597, 780 S.E.2d at 151–52.[6] In its decision, this Court "express[ed] no opinion on the merits of [defendant's] motion for appropriate relief," but vacated the 2012 RJA order and remanded to the trial court to "address [the State's] constitutional and statutory challenges

6. In seeking to reinstate the 2012 RJA order, the majority opinion remarkably faults the State for its failure to "present sufficient rebuttal evidence" despite this fundamentally flawed procedure.

pertaining to the Act." *Id.* at 596, 780 S.E.2d at 152. With the 2012 RJA order vacated, the case was remanded to the trial court to consider the State's challenges and, if needed, to conduct a new hearing, after giving the State adequate time to prepare. *Id.*; *see also State v. Augustine*, 368 N.C. 594, 780 S.E.2d 552 (2015).[7] The Supreme Court of the United States denied defendant's request to review this Court's order vacating the 2012 RJA order. *Robinson v. North Carolina*, 137 S. Ct. 67 (2016). Thus, without question, the decision by this Court to vacate the 2012 RJA order is final.

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7. For the same and additional reasons, this Court also vacated a combined trial court order addressing RJA claims of three other defendants in *State v. Augustine*, 368 N.C. 594, 780 S.E.2d 552 (2015). On remand, since the primary issue involved whether the RJA Repeal could be applied retroactively, the trial court considered the viability of defendant's RJA MAR post-repeal along with the RJA MARs filed by the three defendants.

In *State v. Augustine*, 359 N.C. 709, 616 S.E.2d 515 (2005), this Court affirmed defendant Augustine's conviction for first-degree murder on the basis of malice, premeditation and deliberation and affirmed his death sentence for the killing of Officer Roy Gene Turner, Jr. In that case, one witness testified that he heard defendant Augustine say that "he was angry because his brother had '[gotten] some time' and that he wanted to shoot a police officer," *id.* at 713, 616 S.E.2d at 520 (alteration in original), and other witnesses testified that they "saw defendant [Augustine] take a black pistol out of his pocket and cock it while the officer was still in his car. As Officer Turner emerged from his vehicle, defendant [Augustine] raised himself up on the telephone booth and fired three or four rounds at close range, causing the officer to fall to his knees." *Id.* at 714, 616 S.E.2d at 521.

In *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000), co-defendants and brothers Kevin Salvador Golphin and Tilmon Charles Golphin, Jr., were tried capitally and each were convicted of two counts of first-degree murder, two counts of robbery with a dangerous weapon, one count of assault with a deadly weapon with intent to kill, one count of discharging a firearm into occupied property, and one count of possession of a stolen vehicle. *Id.* at 379, 533 S.E.2d at 183. In that case, the evidence showed that the defendants shot and killed two police officers, Trooper Lloyd E. Lowry and Deputy David Hathcock, when the officers stopped the defendants while responding to a dispatch call that identified the defendants as fleeing the scene of a robbery of a finance company while driving a stolen vehicle. *Id.* at 380, 533 S.E.2d at 183–84.

In *State v. Walters*, 357 N.C. 68, 588 S.E.2d 344 (2003), defendant Walters was tried capitally, was found guilty of two counts of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule, and was sentenced to death for both. *Id.* at 75, 588 S.E.2d at 349. Along with the murder charges, defendant Walters was found guilty of nine other felonies arising out of a gang's crime spree that involved, *inter alia*, multiple random kidnappings of women and their execution-style shooting, ultimately resulting in the death of two of those victims, Susan Moore and Tracy Lambert, and serious injury to the other victim, Debra Cheeseborough. *Id.* at 75–78, 588 S.E.2d at 349–50. "One of the two murder victims watched as her friend was fatally shot in her presence. The other begged to be shot versus having her throat cut before she was shot in the head. The surviving victim was kidnapped at gunpoint." *Id.* at 113, 588 S.E.2d at 371.

This Court's decision today would seem to control the outcome of these cases as well.

c. The 2017 Remand Order

On remand, consistent with this Court's order, the trial court only considered whether the retroactive repeal of the RJA rendered void defendant's RJA MAR. It ultimately dismissed defendant's RJA MAR in an order filed on 25 January 2017, citing the legislature's intent that the 19 June 2013 repeal of the RJA apply retroactively. The trial court determined that "[t]his repealing legislation . . . unambiguously expressed the conclusion of the legislature that statistical evidence should not and could not be used to prove purposeful racial discrimination in a specific case." The statutory language, as the trial court noted, acknowledges that capital defendants retain all the constitutional rights, safeguards, and protections, including the right to a trial free from racial bias, that they enjoyed before the enactment of the RJA, during its tenure, and following its repeal. *See* Act of June 13, 2013, S.L. 2013-154, § 5.(b), 2013 N.C. Sess. Laws 368, 372 [hereinafter the RJA Repeal]. But, as the trial court concluded, the RJA Repeal "prohibited statistical evidence from unrelated cases from admission in evidence in a specific case."

The trial court acknowledged that the statutory language, on its face, "provides that it is retroactive and applies to any MAR filed pursuant to the RJA before 19 June 2013, and that all MARs filed before that date are void. Each MAR in these cases was filed prior to the effective date of the act, 13 June 2013[;]" therefore, the RJA Repeal should retroactively apply to them. Applying the statutory language of the RJA Repeal, the trial court determined that the "resentencing orders to life imprisonment without parole were not affirmed upon appellate review, and because th[o]se orders were subject to appellate review, and were vacated, they were not final orders by a court of competent jurisdiction." The trial court concluded that, because no final order had been entered on defendant's RJA claims or his claims under the amended RJA, those claims were controlled by the RJA Repeal, and his RJA claims were void as a matter of law.

Having interpreted the statutory language as determinative, the trial court acknowledged contentions "that the repeal of the Racial Justice Act violates [defendants'] constitutional rights or limits access to the protections from discrimination that already exist under the North Carolina and United States Constitutions." Such contentions must overcome the presumption that the General Assembly enacts constitutional legislation. Relying on case law from this Court, the trial court concluded that a final judgment, rather than the filing of a MAR, could vest a defendant's right to a remedy under the RJA. Without a final judgment,

the statutory remedy can be repealed by the legislature without constitutional implications.

In short, the remand trial court determined that, because no final order had been entered on defendant's RJA claims, those claims were controlled by the repeal of the RJA, and his RJA claims were void as a matter of law. The trial court concluded that the unconditional repeal of the RJA warranted the dismissal of defendant's RJA motion, citing *Spooners Creek Land Corp. v. Styron*, 276 N.C. 494, 496, 172 S.E.2d 54, 55 (1970), and *In re Incorporation of Indian Hills*, 280 N.C. 659, 663, 186 S.E.2d 909, 912 (1972).

d. Effect of the Vacated 2012 RJA Order

The 2017 remand order and this order alone is the subject of our review in this case. The 2012 RJA order, including its corresponding amended J & C, having been vacated no longer exists.

Significantly, on remand the trial court never conducted an evidentiary hearing or reached the merits of defendant's RJA claims. The State has never had an opportunity to present its evidence. Legally, there is no trial court order on the merits; it was vacated. Though I disagree with its decision, this Court has previously addressed the merits of the 2017 remand order in *Ramseur*, 843 S.E.2d 106, and invalidated the retroactive nature of the RJA Repeal. *Id.* at 118; *see id.* at 122–39 (Newby, J., dissenting).[8]

As stated in Justice Ervin's dissent, the decision in *Ramseur* should control this matter. But, unwilling to simply follow the law and decide the issue presented, the majority opinion takes the unprecedented and indefensible step of attempting to recreate and reinstate a trial court order that legally no longer exists. The only trial court order granting defendant relief under the RJA, the 2012 RJA order, has been declared null and void. The majority opinion, by an act of judicial will, seeks to resurrect whole cloth the 2012 RJA order, which this Court held to have been based on a fundamentally flawed process. *See Robinson II*, 368 N.C. at 597, 780 S.E.2d at 151–52. Thus, this Court vacated it as a result of its unfair proceedings. *Id.* ("The trial court's failure to give [the State] adequate time to prepare resulted in prejudice. Without adequate time to gather evidence and address [defendant's] study, [the State] did not have a full and fair opportunity to defend this proceeding." (internal citations

8. This dissent's analysis of the RJA, including its separation-of-powers discussion, is hereby incorporated by reference.

omitted)). Nonetheless, the majority opinion faults the State for its failure to present adequate rebuttal evidence.

A vacated order is treated as if the order were never entered. *See Alford v. Shaw*, 327 N.C. 526, 543 n.6, 398 S.E.2d 445, 455 n.6 (1990) (defining "vacate" as "[t]o annul; to set aside; to cancel or rescind. To render an act void; as, to vacate an entry of record, or a judgment" (quoting *Black's Law Dictionary* 1388 (rev. 5th ed. 1979))). It "render[s] the judgment null and void"; if a judgment is vacated, "no part of it could thereafter be the law of the case." *Id.* "A void judgment is, in legal effect, no judgment. No rights are acquired or d[i]vested by it. It neither binds nor bars any one, and all proceedings founded upon it are worthless—as if judgment be rendered without service on the party, or his appearance." *Stafford v. Gallops*, 123 N.C. 19, 21–22, 31 S.E. 265, 266 (1898) (citations omitted). Regardless of the nature of the trial court's order, once it is vacated, it has no legal effect. Furthermore, the 2012 RJA order procedurally is not even before this Court. Nonetheless, without analysis or apology, the majority opinion simply seeks to recreate it by raw judicial power. Despite the irredeemably flawed procedure and the State's never having had an opportunity to present its evidence, the majority opinion relies on and seeks to enforce the 2012 RJA order.

As stated earlier, the majority opinion presents three arguments only one of which garners four votes, resulting in the narrow holding that the State failed to appeal the amended J & C so that order is final. This argument is presented in Part IV of the majority opinion. Nonetheless, this dissent will address the arguments in the order in which they are presented in the majority opinion.

II.

Even if by some judicial magic the 2012 RJA order were recreated and properly before the Court procedurally, the majority opinion's creative double jeopardy analysis is flawed. I agree with Justice Ervin's assessment that the double jeopardy argument is "barred by the law of the case doctrine." Furthermore, in a capital-sentencing context, double jeopardy only applies if the final reviewing court determines that the State failed to present evidence sufficient to establish an aggravating circumstance as required to justify a capital sentence. If the State failed to present sufficient evidence, it does not get another chance. Here there is no dispute that more than sufficient evidence supported the jury's finding of both aggravating circumstances, justifying the jury's death sentence recommendation. Thus, a double jeopardy claim is not viable.

At the time of its passage, the General Assembly intended the RJA to provide a new MAR procedure through which a capitally sentenced defendant could collaterally challenge a death sentence. The RJA's procedure does not equate to a defendant's capital-sentencing proceeding because it does not conform to the standards of a criminal trial. It does not negate the facts of the underlying offense or aggravating circumstances, and it cannot serve as an affirmative defense to a sentence imposed during a defendant's capital sentencing. The RJA was simply a mechanism for a defendant to collaterally attack his sentence. Given that on appeal this Court vacated the only trial court order under the RJA, that order cannot constitute a final judgment on defendant's RJA MAR let alone an "acquittal" for double jeopardy purposes. There is no legal support for this approach. The majority opinion misstates and misapplies double jeopardy principles.

The Fifth Amendment of the United States Constitution contains a guarantee that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V; *see also Benton v. Maryland*, 395 U.S. 784, 794–96, 89 S. Ct. 2056, 2062–63 (1969) (incorporating the Double Jeopardy Clause to the States by the Fourteenth Amendment and noting its "fundamental nature" rooted in the English common law and dating back to the Greeks and the Romans); *State v. Brunson*, 327 N.C. 244, 247, 393 S.E.2d 860, 863 (1990) (recognizing the Law of the Land Clause of the North Carolina Constitution as affording the same protections as the Double Jeopardy Clause of the federal constitution). "The law of the land clause, the basis for the former jeopardy defense in North Carolina, is conceptually similar to federal due process," and therefore we "view the opinions of the United States Supreme Court with high regard in the context of interpreting our own law of the land clause." *Brunson*, 327 N.C. at 249, 393 S.E.2d at 864 (citations omitted). This Court has previously rejected a "defendant's contention that the law of this state confers greater former jeopardy protection upon defendants than the federal law does." *Id.*

"Our double jeopardy case law is complex, but at its core, the Clause means that those acquitted or convicted of a particular 'offence' cannot be tried a second time for the same 'offence.' " *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019) (quoting U.S. Const. amend. V). The protections against double jeopardy prevent multiple attempts to convict a defendant of an offense or to retry him for that offense when he has already been acquitted. "It benefits the government by guaranteeing finality to decisions of a court and of the appellate system, thus promoting public confidence in and stability of the legal system. The objective is to

allow the prosecution one complete opportunity to convict a defendant in a fair trial." *Brunson*, 327 N.C. at 249, 393 S.E.2d at 864 (1990) (citing *Arizona v. Washington*, 434 U.S. 497, 505, 98 S. Ct. 824, 830 (1978)).

Conceptually, "jeopardy" centers around the *factual* inquiry that determines guilt or innocence. "[A] defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before *the trier of the facts*, whether the trier be a jury or a judge." *United States v. Jorn*, 400 U.S. 470, 479, 91 S. Ct. 547, 554 (1971) (emphasis added). A conviction or guilty plea brings finality if it represents the final judgment "with respect to the guilt or innocence of the defendant." *See Burks v. United States*, 437 U.S. 1, 15, 98 S. Ct. 2141, 2149 (1978) (discussing that "evidentiary insufficiency," rather than a trial error, decides whether the government has failed to prove its case "with respect to the guilt or innocence of the defendant"). The protection against *double* jeopardy provides that, "once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106, 123 S. Ct. 732, 736 (2003). The State simply cannot retry a convicted defendant in pursuit of harsher punishment. *See Green v. United States*, 355 U.S. 184, 190–91, 78 S. Ct. 221, 225–226 (1957).

Finding double jeopardy presupposes a preceding final judgment, *see Burks*, 437 U.S. at 15, 98 S. Ct. at 2149. It "does not bar reprosecution of a defendant whose conviction is overturned on appeal." *Justices of Bos. Mun. Court v. Lydon*, 466 U.S. 294, 308, 104 S. Ct. 1805, 1813 (1984). "Without risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy." *Serfass v. United States*, 420 U.S. 377, 391–92, 95 S. Ct. 1055, 1064 (1975); *see also State v. Courtney*, 372 N.C. 458, 463 n.5, 831 S.E.2d 260, 265 n.5 (2019) ("[T]he State may proceed with a retrial when a defendant secures the relief of a new trial after an original conviction is vacated on appeal.").

Jeopardy will always terminate following a defendant's acquittal regardless of whether the acquittal originated from a jury or judge. *See Evans v. Michigan*, 568 U.S. 313, 328–29, 133 S. Ct. 1069, 1080–81 (2013). Hence, "[a] verdict of acquittal on the issue of guilt or innocence is, of course, absolutely final," *Bullington v. Missouri*, 451 U.S. 430, 445, 101 S. Ct. 1852, 1861 (1981), even if obtained erroneously, *see Green*, 355 U.S. at 188, 192, 78 S. Ct. at 223–24, 226. Notably, "an 'acquittal' cannot be divorced from the procedural context," *Serfass*, 420 U.S. at 392, 95 S. Ct. at 1064; it has "no significance . . . unless jeopardy has once attached

and an accused has been subjected to the risk of conviction," *id.* at 392, 95 S. Ct. at 1065.

An acquittal, by its very definition, requires some finding of innocence and "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S. Ct. 1349, 1355 (1977). An acquittal is "any ruling that the prosecution's proof is insufficient to establish criminal liability for the offense." *Evans*, 568 U.S. at 318, 133 S. Ct. at 1074–75. In a capital-sentencing context, insufficient proof to establish criminal liability supporting the capital sentence means that the State failed to present evidence sufficient to prove that at least one of the statutory aggravating circumstances existed at the time that the defendant committed the capital offense. Like proving a criminal offense in the guilt or innocence phase of a capital trial, these circumstances must be presented to a jury, and the jury must find at least one of the statutory aggravating circumstances existed beyond a reasonable doubt to impose the death penalty.

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), the Supreme Court of the United States clarified that "if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact—no matter how the State labels it—constitutes an element, and must be found by a jury beyond a reasonable doubt." *Sattazahn*, 537 U.S. at 111, 123 S. Ct. at 739 (citing *Apprendi*, 530 U.S. at 482–84, 120 S. Ct. at 2348). Thus, in the capital-sentencing context, aggravating circumstances that make a defendant eligible for the death penalty "operate as 'the functional equivalent of an element of a *greater offense*.' " *Id.* (quoting *Ring v. Arizona*, 536 U.S. 584, 609, 122 S. Ct. 2428, 2428 (2002)). It is in that sense that the sentencing phase of a capital trial carries the "hallmarks of the trial on guilt or innocence." *Bullington*, 451 U.S. at 439, 101 S. Ct. at 1858; *id.* at 438, 101 S. Ct. at 1858 ("The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence."). North Carolina's death penalty statutes reflect these principles. *See, e.g.*, N.C.G.S. § 15A-2000(c), (e), (f) (2019).[9]

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9. Following a guilty verdict of first-degree murder, in a separate trial phase the jury considers aggravating circumstances from a comprehensive list, N.C.G.S. § 15A-2000(e), presented pursuant to the Rules of Evidence, *see* N.C.G.S. § 8C-1 (2019), and weighs any mitigating circumstances in the defendant's favor, N.C.G.S. § 15A-2000(f). The jury must find the existence of an aggravating circumstance beyond a reasonable doubt and that that circumstance outweighs any mitigating circumstances before recommending the death penalty. N.C.G.S. § 15A-2000(c)(1)–(3). This Court automatically reviews cases where a

"If a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that 'acquittal' on the offense of 'murder plus aggravating circumstance(s).' " *Sattazahn*, 537 U.S. at 112, 123 S. Ct. at 740. The reason for this determination "is not that a capital-sentencing proceeding is 'comparable to a trial,' but rather that 'murder plus one or more aggravating circumstances' is a separate offense from 'murder' simpliciter." *Id.* (first quoting *Arizona v. Rumsey*, 467 U.S. 203, 209, 104 S. Ct. 2305, 2309 (1984); then citing *Bullington*, 451 U.S. at 438, 101 S. Ct. at 1861) (internal citations omitted)).

In a capital-sentencing context, only after there has been a finding that no aggravating circumstance is present can a defendant claim an acquittal, *State v. Sanderson*, 346 N.C. 669, 679, 488 S.E.2d 133, 138 (1997), and "the touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal,' " *Sattazahn*, 537 U.S. at 109, 123 S. Ct. at 738. "[A]n acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge." *Poland v. Arizona*, 476 U.S. 147, 154, 106 S. Ct. 1749, 1754 (1986) (citing *Rumsey*, 467 U.S. at 211, 104 S. Ct. at 2310).

The majority opinion correctly defines the term "acquittal" initially, but then blurs the lines between capital trials, capital-sentencing proceedings, and post-conviction procedures to broaden its definition. Simply referring to an event as an acquittal, however, does not make it so. For an event to be an "acquittal," it must tie factually to a defendant's guilt or innocence of the offense charged or factually determine that an aggravating circumstance to justify the death penalty does not exist. That definition of an acquittal remains the same and must be met regardless of the stage of the defendant's proceedings, whether during a defendant's capital trial or capital-sentencing proceedings, on appeal, or during post-conviction proceedings.

In *Sattazahn* the state statute required a unanimous jury to impose a death sentence. *Sattazahn*, 537 U.S. at 109–10, 123 S. Ct. at 738–39. When a jury was hopelessly deadlocked in the penalty stage, the same statutory scheme required the judge to enter life sentence. *Id.* At defendant Sattazahn's trial, the jury convicted him but was hopelessly deadlocked on the death penalty, and the judge imposed a life sentence. *Id.* at 104–05, 123 S. Ct. at 736. Defendant Sattazahn appealed, and the appellate court

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death sentence is imposed to ensure the defendant received a fair trial, free from prejudicial error, and that the death sentence was proportional to the facts of the defendant's individual case. *See* N.C.G.S. § 7A-27(a)(1) (2019).

reversed the first-degree murder conviction and remanded the case for a new trial. *Id.* at 105, 123 S. Ct. at 736. On remand the State presented evidence of an *additional* aggravating circumstance, the jury again convicted defendant Sattazahn of first-degree murder, but this time imposed a death sentence. *Id.* Both the conviction and sentence were affirmed on appeal. *Id.* On review the Supreme Court of the United States determined that defendant Sattazahn's original life sentence was not an acquittal on the merits, *id.* at 109, 123 S. Ct. at 738, reiterating that "it is not the mere imposition of a life sentence that raises a double-jeopardy bar," *id.* at 107, 123 S. Ct. at 737. The judge's imposition of a life sentence during the first trial was not an "acquittal" for double jeopardy purposes because the jury's inability to agree did not constitute a finding of fact that no aggravating circumstance existed. *See id.* at 112–13, 123 S. Ct. at 740.[10]

In *Bobby v. Bies*, 556 U.S. 825, 129 S. Ct. 2145 (2009), the Supreme Court of the United States considered a post-conviction attempt to vacate a defendant's death sentence based on the aggravating and mitigating circumstances the jury considered at his capital-sentencing proceeding. *Id.* at 831, 129 S. Ct. at 2150. In its analysis, the Supreme Court distinguished an actual acquittal for double jeopardy purposes from a post-conviction attempt to vacate a death sentence. *Id.* at 829, 129 S. Ct. at 2149. Defendant Bies argued that a then-recent case *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002), which prohibited the execution of intellectually disabled defendants, entitled him to post-conviction sentencing relief. *Id.* at 832, 129 S. Ct. at 2151. Defendant Bies contended that, because the jury in his case had found his intellectual disability to be a mitigating circumstance at his prior sentencing hearing, the jury essentially found facts sufficient to settle the issue of his intellectual disability. *Id.* Considering this fact-finding as a type of "issue preclusion," the federal appeals court concluded that it, in conjunction with defendant Bies's newly recognized "*Aktins* defense" of intellectual disability, "acquitted" defendant Bies of his death sentence and vacated his death sentence. *Id.* at 832–33, 129 S. Ct. at 2151. In that court's view,

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10. A jury can also revisit previously submitted aggravating circumstances in a new capital-sentencing proceeding without implicating double jeopardy, if there has been no conclusive factual finding on those factors. *Sanderson*, 346 N.C. at 679, 488 S.E.2d at 138 (Double jeopardy principles did not prevent a jury's consideration of aggravating circumstances in a third capital-sentencing proceeding when neither jury previously found that no aggravating circumstance existed). *Compare Poland*, 476 U.S. at 154, 106 S. Ct. at 1755 (The failure to find one particular aggravating circumstance is not an acquittal for double jeopardy purposes and does not preclude the death penalty.), *with Rumsey*, 467 U.S. at 203, 205, 104 S. Ct. at 2305, 2307 (A life sentence imposed by a judge during a capital-sentencing proceeding, who found no aggravating circumstances, constituted an acquittal of the death penalty for purposes of the Double Jeopardy Clause.).

any proceedings on defendant Bies's intellectual disability would violate double jeopardy. *Id.* at 833, 129 S. Ct. at 2151.

On review the Supreme Court of the United States first reiterated that "[t]he touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal.' " *Id.* (quoting *Sattazahn*, 537 U.S. at 109, 123 S. Ct. at 738). Since the State presented sufficient evidence to support the jury's finding of aggravated circumstances during the capital-sentencing proceeding, and the jury then voted to impose the death penalty, there was no "acquittal." *Id.* at 833–34, 129 S. Ct. at 2152. The State did not "twice put [defendant Bies] in jeopardy" because "neither the judge nor the jury had acquitted the defendant in his first . . . proceeding by entering findings sufficient to establish legal entitlement to the life sentence." *Id.* at 833, 129 S. Ct. at 2151–52 (first quoting U.S. Const. amend. V; then quoting *Sattazahn*, 537 U.S. at 108–09, 123 S. Ct. at 738). The issue in *Bies* did not involve serial prosecutions or an attempt by the State to procure a conviction or to increase defendant Bies's punishment, but rather his "second run at vacating his death sentence." *Id.* at 833–34, 129 S. Ct. at 2152 (quoting *Bies v. Bagley*, 535 F.3d 520, 531 (6th Cir. 2008) (Sutton, J., dissenting)). Such an inquiry does not implicate double jeopardy. *Id.*

A RJA MAR hearing does not involve serial prosecutions or an attempt by the State to procure a conviction or to increase a defendant's punishment. It is not akin to a trial on the merits as to the issue of punishment. The subject matter of the RJA hearing is unrelated to the murder that led to a defendant's conviction and sentence. Even if relief is granted under the RJA, it does not invalidate, excuse, or justify a defendant's guilt for that murder. A RJA hearing does not seek to increase a defendant's punishment; a defendant asserting RJA claims has already received the highest punishment available. Even if relief is initially granted under the RJA, a RJA hearing does not invalidate the aggravating circumstances that justified the imposition of the death sentence as required for an acquittal. Because defendant here "cannot establish that the jury or the court 'acquitted' him during his first capital-sentencing proceeding," *Sattazahn*, 537 U.S. at 109, 123 S. Ct. at 738, double jeopardy does not apply.

Nonetheless, the majority opinion creatively cites *Burks* in an attempt to support its argument. *See Burks*, 437 U.S. 1, 98 S. Ct. 2141. *Burks*, however, simply stands for the same basic proposition that the evidence presented at the guilt or innocence phase of defendant's capital trial must be sufficient to justify a defendant's conviction. *Id.* At his trial for a bank robbery, defendant Burks relied on an insanity defense and

presented multiple expert witnesses to support that theory. *Id.* at 2–3, 98 S. Ct. at 2143. The prosecution offered, *inter alia*, its expert witnesses in rebuttal, but they acknowledged defendant Burks's "character disorder" and one of those witnesses equivocally answered whether defendant Burks was capable of conforming his conduct to the law. *Id.* at 3, 98 S. Ct. at 2143. Defendant Burks unsuccessfully moved for an acquittal before the case was submitted to the jury, which found him guilty. *Id.* Following his conviction, he argued that the evidence was insufficient to support the guilty verdict, and the trial court denied any relief. *Id.*

On direct appeal the reviewing court held that the prosecution had failed to rebut defendant Burks's proof of insanity at the guilt or innocence phase, a defense that could excuse his criminal culpability for the offense itself. *Id.* at 17–18, 98 S. Ct. at 2150–51. The appellate court reversed and remanded the case for the trial court to decide whether defendant was entitled to a new trial or a directed verdict of acquittal. *Id.* at 4, 98 S. Ct. at 2144.

On appeal to the Supreme Court of the United States, the issue presented was "whether a defendant may be tried a second time when a reviewing court has determined that in a prior trial the evidence was insufficient to sustain the verdict of the jury." *Id.* at 5, 98 S. Ct. at 2144. The Supreme Court concluded that, once the reviewing court found the evidence presented at his first trial insufficient to warrant a guilty verdict, the protection against double jeopardy prevented a *second trial* during which the prosecution could try to supply the evidence once lacking and secure a guilty verdict. *Id.* at 18, 98 S. Ct. at 2150–51.

> The appellate decision unmistakably meant that the [trial court] had erred in failing to grant a judgment of acquittal. . . . The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials.

Id. at 11, 98 S. Ct. at 2147 (footnote omitted). The Supreme Court then placed defendant Burks's scenario within the traditional double jeopardy protection that prevents a series of trials and repeated attempts *to convict* a defendant of a criminal offense:

> The Clause does not allow "the State . . . to make repeated attempts to convict an individual for an alleged offense," since "[t]he constitutional prohibition against 'double jeopardy' was designed to protect an individual from being

> subjected to the hazards of trial and possible conviction more than once for an alleged offense."

Id. (quoting *Green*, 355 U.S. at 187, 78 S. Ct. at 223).

The RJA, however, does not constitute an affirmative defense to a capital offense because RJA relief does not negate proof of the elements of any capital offense or any aggravating circumstance in capital sentencing. The cases relied on by the majority opinion only find an acquittal when the evidence is legally *insufficient* to support proof of the offense committed or proof of the aggravating factors beyond a reasonable doubt. Defendant has already been convicted at his capital trial, received the highest sentence possible at his capital-sentencing proceeding before a jury, and both his conviction and sentence has been affirmed on appeal. Defendant has never received an "acquittal on the merits." *See Poland*, 476 U.S. at 154, 106 S. Ct. at 1754.

RJA claims are not part of a defendant's capital trial or capital-sentencing proceeding at all, but must be pursued by filing a collateral MAR. A post-conviction hearing on a RJA MAR does not bear "the hallmarks of the trial on guilt or innocence," as argued by the majority opinion because, as it also concedes, defendant's guilt or any other factual inquiry surrounding the nature of the offense at the time of its commission are not at issue.

To support the desired outcome, the majority opinion here seeks to expand the interpretation of double jeopardy far beyond that recognized by our case law or that of the federal courts. Without authority, the majority opinion tries to embed that expansive interpretation into our state constitution. Notably, this Court has held that the double jeopardy protection provided by our state constitution provides no greater protection than its federal counterpart. *Brunson*, 327 N.C. at 249, 393 S.E.2d at 864 (rejecting the "defendant's contention that the law of this state confers greater former jeopardy protection upon defendants than the federal law does").

III.

Recognizing the deficiencies in its double jeopardy analysis based on its attempt to resurrect the 2012 RJA order, the majority opinion submits alternative theories, again unsupported by law: The majority opinion argues that the State only sought appellate review of the 2012 RJA order, not the corresponding amended J & C entered pursuant to the 2012 RJA order. The majority opinion reasons that, even if the 2012 RJA order were vacated, the companion amended J & C remains effective

because it was not part of the certiorari review allowed by this Court. As previously noted, this theory—that the State failed to seek review of the amended J & C—is the only theory for which there are four votes. The majority opinion further argues that the State was prohibited from seeking any appellate review of the amended J & C.

Both of these creative arguments are indefensible. The only legal basis for the trial court's entry of the amended J & C was the 2012 RJA order. By allowing the State's petition for writ of certiorari to review the court's ruling of defendant's RJA MAR, this Court granted review of the entire proceeding. Once the 2012 RJA order was vacated, everything arising from it was likewise void. It is nonsensical to concede that the 2012 RJA order was properly before the Court, but the amended J & C was not. Similarly, there is no support that this Court's review of the amended J & C was prohibited. Both under our state constitution and applicable statutes the State had the authority to seek appellate review. Finally, as previously discussed, the validity of the 2012 RJA order with its corresponding amended J & C is not procedurally before this Court.

The General Assembly intended the RJA to allow a capitally sentenced defendant to collaterally challenge a death sentence by generally following the MAR procedures. Like any other trial court decision on a MAR, it is subject to appellate review. By allowing the State's petition for writ of certiorari, this Court provided appellate review of the entire MAR proceeding, including the process and any resulting orders. It is indisputable that this Court has the authority to review the actions of any lower court.

The state constitution recognizes this Court's jurisdiction to review any decision of the courts below, N.C. Const. art. IV, § 12, and that it has subject matter jurisdiction regardless whether the trial court grants or denies relief, *see id.* art IV, § 12(1) ("The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference."). This basic principle of appellate review rings particularly true here because this Court has appellate jurisdiction by statute over death penalty cases like this one. *See* N.C.G.S. § 7A-27(a)(1) (2019).

I agree with the statutory analysis of Justice Ervin in his dissenting opinion that the amended J & C was subject to appellate review which we granted when this Court allowed the State's petition for writ of certiorari. Our case law supports this perspective. In *State v. Stubbs*, 368 N.C. 40, 770 S.E.2d 74 (2015), this Court determined "the Court of Appeals has subject matter jurisdiction to review the State's appeal from a trial

court's ruling on a [MAR] when the defendant has been granted relief in the trial court." *Id.* at 41, 42–43, 770 S.E.2d at 76. In that case, defendant Stubbs's 1973 guilty plea resulted in a sentence of life imprisonment, *id.* at 40, 770 S.E.2d at 75, but under the new Structured Sentencing Act, the length of his sentence would have likely been much shorter, *id.* at 40 n.1, 770 S.E.2d at 75 n.1 (citing N.C.G.S. §§ 15A-1340.10 to 1340.23 (effective 1 Oct. 1994)). In 2011 defendant Stubbs filed a pro se MAR in the Superior Court, Cumberland County arguing that the new Structured Sentencing Act made "significant changes" in the sentencing laws and that his 1973 sentence now constituted cruel and unusual punishment under the Eighth Amendment to the federal constitution. *Id.* at 40, 770 S.E.2d at 75. After an evidentiary hearing, the trial court agreed, granted the MAR, and vacated defendant Stubbs's judgment and life sentence. *Id.* The trial court then resentenced defendant Stubbs to a term of thirty years, applied time served, and ordered his immediate release. *Id.* The State sought review by a petition for writ of certiorari. *Id.*

A panel of the Court of Appeals reversed the trial court's order and remanded to the trial court for reinstatement of the original 1973 sentence. *Id.* In doing so, it "addressed whether it had subject matter jurisdiction to review the State's appeal from a trial court's decision on a defendant's MAR when the defendant prevailed in the trial court." *Id.* at 42, 770 S.E.2d at 75. In taking up this same question on appeal, this Court first noted that "the General Assembly has specified when appeals relating to MARs may be taken" by writ of certiorari, for instance, when "the time for appeal has expired and no appeal is pending." *Id.* at 42–43, 770 S.E.2d at 76 (quoting N.C.G.S. § 15A-1422(c) (2014)). "[S]ubsection 15A-1422(c) does not distinguish between a MAR when the State prevails below and a MAR under which the defendant prevails." *Id.* at 43, 770 S.E.2d at 76.

> Accordingly, given that our state constitution authorizes the General Assembly to define the jurisdiction of the Court of Appeals, and given that the General Assembly has given that court broad powers "to supervise and control the proceedings of any of the trial courts of the General Court of Justice," [N.C.G.S.] § 7A-32(c), and given that the General Assembly has placed no limiting language in subsection 15A-1422(c) regarding which party may appeal a ruling on an MAR, we hold that the Court of Appeals has jurisdiction to hear an appeal by the State of an MAR when the defendant has won relief from the trial court.

Id. A trial court may not unilaterally reduce sentences without being subjected to appellate review. A trial court's order on a MAR is subject to review regardless of the prevailing party or subject matter. Significantly, this Court did not distinguish between review of the trial court's MAR ruling and any corresponding amended J & C.

In *State v. Bowden*, 367 N.C. 680, 766 S.E.2d 320 (2014), defendant Bowden unsuccessfully sought application of various credits to his life sentence at the trial court through a petition for writ of habeas corpus and later following a MAR hearing under N.G.G.S. § 15A-1420. *Id.* at 681–82, 766 S.E.2d at 321–22. Upon a second remand from the Court of Appeals, the trial court granted defendant relief and calculated and applied all of his credits to determine that defendant had served his entire sentence. *Id.* at 682, 766 S.E.2d at 322. Notably, though ordering defendant's unconditional release, the trial court anticipatorily "stayed its order the following day *pending final appellate review*." *Id.* (emphasis added). This Court reversed, recognizing that these credits have never applied toward the calculation of an unconditional release date for a similarly situated inmate like Bowden serving a life sentence." *Id.* at 685–86, 766 S.E.2d at 324. Even though the trial court had ordered defendant Bowden's immediate release through a MAR, this Court reversed upon review, and defendant "remain[ed] lawfully incarcerated." *Id.* Like defendant Stubbs, defendant Bowden received more than one round of appellate review, both with the Court of Appeals and with this Court, even though he was twice denied relief by the trial court and once granted relief by the trial court.

Here the 2012 RJA order including the corresponding amended J & C, has been subjected to appellate review, has been determined to be the result of a fundamentally flawed procedure, and has been vacated. A vacated trial court order certainly carries no degree of finality and is void. *See Robinson II*, 368 N.C. at 597, 780 S.E.2d at 152.

It is ludicrous to say that defendant's resentencing in the amended J & C can stand alone when that resentencing could only legally occur based on the underlying 2012 RJA order. Certainly, the State sought review of defendant's resentencing through its petition for writ of certiorari when it sought review of the 2012 RJA order. That order explicitly stated that, "having determined that Robinson is entitled to appropriate relief as to [his RJA claims], . . . Robinson is entitled to have his sentence of death vacated, and Robinson is resentenced to life imprisonment without the possibility of parole." The amended J & C simply effectuated this order. There is no legal support for the holding that the State failed to appeal the amended J & C.

IV.

In its apparent eagerness to undermine defendant's death sentence, the majority opinion steps outside our time-honored judicial role of simply deciding the case before us. Of the three novel theories presented, only one, the narrowest, has four votes. These four justices hold that the State failed to seek judicial review of the amended J & C when this Court allowed review of the 2012 RJA order. As with the other two theories, there is no legal support for this position. There is no explanation of how an amended J & C, which effectuated the 2012 RJA order can legally exist apart from the 2012 RJA order. It does exist and is given substance purely by four votes. The majority opinion's extraordinary judicial activism is completely unnecessary. This case should be controlled by our prior decision in *Ramseur* and remanded to the trial court for a new RJA hearing. The majority opinion's result guarantees that the State will never have a fair hearing in court. The ultimate damage to our jurisprudence and public trust and confidence in our judicial system is yet to be determined. I dissent.

Justice ERVIN, dissenting.

I am unable to join the Court's decision to reinstate the trial court's original order and judgment sentencing defendant to a term of life imprisonment rather than death based upon a determination that Judge Weeks' order finding that defendant's race had been a significant factor in the imposition of his death sentence was entitled to double jeopardy effect and that the State had not sought and was not entitled to seek appellate review of the judgment that Judge Weeks entered in light of the determination reflected in his order. On the contrary, I believe that the Court's holding that Judge Weeks' "order resentencing [defendant] to life in prison was an acquittal for purposes of double jeopardy" (1) fails to take the procedural context in which that decision was made into account despite the fact that the double jeopardy-related rules applicable to acquittals that occur before and after the initial verdict are different and (2) implicitly vacates this Court's 2015 order overturning Judge Weeks' decision and remanding this case to the Superior Court, Cumberland County, *State v. Robinson*, 368 N.C. 596, 780 S.E.2d 151 (2015), *cert. denied*, 137 S. Ct. 67, 196 L. Ed. 2d 34 (2016), despite the fact that the State sought review of Judge Weeks' decision in accordance with the applicable statutory provisions and prevailed before this Court on procedural grounds. As a result, given my belief that the Court's decision is simply inconsistent with the relevant decisions of this Court and the Supreme Court of the United States and with this Court's statutory

authority to review decisions of the trial court in proceedings conducted pursuant to the Racial Justice Act, I respectfully dissent from the Court's decision and would, instead, reverse the trial court's order and remand this case to the Superior Court, Cumberland County, for a hearing concerning the merits of defendant's Racial Justice Act claim on the basis of the logic set out in this Court's decision in *State v. Ramseur*, 843 S.E.2d 106 (2020), and our 2015 order.

As an initial matter, the Court's determination that Judge Weeks' order granting relief pursuant to the Racial Justice Act constituted a final acquittal for double jeopardy purposes cannot be squared with the relevant decisions of the Supreme Court,[1] which have stated that, in the event that a defendant is acquitted following a jury verdict or a decision made at a bench trial, double jeopardy considerations do not prevent the government from appealing the acquittal decision given that an appellate reversal would simply reinstate the original verdict rather than subject the defendant to a second trial. *See United States v. Wilson*, 420 U.S. 332, 344–45, 95 S. Ct. 1013, 1022, 43 L. Ed. 2d 232, 242 (1975). In view of the fact that the effect of an appellate decision vacating Judge Weeks' order and the related judgment and remanding this case to the Superior Court, Cumberland County, for further proceedings would, depending upon the result reached on remand, at most, have the effect of reinstating the original jury verdict and the resulting death sentence, I am not persuaded that Judge Weeks' order and the related judgment were entitled to preclusive effect or that the order and judgment must be reinstated.

In *Wilson*, the defendant was charged with converting union funds in order to pay for his daughter's wedding reception in violation of federal law. *Id*. at 333, 95 S. Ct. at 1017, 43 L. Ed. 2d at 235–36. The government began its investigation into the defendant's alleged unlawful conduct in April 1968, concluded that investigation in June 1970, and did not indict the defendant for another sixteen months, formally charging him three days prior to the expiration of the applicable statute of limitations. *Id*. at 333–34, 95 S. Ct. at 1017, 43 L. Ed. 2d at 235–36. The defendant filed a pretrial motion seeking to have the indictment dismissed on the grounds that the government's delay in charging him had prejudiced his ability to

1. As this Court has previously stated, the double jeopardy protection inherent in article I, section 19 of the state constitution affords the same protections to criminal defendants as the double jeopardy provision of the Fifth Amendment to the Constitution of the United States. *State v. Oliver*, 343 N.C. 202, 205, 470 S.E.2d 16, 18 (1996) (discussing double jeopardy and N.C. Const. art. I, § 19).

obtain a fair trial given that two defense witnesses—one of whom had died and the other of whom was suffering from a terminal illness—would be unavailable to testify. *Id.* at 334, 95 S. Ct. at 1017, 43 L. Ed. 2d at 236. After the trial court denied the defendant's dismissal motion, the jury found the defendant guilty. *Id.* Following the return of the jury's verdict, the defendant filed several post-verdict motions in which he reiterated his assertion that, among other things, the charge that had been lodged against him should have been dismissed on the basis of preindictment delay. *Id.* At that point, the district court reversed itself and dismissed the indictment that had been returned against the defendant on the grounds that he had been subject to unreasonable preindictment delay that had prejudiced his ability to obtain a fair trial. *Id.* Although the government appealed from the trial court's order, the United States Court of Appeals for the Third Circuit dismissed the government's appeal on the grounds that the trial court's dismissal decision constituted an acquittal that was entitled to double jeopardy effect. *Id.* at 335, 95 S. Ct. at 1017–18, 43 L. Ed. 2d at 236–37. After granting certiorari, the Supreme Court reversed the Third Circuit's decision on the grounds that the government was entitled to appeal from the district court's dismissal order given that the challenged order was not entitled to preclusive effect.[2] *Id.* at 352–53, 95 S. Ct. at 1026, 43 L. Ed. 2d at 246–47.

In rejecting the defendant's argument that the Double Jeopardy Clause precluded the government from appealing the district court's dismissal order, the Supreme Court recognized that "[t]he development of the Double Jeopardy Clause from its common-law origins . . . suggests that it was directed at the threat of multiple prosecutions, not at Government appeals, at least where those appeals would not require a new trial." *Id.* at 342, 95 S. Ct. at 1021, 43 L. Ed. 2d at 241. Thus, "where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended." *Id.* at 344, 95 S. Ct. at 1022, 43 L. Ed. 2d at 242. For that reason, prosecutorial appeals of adverse rulings noted after the return of the jury's verdict or the judge's decision at the conclusion of a bench trial do not implicate double jeopardy considerations because "reversal on appeal would merely reinstate the jury's verdict" without "offend[ing] the policy against multiple prosecution." *Id.* at 344–45, 95 S. Ct. at 1022, 43 L. Ed. 2d at 242. Simply put, the "[c]orrection of [a post-verdict error of law by a trial judge] would

2. The Supreme Court of the United States assumed, without deciding, that an order dismissing a case based upon prejudicial preindictment delay would constitute an acquittal for double jeopardy purposes. *Wilson*, 420 U.S. at 336, 95 S. Ct. at 1018, 43 L. Ed. 2d at 237.

not grant the prosecutor a new trial or subject the defendant to the harassment traditionally associated with multiple prosecutions." *Id.* at 352, 95 S. Ct. at 1026, 43 L. Ed. 2d at 247. As a result, the Supreme Court held that, "when a judge rules in favor of the defendant after a verdict of guilty has been entered by the trier of fact, the Government may appeal from that ruling without running afoul of the Double Jeopardy Clause," *id.* at 352–53, 95 S. Ct. at 1026, 43 L. Ed. 2d at 247, and that, given that the jury had returned a verdict convicting the defendant, the government's appeal from the district court's order dismissing the indictment that had been returned against the defendant could be entertained by the appellate courts without placing the defendant in jeopardy multiple times for the same offense. *Id.* at 353, 95 S. Ct. at 1026–27, 43 L. Ed. 2d at 247 (stating that, "if [the defendant] prevails on appeal, the matter will become final, and the Government will not be permitted to bring a second prosecution against him for the same offense").[3]

Although this Court has not previously addressed the issue decided by the Supreme Court in *Wilson*, the Court of Appeals has adopted an approach to this issue that is consistent with the one that I believe to be appropriate. In *State v. Scott*, the State appealed from the trial court's order granting a post-verdict motion to dismiss for insufficiency of the evidence. 146 N.C. App. 283, 285, 551 S.E.2d 916, 918 (2001), *rev'd on other grounds*, 356 N.C. 591, 573 S.E.2d 866 (2002). In rejecting the defendant's contention that the State had no right to note an appeal from the trial court's dismissal order and that allowing the State's appeal would result in a double jeopardy violation, *id.* at 285–86, 551 S.E.2d at 918–19, the Court of Appeals began by recognizing that, "[a]t common law, the State had no right to bring an appeal" and could only be "authorized to do so by statute." *Id.* at 285, 551 S.E.2d at 918. As a general proposition, the State is entitled to pursue an appeal from an adverse trial court decision "[u]nless the rule against double jeopardy prohibits further

3. The Supreme Court has reiterated its decision that the Government is entitled to seek appellate review of a post-verdict ruling acquitting a defendant as long as such an appeal does not subject the defendant to multiple prosecutions or punishments on multiple occasions since *Wilson*. *See, e.g.*, *Smith v. Massachusetts*, 543 U.S. 462, 467, 125 S. Ct. 1129, 1134, 160 L. Ed. 2d 914, 922–23 (2005) (stating that, "[w]hen a jury returns a verdict of guilty and a trial judge (or an appellate court) sets aside that verdict and enters a judgment of acquittal, the Double Jeopardy Clause does not preclude a prosecution appeal to reinstate the jury verdict of guilty" (citing *Wilson*, 420 U.S. at 352–53, 95 S. Ct. at 1026, 43 L. Ed. 2d at 246–47)); *Evans v. Michigan*, 568 U.S. 313, 329–30 n.9, 133 S. Ct. 1069, 1081 n.9, 185 L. Ed. 2d 124, 140 n.9 (2013) (stating that, "[i]f a court grants a motion to acquit after the jury has convicted, there is no double jeopardy barrier to an appeal by the government from the court's acquittal, because reversal would result in reinstatement of the jury verdict of guilt, not a new trial" (citing *Wilson*, 420 U.S. at 332, 95 S. Ct. at 1013, 43 L. Ed. 2d at 232)).

prosecution," including instances in which "there has been a decision or judgment dismissing the criminal charges as to one or more counts." N.C.G.S. § 15A-1445(a)(1) (2019). In light of the fact that the trial court's dismissal order constituted a decision or judgment dismissing criminal charges, the Court of Appeals concluded that "the State [was] within its statutory authority to bring this appeal as long as it [did] not violate the rule against double jeopardy," *Scott*, 146 N.C. App. at 285, 551 S.E.2d at 918, and that the State's appeal did not result in a double jeopardy violation because "reversal would only serve to reinstate the verdict rendered by the jury," with "defendant [being] in no danger of re[-]prosecution [because] the appeal does not place the defendant in double jeopardy." *Id.* at 286, 551 S.E.2d at 918 (citing *Wilson*, 420 U.S. at 344–45, 95 S. Ct. at 1022–23, 43 L. Ed. 2d at 242). According to the Court of Appeals, "[t]he emphasis of double jeopardy is on the possibility of [the] defendant being subjected to a new trial—not whether the dismissal acts as a verdict of not guilty"—and that, "[a]s long as [the] defendant would not be subjected to a new trial on the issues, his double jeopardy rights have not been violated." *Id.* at 286, 551 S.E.2d at 919. As a result, the Court of Appeals held that the State could lawfully bring its appeal. *Id.*

Assuming, for the purpose of discussion, that Judge Weeks' decision to grant defendant's motion for appropriate relief by affording defendant relief pursuant to the Racial Justice Act and to enter a judgment sentencing him to a term of life imprisonment constituted an acquittal as that term is used in double jeopardy jurisprudence, that decision was not unreviewable and double jeopardy was not implicated because any appellate reversal of that decision would, at most, result in the reinstatement of the defendant's original sentence and would not subject defendant to a new trial.[4] All of the decisions upon which this Court relies in reaching a different result involve either acquittals that occurred during or prior to, rather than after, the return of initial jury or judicial verdicts convicting or acquitting the defendant of the commission

4. The fact that a refusal to afford Judge Week's order double jeopardy effect will require defendant to participate in a new hearing under the Racial Justice Act does not, unlike the situation at issue in *Arizona v. Rumsey*, 467 U.S. 203, 211–12, 104 S. Ct. 2305, 2310, 81 L. Ed. 2d 164, 172 (1984), in which the "acquittal" that barred retrial occurred on direct appeal from the trial court's initial judgment rather than in a post-conviction proceeding, does not, at least in my opinion, suffice to require that Judge Weeks' order be treated differently than any other postconviction acquittal, with there being no decision of either this Court or the Supreme Court of which I am aware having reached such a result and with the Supreme Court's decision to remand for further proceedings in *Bobby v. Bies*, 556 U.S. 825, 837, 129 S. Ct. 2145, 2154, 173 L. Ed. 2d 1173, 1183 (2009), appearing to me to conflict with the logic upon which the Court relies.

of a substantive criminal offense or sentencing the defendant to death; determinations that the decision in defendant's favor was not entitled to double jeopardy effect at all; or holdings that a determination made on direct appeal or in postconviction proceedings was entitled to double jeopardy effect upon becoming final. *Evans*, 568 U.S. at 324, 133 S. Ct. at 1078, 185 L. Ed. 2d at 137 (holding that the trial court's erroneous ruling that the prosecution had failed to prove the existence of an alleged element of the crime at defendant's trial that it was not, in fact, required to prove was not subject to appellate review); *Monge v. California*, 524 U.S. 721, 734, 118 S. Ct. 2246, 2253, 141 L. Ed. 2d 615, 628 (1998) (refusing to afford double jeopardy effect to an appellate determination that a trial court conclusion that the defendant had committed a "qualifying felony" for purposes of California's "three strikes and you're out" law lacked sufficient evidentiary support on the grounds that this determination did not constitute an acquittal for double jeopardy purposes); *Poland v. Arizona*, 476 U.S. 147, 157–57, S. Ct. 1749, 1757, 90 L. Ed. 2d 123, 133 (1986) (holding that a new capital sentencing hearing may be held when, in the course of a death-sentenced defendant's direct appeal, the reviewing court determines that, even though the evidence did not suffice to support the submission of the sole aggravating circumstance upon which the sentencing judge relied in sentencing the defendant to death, the record did contain sufficient evidence tending to show the existence of an aggravating circumstance that the sentencing judge erroneously found to be legally, rather than factually, inapplicable); *Rumsey*, 467 U.S. at 212, 104 S. Ct. at 2311, 81 L. Ed. 2d at 172 (holding that a trial court's decision at the defendant's initial trial and capital sentencing hearing that no aggravating circumstance existed and that the defendant was not death-eligible under Arizona law was entitled to double jeopardy effect despite a decision made in connection with the State's cross-appeal that the record evidence did, in fact, support a finding of the existence of an aggravating circumstance); *Bullington v. Missouri*, 451 U.S. 430, 446–47, 101 S. Ct. 1852, 1862, 68 L. Ed. 2d 270, 283–84 (1981) (holding that the jury's determination at the defendant's capital sentencing hearing that the defendant should be sentenced to life imprisonment rather than death was entitled to double jeopardy effect despite a decision by the trial court allowing a post-verdict motion and awarding the defendant a new trial on the issue of guilt); *Burks v. United States*, 437 U.S. 1, 17–18, 98 S. Ct. 2141, 2150–51, 57 L. Ed. 2d 1, 13 (1978) (holding that a final appellate decision that the record evidence did not suffice to support the defendant's conviction was entitled to double jeopardy effect and precluded a retrial); *Morrison v. United States*, 429 U.S. 1, 3–4, 97 S. Ct. 24, 26, 50 L. Ed. 2d 1, 4 (1976) (holding that an acquittal

at a bench trial has the same effect as an acquittal by a jury for double jeopardy purposes); *Fong Foo v. United States*, 369 U.S. 141,143, 82 S. Ct. 671, 672, 7 L. Ed. 2d 629, 631 (1962) (holding that a trial court's determination during the course of the defendant's trial that the defendant should be acquitted on a legally unsupportable ground was entitled to double jeopardy effect). Simply put, the Court has not cited any decision of either the Supreme Court or this Court holding that a postconviction acquittal of the type at issue here is subject to preclusive effect unless and until that decision has become final at the conclusion of the process of appellate review, and I have been unable to find any such decision in the course of my own research. As a result, I feel compelled to conclude that the Court's double jeopardy analysis, which relies upon general statements of double jeopardy jurisprudence that were made in a procedural context that is completely different from the one that is present here, is fundamentally flawed.

In addition, the Court fails to recognize that essentially the same double jeopardy argument that it now finds persuasive was presented to this Court during the proceedings that led to the entry of our 2015 order, from which defendant unsuccessfully sought relief from the Supreme Court and which has, given the absence of such relief, become final. I am unable to read our 2015 order to vacate Judge Weeks' order and to remand this case to the Superior Court, Cumberland County, as anything other than a rejection of defendant's double jeopardy claim in light of the fact that no such remand would have been permissible had Judge Weeks' order and the related judgment been entitled to double jeopardy effect. As a result, it would appear to me that defendant's double jeopardy claim is, in addition to lacking support in our jurisprudence relating to that constitutional provision, barred by the law of the case doctrine. *Hayes v. City of Wilmington*, 243 N.C. 525, 536, 91 S.E.2d 673, 681–82 (1956) (stating that, "when an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal, provided the same facts and the same questions which were determined in the previous appeal are involved in the second appeal") (citations omitted).

In apparently holding that our 2015 order is a nullity, the Court concludes that the State was not entitled to seek appellate review of Judge Weeks' order and the related judgment and that, by failing to list the judgment that Judge Weeks entered in conjunction with his order concluding that defendant was entitled to relief from his death sentence pursuant to the Racial Justice Act as one of the determinations of which

it sought review in the certiorari petition that led to the entry of this Court's 2015 order, the State failed to properly seek and obtain review of Judge Weeks' sentencing decision. I am not persuaded by the Court's reasoning, which overlooks the relevant statutory provisions and the fundamental reason for which the State sought, and the Court granted further review of Judge Weeks' order granting relief to defendant on the basis of his Racial Justice Act claim and his decision to resentence defendant to life imprisonment.

The North Carolina Constitution provides that this Court "shall have jurisdiction to review upon appeal *any decision of the courts below*, upon any matter of law or legal inference." N.C. Const. art. IV, § 12(1) (emphasis added). While certain statutes generally limit the extent to which this Court is entitled to review the decisions of lower courts, "it is beyond question that a statute cannot restrict this Court's constitutional authority" to supervise the activities of North Carolina's lower courts. *State v. Ellis*, 361 N.C. 200, 205, 639 S.E.2d 425, 428 (2007). For that reason, "[t]his Court will not hesitate to exercise its rarely used general supervisory authority when necessary to promote the expeditious administration of justice." *State v. Stanley*, 288 N.C. 19, 26, 215 S.E.2d 589, 594 (1975). In apparent recognition of our constitutional supervisory authority, the General Assembly has enacted N.C.G.S. § 7A-32(b), which provides that this Court "has jurisdiction . . . to issue the prerogative writs, including . . . certiorari, . . . in aid of its own jurisdiction or in exercise of its general power to supervise and control the proceedings of any of the other courts of the General Court of Justice." N.C.G.S. § 7A-32(b) (2019). This Court has utilized its general supervisory authority to hear appeals concerning motions for appropriate relief despite the absence of any statutory authority to do so and, in some instances, in the face of a statutory prohibition against appellate review of specific types of lower court orders or decisions. *See*, *e.g.*, *State v. Todd*, 369 N.C. 707, 709–10, 799 S.E.2d 834, 837 (2017); *Ellis*, 361 N.C. at 200, 639 S.E.2d at 425. As a result, this Court may well have had the authority to review Judge Weeks' order and the related judgment as a constitutional matter.

I see no need for further discussion of the Court's constitutional supervisory authority in this case, however, given that there is explicit statutory authority for the Court's decision to grant a certiorari petition authorizing review of Judge Weeks' original order. The Racial Justice Act expressly provided that "the procedures and hearing on the motion" seeking relief from a defendant's sentence on the basis that racial discrimination played a significant role in the decision to seek or impose the death penalty "shall follow and comply with" a number of statutory

provisions governing the litigation of motions for appropriate relief, including "[N.C.G.S. §] 15A-1422." North Carolina Racial Justice Act, S.L. 2009-464, § 1, 2009 N.C. Sess. Laws 1213, 1215 (codified at N.C.G.S. § 15-2012(c) (2009)) (repealed 2013). Subsection 15A-1422(c) provides, in turn, that "[t]he court's ruling on a motion for appropriate relief" is subject to review "[i]f the time for appeal has expired and no appeal is pending, by writ of certiorari." N.C.G.S. § 15A-1422(c) (2019).[5] Thus, the General Assembly expressly granted this Court the authority to review trial court decisions granting or denying relief pursuant to the Racial Justice Act through the use of its certiorari jurisdiction, which is the exact procedural vehicle that the State utilized in seeking and obtaining review of Judge Weeks' order.[6] As a result, I am further compelled to conclude that the Court's apparent determination that Judge Weeks' order granting relief pursuant to the Racial Justice Act was not subject to appellate review is erroneous.

Finally, I am equally unpersuaded by the Court's conclusion that the State's failure to list the judgment that Judge Weeks entered based upon his decision to grant defendant's request for relief from his death sentence pursuant to the Racial Justice Act in the certiorari petition that led to the entry of our 2015 order deprived us of any authority to vacate Judge Weeks' order and the related judgment following appellate review. Aside from the fact that no meaningful request for appellate review of the underlying judgment could be taken apart from review of the order granting defendant's request for relief from his death sentence under the Racial Justice Act and the fact that the State's certiorari petition cannot be understood as anything other than a challenge to the correctness of both Judge Weeks' order and the judgment that was entered in reliance

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5. The amended Racial Justice Act provided that a defendant's Racial Justice Act claim "shall be raised by the defendant . . . in postconviction proceedings pursuant to Article 89 of Chapter 15A of the General Statutes." An Act to Amend Death Penalty Procedures, S.L. 2012-136, § 3, 2012 N.C. Sess. Laws 471, 472 (enacting N.C.G.S. § 15A-2011(f)(1) (Supp. 2012)) (repealed 2013). Section 15A-1422 falls within Article 89 of Chapter 15A.

6. The fact that the General Assembly did not grant the State an appeal as of right from orders granting relief pursuant to the Racial Justice Act, upon which the Court places some emphasis in its opinion, has no bearing upon the proper resolution of this case given the General Assembly's decision to expressly authorize appellate review of such orders pursuant to N.C.G.S. § 15A-1422(c)(3) and former N.C.G.S. § 15A-2012(c). Similarly, the fact that N.C.G.S. § 15A-1422(c)(3) makes no mention of proceedings conducted pursuant to the Racial Justice Act is irrelevant to the issue of whether the State was entitled to seek the issuance of a writ of certiorari authorizing review of Judge Weeks' order given that the use of the procedure authorized by N.C.G.S. § 15A-1422(c) was expressly imported into Racial Justice Act proceedings by former N.C.G.S. § 15A-2012(c).

upon that order, the Court's decision, which seems to me to be overly technical for that reason alone, is inconsistent with the relevant statutory provisions governing review of trial court decisions made pursuant to the Racial Justice Act. According to N.C.G.S. § 15A-1422(c), which specifically provides for review of "[t]he court's ruling on a motion for appropriate relief," the order or decision that is subject to further review is the "ruling on a motion for appropriate relief" rather than any remedial judgment that the trial court might have entered for the purpose of effectuating its decision to afford relief to a defendant. I have a great deal of difficulty seeing how the General Assembly could have intended for this logic to permit review of the order entered in connection with the allowance of a motion for appropriate relief while requiring a separate request for review of the judgment that the trial court entered based upon the underlying order. The interpretation of N.C.G.S. § 15A-1422(c) that I believe to be appropriate is fully consistent with our certiorari-related jurisprudence, which brings the entire record forward for review and recognizes the fundamental principle that the trial court's judgment flows logically from the proceedings that led to its entry. *State v. Moore*, 258 N.C. 300, 302, 128 S.E.2d 563, 565 (1962); *In re Burton*, 257 N.C. 534, 545, 126 S.E.2d 581, 589 (1962). As a result, I believe that, in light of the language in which the relevant statutory provisions are couched and the effect of our decision to issue a writ of certiorari authorizing review of Judge Weeks' order, the fact that the State failed to expressly seek review of the judgment that was entered on the basis of Judge Weeks' order in the certiorari petition that led to the entry of our 2015 order does not have the effect of precluding further review of that judgment.[7]

I do not, by dissenting from the Court's decision in this case, wish to be understood as expressing any doubt about the fundamental importance of the goals sought to be achieved by the Racial Justice Act or the pressing need to completely eradicate racial and all other forms of odious discrimination from our system of justice, to cast any doubt upon the correctness of our recent decision in *Ramseur*, or to express any opinion concerning the extent to which the Court did or did not correctly grant relief from Judge Weeks' order in 2015, which was a decision in which I did not participate. However, it seems clear to me that

7. The majority's reference to *State v. Miller*, 205 N.C. App. 724, 725, 696 S.E.2d 542, 543 (2010), has no bearing upon a proper analysis of this case given that the manner in which an appeal must be taken from an order denying a motion to suppress evidence differs from the manner in which appellate review of orders granting or denying relief pursuant to the Racial Justice Act must be sought. *See* N.C.G.S. § 15A-979 (b) (2019) (stating that "[a]n order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty").

a trial court order granting relief pursuant to the Racial Justice Act and the entry of a related judgment of life imprisonment is not an unreviewable decision entitled to double jeopardy protection, with there being no support in the relevant decisions of this Court or the Supreme Court or in the statutory provisions governing our review of lower court decisions in criminal cases. As a result, I am unable to join the Court's decision that defendant is entitled to have the sentence of life imprisonment without the possibility of parole that was imposed upon him as the result of Judge Weeks' order to grant defendant relief pursuant to the Racial Justice Act reinstated and would, instead, hold, for the reasons set forth in *Ramseur*, that the trial court erred by dismissing defendant's Racial Justice Act claim based upon the General Assembly's decision to repeal that legislation and that this case should be remanded to the Superior Court, Cumberland County, for further proceedings not inconsistent with this opinion, including the hearing on the merits contemplated in our 2015 order.

Justice DAVIS joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER NATHANIEL SMITH

No. 119PA18

Filed 14 August 2020

1. Appeal and Error—preservation of issues—motion to dismiss for insufficiency of evidence—specific argument at trial—all sufficiency issues preserved

A criminal defendant's timely motion to dismiss and renewal of the motion preserved for appellate review any and all sufficiency of the evidence challenges; thus, even though defendant argued at trial that the evidence was insufficient to support allegations that sexual activity had occurred, he was entitled to argue on appeal that the evidence was insufficient to support the allegation that he was a "teacher" under the charging statute (N.C.G.S. § 14-27.7).

2. Sexual Offenses—sexual activity with student by teacher—sufficiency of evidence—status as teacher

There was substantial evidence that defendant was a "teacher" under the statute prohibiting sexual activity with students (N.C.G.S.

§ 14-27.7) where—even though he was denominated as a "substitute teacher" because he lacked a teaching certificate—he worked at a high school as a full-time physical education teacher, he had a planning period, and he had the same access to students as any certified teacher would. The Supreme Court rejected a hyper-technical interpretation of the statute in favor of a common-sense, case-by-case evaluation of whether an individual would qualify as a teacher under the statute.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, *State v. Smith*, No. COA17-680, 2018 WL 1598522 (N.C. Ct. App. Apr. 3, 2018), finding no error in part and remanding for resentencing a judgment entered on 8 July 2016 by Judge Reuben F. Young in Superior Court, Wake County. Heard in the Supreme Court on 8 January 2020.

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

Yoder Law PLLC, by Jason Christopher Yoder, for defendant.

NEWBY, Justice.

In this case we decide whether defendant's motion to dismiss preserved for appellate review all sufficiency of the evidence challenges, and if so, whether defendant qualifies as a teacher under N.C.G.S § 14-27.7. Though at trial defendant made arguments about only one specific element of the crime with which he was charged in support of his motion to dismiss, defendant's timely motion and his timely renewal of that motion preserved for appellate review all sufficiency of the evidence issues. Nevertheless, the trial court properly denied defendant's motion to dismiss since, based on the facts of his case, defendant was properly categorized as a "teacher" under our criminal statutes prohibiting sexual offenses with students. Thus, we modify and affirm the Court of Appeals decision upholding defendant's convictions.

The evidence at trial showed the following: though denominated as a "substitute teacher," defendant worked full-time at Knightdale High School, initially as an In-School Suspension (ISS) teacher and then as a Physical Education (PE) teacher. He worked the same hours as a certified teacher, which included a regularly scheduled planning period. He taught at the school on a long-term assignment and was an employee of Wake County Public Schools. Defendant began the position with hopes

of becoming a certified teacher. While defendant did not have his teaching certificate, his transition to the PE department was intended for him to "get a feel for" the position so he would have experience and "be ready" when he tested to receive his certificate and began to serve as a licensed teacher through lateral entry. Defendant met minor D.F., a student at Knightdale High, during his time teaching at the school. On 29 October 2014 D.F. went to defendant's home. D.F. alleged the two engaged in sexual activity.

D.F.'s father became suspicious of D.F. and defendant's relationship, so he brought his concerns to the school's attention. After an internal investigation, the school's resource officer reported the matter to the Raleigh Police Department. Defendant was thereafter indicted for two counts of engaging in sexual activity with a student pursuant to N.C.G.S. § 14-27.7 (2013)[1]. The indictment alleged that:

> I. [O]n or about October 29, 2014, in Wake County, the defendant named above unlawfully, willfully, and feloniously did engage in vaginal intercourse with D.F. . . . At the time of this offense, the defendant was a teacher at Knightdale High School and the victim was a student at this same school. . . . This act was done in violation of N[.]C[.]G[.]S[.] § 14-27.7(B).
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> II. [O]n or about October 29, 2014, in Wake County, the defendant named above unlawfully, willfully, and feloniously did engage in a sexual act with D.F. . . . At the time of this offense, the defendant was a teacher at Knightdale High School and the victim was a student at this same school. . . . This act was done in violation of N[.]C[.]G[.]S[.] § 14-27.7(B).

The case proceeded to trial. At the close of the State's evidence, defense counsel made a motion to dismiss based on insufficient evidence. He asserted the following:

> Your Honor, we would like to make a Motion to Dismiss. Very briefly, the State hasn't met every element of the charge. I don't think there are – I know that the Court is to take every inference in the light most favorable to the State but there's also case law when the State's case

1. Because the 2013 version of N.C.G.S. § 14-27.7 was the controlling version of the statute when the events occurred here, we utilize the 2013 version in this opinion. We note, however, that the statute has since been recodified as N.C.G.S. §§ 14-27.31, 14-27.32 (2015).

> conflict [sic] to such a degree the Court is to take that into consideration. We would argue this is that type of case, Your Honor.
>
> The victim has stated that sexual intercourse lasted five minutes. She then stated the next day it was between 20 and 30 minutes. She then stated in court it was between 10 and 15 minutes. There is evidence of the victim not being credible, Your Honor.
>
> There is a police report where she told her dad that she saved the contact information under "parentheses A." There was evidence that she told the officer that it was under "dot dot dot." There's evidence that she was interviewed by the officer and she didn't give the officer information. At first she said, well, I didn't, I wouldn't lie; I would just omit information, and then she changed that to hide information. She didn't tell information about marijuana. She was interviewed by Officer Emser twice and she didn't give information about alleged oral sex occurring on November 11. She was interviewed by two officers. But then she comes here in court and says that the act did occur.
>
> Your Honor, based on this evidence we would ask that you find that the State's evidence conflicts to such a degree that the Motion to Dismiss should be granted.

The trial court denied the motion. At the end of all the evidence, defense counsel renewed the motion to dismiss:

> Your Honor, at the end of all the evidence the Defendant would like to renew his Motion To Dismiss. There's no physical evidence. We would argue the eight pillows, the bottom sheet, the comforter, the blanket and the Toshiba laptop were not tested. There's been conflict in the victim's own testimony. Based on that we would renew our Motion to Dismiss.

The trial court again denied the motion. Ultimately, the jury convicted defendant of two counts of sexual activity with a student.

Defendant appealed, arguing to the Court of Appeals, *inter alia*, that the trial court erroneously denied his motion to dismiss because the evidence at trial did not establish that he was a "teacher" within the meaning of N.C.G.S. § 14-27.7(b). In the alternative, defendant argued

that his motion to dismiss should have been granted because there was a fatal variance between the indictment and proof at trial since the indictment alleged defendant was a "teacher," but his status as a substitute teacher made him "school personnel" under section 14-27.7(b).

The Court of Appeals concluded that defendant had failed to preserve either argument for appellate review. *State v. Smith*, 2018 WL 1598522, at *3 (N.C. Ct. App. Apr. 3, 2018). The Court of Appeals reasoned that, though a general motion to dismiss preserves for appellate review all arguments on the sufficiency of the evidence, *id.* at *2 (citing *State v. Stephens*, 244 N.C. 380, 383, 93 S.E.2d 431, 433 (1956)), when a defendant makes a more specific motion to dismiss, he only preserves for appellate review a sufficiency of the evidence argument for that specific element argued, *id.* at *3. Thus, it opined that any other sufficiency of the evidence argument pertaining to other elements of the crime would not be preserved by a defendant's motion to dismiss. *Id.* (citing *State v. Walker*, 252 N.C. App. 409, 411–12, 798 S.E.2d 529, 530–31 (2017), *abrogated by State v. Golder*, 374 N.C. 238, 839 S.E.2d 782 (2020)). The Court of Appeals noted that defendant's initial motion to dismiss "focused on the veracity of D.F.'s testimony and the lack of physical evidence supporting the allegations that any sexual conduct had occurred," which defendant narrowed in his renewed motion to dismiss when he referenced the preceding arguments and stated that his renewed motion was "based on [those arguments.]" *Id.* at *3. Thus, because it believed defendant had limited his motion to a single element, "whether sexual activity had occurred," the Court of Appeals concluded that defendant had not preserved appellate review of any argument based on whether he qualified as a teacher under the applicable statute. *Id.*[2] The Court of Appeals also concluded that defendant's fatal variance argument was not preserved because it was not expressly presented to the trial court. *Id.*

[1] Before this Court, defendant first asserts that he sufficiently preserved for appellate review all sufficiency of the evidence issues through his motion to dismiss at trial. At the time that the Court of Appeals decided this case, this Court had not addressed the specific issue of when a motion to dismiss preserves all sufficiency of the evidence issues for appellate review. Subsequently, this Court examined that question

2. The Court of Appeals also addressed defendant's argument that "if his trial counsel failed to preserve th[e substantive] issue for appeal, then he received ineffective assistance of counsel." *Smith*, 2018 WL 1598522, at *4. Because we ultimately conclude that defendant preserved his argument through the motion to dismiss at trial, we need not reach defendant's ineffective assistance of counsel claim.

in *State v. Golder*, 374 N.C. 238, 839 S.E.2d 782 (2020). In *Golder*, we held that "Rule 10(a)(3) provides that a defendant preserves all insufficiency of the evidence issues for appellate review simply by making a motion to dismiss the action at the proper time." *Id.* Thus, as set forth in *Golder*, under Rule 10(a)(3), so long as a defendant moves to dismiss a case at the appropriate times, his motion preserves "all issues related to the sufficiency of the evidence for appellate review." *Id.* Because defendant here made a general motion to dismiss at the appropriate time and renewed that motion to dismiss at the close of all the evidence, his motion properly preserved all sufficiency of the evidence issues.

[2] On the merits of his case, defendant argues there was not substantial evidence that he was a "teacher" under the statute. He claims his position is better denominated as "substitute teacher," which falls under "school personnel." Thus defendant's argument requires us to evaluate the language of several statutes.

N.C.G.S. § 14-27.7(b) (2013) provides that

> If a defendant, who is a teacher, school administrator, student teacher, school safety officer, or coach, at any age, or who is other school personnel, and who is at least four years older than the victim engages in vaginal intercourse or a sexual act with a victim who is a student, at any time during or after the time the defendant and victim were present together in the same school, but before the victim ceases to be a student, the defendant is guilty of a Class G felony . . . . For purposes of this subsection, the terms "school", "school personnel", and "student" shall have the same meaning as in G.S. 14-202.4(d).

Section 14-202.4, which criminalizes taking indecent liberties with a student, states that " '[s]chool personnel' means any person included in the definition contained in G.S. 115C-332(a)(2), and any person who volunteers at a school or school-sponsored activity." N.C.G.S. § 14-202.4(d)(3) (2013). The statute referenced in section 14-202.4 is not within the chapter of the North Carolina General Statutes relating to criminal law but falls under a section about criminal history checks within North Carolina's education statutes. Section 115C-332 casts a wide net defining the identity of individuals who should be subjected to criminal history checks in a seeming attempt to require background checks for all those who interact with students in the school system. Therefore, section 115C-332 provides that

> (2) "School personnel" means any:
>
> a. Employee of a local board of education whether full-time or part-time, or
>
> b. Independent contractor or employee of an independent contractor of a local board of education, if the independent contractor carries out duties customarily performed by school personnel,
>
> whether paid with federal, State, local, or other funds, who has significant access to students. School personnel includes substitute teachers, driving training teachers, bus drivers, clerical staff, and custodians.

N.C.G.S. § 115C-332(a)(2) (2013).

Here we are asked to construe these statutes and determine what the General Assembly intended by the reference to teachers in N.C.G.S. § 14-27.7(b). It is a well-established principle of statutory construction that "the intent of the Legislature controls." *In re Hardy*, 294 N.C. 90, 95, 240 S.E.2d 367, 371 (1978). In evaluating all of the above statutes, it is evident that the General Assembly intended to cast a wide net prohibiting criminal sexual conduct with students by any adult working on school property. It is clear that the legislature intended that each category be read broadly with a common-sense understanding. A person's categorization as a "teacher" should be based on a common-sense evaluation of all the facts of the case, not a hyper-technical interpretation based solely on the individual's title. Such a case-by-case analysis involves evaluating, among other circumstances, whether the individual is serving in a full-time or truly part-time position, and whether the individual is in fact teaching students on a regular basis. Taking into account all circumstances in a specific case to determine whether an individual is a "teacher" under N.C.G.S. § 14-27.7 serves the intended purpose by giving a common-sense interpretation of the word "teacher" and protecting students from sexual offenses by adults serving within the school system.

This reasoning is supported by the fact that N.C.G.S. § 115C-332(a)(2) makes clear that the legislature intended to subject anyone working in a school-related role, even ones with less face-to-face access to students such as custodians and non-employees of the school system, to criminal history checks to ensure the protection of students. Therefore, the statutory reference to "substitute teacher" under "school personnel" does not preclude someone with the title of substitute teacher from actually being a "teacher" for purposes of the criminal statute, N.C.G.S. § 14-27.7.

To the contrary, whether an individual is a teacher under the criminal statute depends on the facts of the case and the nature of the position in which the individual served.

Thus, the facts of this case, not merely defendant's title, determine whether he was a "teacher" under the statute. The evidence indicated that defendant was in a full-time position. Defendant testified that in serving as a PE teacher, his understanding of the job was that he would work full-time and "be a teacher without my certification." Defendant served as an ISS teacher for a month on a regular basis before moving into the PE spot, which also provided a full-time schedule. This move to the PE department was intended for defendant to "get a feel for" the position so he would have experience and "be ready" when he qualified to receive his certificate and serve as a licensed teacher through lateral entry. Despite his lack of certification, defendant was at the school on a long-term assignment, an employee of Wake County Public Schools, and held to the same standards as a certified teacher. Defendant taught at the school daily, had a planning period, and had full access to students as any certified teacher would. The only difference between defendant and other teachers was his title based on his lack of a teaching certificate at that time.

Given the statute's clear intent to protect students from sexual encounters with adults working in their schools, it is evident that the various titles set forth in the relevant statutory language should be interpreted functionally, taking into account the nature in which an individual served, as opposed to simply considering the individual's title in a hyper-technical manner. The position defendant fulfilled falls within the "teacher" category as described by N.C.G.S. § 14-27.7. While every substitute teacher may not qualify as a "teacher" under the statute, given the circumstances and facts of this case, defendant fell within the "teacher" category under the statute.

Because we conclude that defendant was correctly deemed a teacher in this case, the same analysis would apply to defendant's secondary argument—that the trial court erred in denying defendant's motion to dismiss because there was a fatal variance between the indictment, alleging that defendant was a teacher, and the evidence at trial, which he asserts showed that defendant was actually "school personnel." Therefore, assuming without deciding that defendant's fatal variance argument was preserved, defendant's argument would not prevail for the same reasoning.

Since defendant moved to dismiss at the appropriate time at trial and timely renewed his motion, he sufficiently preserved for appellate

review whether the State presented sufficient evidence of each element of the crime for which he was convicted. Nonetheless, the trial court properly denied defendant's motion to dismiss as defendant falls within the teacher category as defined in N.C.G.S. § 14-27.7. The Court of Appeals decision is therefore modified and affirmed.

MODIFIED AND AFFIRMED.

STATE OF NORTH CAROLINA
v.
JEFFERY DANIEL WAYCASTER

No. 294A18

Filed 14 August 2020

Criminal Law—habitual felon status—proof of prior convictions—evidentiary requirements—statutory methods nonexclusive—ACIS printout

In a plurality opinion, the Supreme Court determined that where the methods of proof listed in N.C.G.S. § 14-7.4 were not the exclusive means by which the State could prove prior convictions to establish habitual felon status, the State's use of a printout from the Automated Criminal/Infraction System (ACIS)—where the original judgment was not available—was admissible to prove a prior felony at defendant's habitual felon trial. There was a split among the justices regarding whether Evidence Rule 1005 applied, and if so, whether its application would allow the admission of the ACIS printout in this case.

Chief Justice BEASLEY concurring.

Justice MORGAN joins in this concurring opinion.

Justice EARLS concurring in part and dissenting in part.

Justice HUDSON joins in this opinion concurring in part and dissenting in part.

On discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal of right pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 260 N.C. App. 684, 818 S.E.2d 189 (2018), affirming a judgment entered on 16 May 2017 by Judge Gary M. Gavenus in Superior Court, McDowell County. Heard in the Supreme Court on 6 November 2019.

Joshua H. Stein, Attorney General, by Alexander Walton, Assistant Attorney General, for the State-appellee.

Dylan J.C. Buffum, for defendant-appellant.

DAVIS, Justice.

North Carolina's Habitual Felons Act references three ways by which the State may prove a defendant's prior convictions for the purpose of establishing that he is a habitual felon. The issue in this case is whether these methods of proof set out in the Act are exclusive. Because we conclude that the General Assembly intended for the means of proof mentioned in the Act to be nonexclusive, we affirm the decision of the Court of Appeals on that issue. Defendant also raised an additional issue relating to whether the trial court committed plain error by allowing the introduction of hearsay evidence during his trial. We now conclude that discretionary review of this additional issue was improvidently allowed.

Factual and Procedural Background

On 22 July 2014, defendant was sentenced to 30 months of supervised probation after pleading no contest to a charge of felony larceny. The terms of defendant's probation were modified on 3 September 2015, and pursuant to these modifications, he submitted to electronic monitoring and was required to wear an ankle monitor that tracked his location. In addition, although not under house arrest, defendant was required to comply with the curfew set by his primary probation officer, Matthew Plaster.

Defendant's electronic monitoring involved three different pieces of equipment: an ankle monitor worn by him, a Global Positioning System beacon that tracked the monitor, and a charger for the ankle monitor. The beacon was kept at defendant's home, and his probation officer would receive text messages or email alerts if he was not at home during his curfew. His probation officer would also receive notification if defendant tampered with his ankle monitor strap by cutting it off or otherwise trying to remove it. These alerts were sent from BI Total Monitoring (BI), a company with which the North Carolina Department of Public Safety

contracted to install and maintain the monitoring equipment assigned to probationers such as defendant.

On 24 September 2015, the probation officer on duty, David Ashe, received a text message alert from BI notifying him that defendant had tampered with his ankle monitor strap. Officer Ashe attempted to call defendant but received no answer. After consulting the BI computer program to locate the ankle monitor, Officer Ashe went to the last known location of the monitor and discovered that it had been cut off and left in a ditch approximately eight feet from a road that was located a few miles away from defendant's home. Upon returning to his office, Officer Ashe verified that the monitor he had found in the ditch was, in fact, the one that had been given to defendant, and he submitted a report of the incident to Officer Plaster.

On 26 October 2015, defendant was indicted on charges of interfering with an electronic monitoring device and attaining the status of a habitual felon. A trial was held in Superior Court, McDowell County, beginning on 16 May 2017. The jury returned a verdict of guilty on the charge of interfering with an electronic monitoring device on that same day. On the following day, the habitual felon phase of the trial began. The habitual felon indictment charged defendant with attaining habitual felon status based upon three prior felony convictions in McDowell County: (1) a 4 June 2001 conviction for felonious breaking and entering; (2) a 18 February 2010 conviction for felonious breaking and entering; and (3) a 22 July 2014 conviction for safecracking. At trial, the State admitted into evidence certified copies of the judgments for the latter two convictions in order to prove their existence.

With regard to the 4 June 2001 conviction, however, the prosecutor stated to the court that he had been informed by the Clerk of Court's office "that they didn't have the original" judgment associated with that conviction. In an effort to prove the existence of this conviction, the State called Melissa Adams, the Clerk of Court for McDowell County, as a witness. The State then introduced as an exhibit a computer printout from the Automated Criminal/Infraction System (ACIS). Adams testified that ACIS is a statewide computer system relied upon by courts and law enforcement agencies for accessing information regarding a defendant's criminal judgments, offense dates, and conviction dates. She further stated that the information contained in ACIS is taken from court records such as criminal judgments and manually entered into the database by an employee in the Clerk of Court's office. The ACIS printout offered by the State showed that defendant had been convicted of

felonious breaking and entering on 4 June 2001, and Adams testified that the printout was a "certified true copy of the ACIS system."

When the State formally moved to introduce the ACIS printout into evidence as proof of defendant's 4 June 2001 felony conviction, defense counsel objected, arguing that the ACIS printout was not a true copy of the actual judgment but rather "simply a computer printout of data entered at some time in the past by someone of what purports to be a judgment." Defense counsel contended that the ACIS printout was therefore insufficient to prove defendant's 2001 conviction. The trial court overruled the objection, stating that "ACIS is a way in which the State can introduce true copies of judgments entered in the system, and it's admissible under the rules of evidence."

The jury found that defendant had attained the status of a habitual felon, and the trial court sentenced him to a term of imprisonment of 38 to 58 months. Defendant appealed to the Court of Appeals.

Before the Court of Appeals, defendant made two arguments. First, he asserted that the trial court committed plain error by admitting hearsay evidence to establish that the ankle monitor found in the ditch belonged to him. Second, he contended that the trial court erred by allowing the ACIS printout to be introduced into evidence as proof of his 2001 conviction for the purpose of establishing that he was a habitual felon.

With regard to the first issue, defendant asserted that the trial court had plainly erred in allowing Officer Ashe to testify that he had verified through BI that the ankle monitor he found in the ditch belonged to defendant. Defendant contended that Officer Ashe's testimony constituted inadmissible hearsay because it was based entirely upon communications from BI and the State had failed to provide an adequate foundation to allow such information to be admitted pursuant to the business records exception to the hearsay rule set out in N.C.G.S. § 8C-1, Rule 803(6). Relying on its own precedent, the Court of Appeals rejected this argument and held that "hearsay statements based on 'GPS tracking evidence and simultaneously prepared reports are admissible under the business records exception to the hearsay rule.' " *State v. Waycaster*, 260 N.C. App. 684, 689, 818 S.E.2d 189, 193 (2018) (quoting *State v. Gardner*, 237 N.C. App. 496, 499, 769 S.E.2d 196, 198 (2014)).

As for the second issue, defendant argued that the trial court had improperly allowed the ACIS printout to be used as proof of his 2001 conviction because N.C.G.S. § 14-7.4 contained the exclusive methods for proving prior convictions in a proceeding to determine habitual felon

status. The Court of Appeals likewise rejected this argument based on its determination that the ACIS printout was "sufficient evidentiary proof of defendant's 4 June 2001 conviction under the Habitual Felon Act." *Waycaster*, 260 N.C. App. at 691, 818 S.E.2d at 195. The Court of Appeals stated that "ACIS 'duplicates the physical records maintained by each Clerk and constitutes the collective compilation of all records individually entered by' clerks of court." *Id.* (quoting *LexisNexis Risk Data Mgmt. Inc. v. North Carolina Admin. Office of the Courts*, 368 N.C. 180, 181, 775 S.E.2d 651, 652 (2015)). The Court of Appeals concluded that the use of the ACIS printout to prove defendant's prior conviction did not violate N.C.G.S. § 14-7.4 due to the fact that the statute "is permissive and does not exclude methods of proof that are not specifically delineated in the Act." *Id.* at 692, 818 S.E.2d at 195.

In a separate opinion concurring in part and dissenting in part, Judge Murphy concurred in the majority's decision with respect to the first issue but dissented from the portion of the majority's opinion relating to the issue of whether the admission of the ACIS printout satisfied N.C.G.S. § 14-7.4. He expressed his belief that the State was required by the statute to prove defendant's prior convictions by stipulation or by introducing either the actual judgments of the convictions or certified copies thereof. *Waycaster*, 260 N.C. App. at 693, 818 S.E.2d at 196 (Murphy, J., dissenting). He further stated that, in his view, the State had failed to demonstrate the exercise of reasonable diligence in seeking to obtain the actual judgment relating to the 4 June 2001 conviction. *Id.* at 695–96, 818 S.E.2d at 197–98. For this reason, he expressed his belief that the ACIS printout did not qualify as admissible secondary evidence pursuant to Rule 1005 of the North Carolina Rules of Evidence. *Id.* at 695, 818 S.E.2d at 197 (citing N.C.G.S. § 8C-1, Rule 1005 (2019)).

On 11 September 2018, defendant appealed to this Court as of right on the basis of the dissent. Defendant also filed a petition for discretionary review in which he requested that this Court review the first issue decided by the Court of Appeals regarding the use of hearsay evidence to establish that the ankle monitor located in the ditch belonged to him. This Court allowed the petition for discretionary review on 30 January 2019.

Analysis

North Carolina's Habitual Felons Act states, in pertinent part, that "[a]ny person who has been convicted of or pled guilty to three felony offenses . . . is declared to be a habitual felon and may be charged as a status offender . . . ." N.C.G.S. § 14-7.1(a) (2019). In such cases,

"[t]he trial for the substantive felony is held first, and only after defendant is convicted of the substantive felony is the habitual felon indictment revealed to and considered by the jury." *State v. Cheek*, 339 N.C. 725, 729, 453 S.E.2d 862, 864 (1995) (citing N.C.G.S. § 14-7.5). During the habitual felon phase of the trial, "the proceedings shall be as if the issue of habitual felon were a principal charge." N.C.G.S. § 14-7.5. When a defendant is found to have attained the status of a habitual felon, "the felon must . . . be sentenced at a felony class level that is four classes higher than the principal felony for which the person was convicted; but under no circumstances shall an habitual felon be sentenced at a level higher than a Class C felony." *Id.* § 14-7.6.

The Habitual Felons Act also references several specific methods of proof for establishing the existence of a defendant's prior felony convictions. Subsection 14-7.4 states as follows with regard to this subject:

> In all cases where a person is charged under the provisions of this Article with being an habitual felon, the record or records of prior convictions of felony offenses shall be admissible in evidence, but only for the purpose of proving that said person has been convicted of former felony offenses. A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction. The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein.

N.C.G.S. § 14-7.4.

In this appeal, defendant does not argue that the ACIS printout was inadmissible on the grounds of hearsay or lack of authentication. Instead, defendant's sole contention is that the methods referenced in the statute for proving the existence of a prior felony conviction—that is, by stipulation or by the introduction of either the original or a certified copy of the prior judgment—were intended by the General Assembly to be exclusive. Defendant's argument therefore raises an issue of statutory interpretation.

It is well established that "[i]n matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished. Legislative purpose is first ascertained from the plain words of the statute." *Elec. Supply Co. v. Swain Elec. Co.*,

328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) (citations omitted). Thus, "[w]hen the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 811, 517 S.E.2d 874, 878 (1999) (citation omitted). However, "where a statute is ambiguous or unclear in its meaning, resort must be had to judicial construction to ascertain the legislative will, and the courts will interpret the language to give effect to the legislative intent." *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 389 (1978) (citations omitted).

Defendant argues that the language utilized by the General Assembly in N.C.G.S. § 14-7.4 clearly expresses a legislative intent that the modes of proof set out therein be exclusive, contending that no logical reason would have existed for the legislature to identify certain methods of proof if it intended that the State be permitted to prove defendant's prior convictions by other means as well. The State, conversely, asserts that N.C.G.S. § 14-7.4 is permissive—rather than mandatory—with respect to the issue of how a defendant's prior convictions may be established and that such convictions may be proven by means of any admissible evidence.

In construing the language utilized by the General Assembly in N.C.G.S. § 14-7.4, we do not write on a clean slate. To the contrary, we construed identical statutory language in *State v. Graham*, 309 N.C. 587, 308 S.E.2d 311 (1983). In that case, the defendant pled guilty to four counts of felonious breaking and entering. During sentencing, the trial court determined that the defendant had prior convictions punishable by more than sixty days imprisonment and therefore found the existence of an aggravating factor pursuant to N.C.G.S. § 15A-1340.4(e) of the Fair Sentencing Act. The information concerning the defendant's prior convictions was presented to the court in the form of testimony from a sheriff's deputy "who had been informed by the law enforcement authorities in North Carolina and New York [and] advise[d] the court as to the defendant's conviction record." *Id.* at 593, 308 S.E.2d at 316.

On appeal, the defendant asserted that the trial court had erred in finding the aggravating factor based on his prior convictions because the State had failed to introduce a certified copy of his criminal record. *Id.* at 592, 308 S.E.2d at 315. In addressing his argument, we were required to interpret the following statutory language in the Fair Sentencing Act:

> A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court

> record of the prior conviction. The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein.

Id. at 592, 308 S.E.2d at 315–16 (quoting N.C.G.S. § 15A-1340.4(e) (1983) (repealed 1994)).

Like defendant in the present case, the defendant in *Graham* asserted that this statutory language allowed his prior convictions to be proven only by stipulation or by the introduction of either the original or a certified copy of the court record of the prior convictions. *Id.* at 592–93, 308 S.E.2d at 315–16. We rejected defendant's argument, stating the following:

> We disagree that these are the exclusive methods by which prior convictions may be shown. As we emphasized in *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983), this Court and the Court of Appeals have repeatedly held that the enumerated methods of proof of N.C. Gen. Stat. § 15A-1340.4(e) are permissive rather than mandatory. We recognize that the more appropriate way to show the "prior conviction" aggravating circumstance would be to offer authenticated court records, for such records establish a prima facie case. However, the legislature did not intend to bind the State and the trial court by precluding other means of proof. Clearly the conviction could have been proven by the deputy's testimony as to his own personal knowledge or by defendant's admission. While here the deputy's testimony was hearsay, the record indicates that the defendant took the stand and admitted the prior convictions. Not only do we find that the defendant's testimony before the court constituted an acceptable form of proof of his prior convictions, but his admissions also cured any defect caused by the hearing of the deputy's testimony.

Id. at 593, 308 S.E.2d at 316 (citations omitted); *see also Thompson*, 309 N.C. at 424, 307 S.E.2d at 159 ("We agree with that portion of the Court of Appeals' opinion holding that the language of G.S. § 15A-1340.4(e) is permissive rather than mandatory respecting methods of proof. It provides that prior convictions 'may' be proved by stipulation or by original

certified copy of the court record, not that they *must* be. The statute does not preclude other methods of proof.").

Given that the key language of N.C.G.S. § 14-7.4 is identical to the statutory language this Court construed in *Graham*, we are unable to discern any valid basis for adopting a different construction in the present case. *See State v. Rose*, 327 N.C. 599, 606, 398 S.E.2d 314, 317 (1990) ("We find no justifiable reason for giving a different interpretation to the identical language found in the two statutes.").

Moreover, we believe that such a reading of N.C.G.S. § 14-7.4 is logical. This Court has repeatedly interpreted the General Assembly's usage of the word "may" as having a permissive—as opposed to a mandatory—effect. *See, e.g.*, *Campbell v. First Baptist Church*, 298 N.C. 476, 483, 259 S.E.2d 558, 563 (1979) ("We recognize that . . . the use of 'may' generally connotes permissive or discretionary action and does not mandate or compel a particular act." (citation omitted)); *Rector v. Rector*, 186 N.C. 618, 620, 120 S.E. 195 (1923) ("The word 'may,' as used in statutes, in its ordinary sense, is permissive and not mandatory." (citation omitted)).

Furthermore, we recognize that there are a number of different ways in which a defendant's prior convictions may be proven in a given case. It would make little sense for the legislature to have limited the universe of available methods of proof to merely those few expressly referenced in the statute.

We also reject defendant's contention that the State's interpretation of N.C.G.S. § 14-7.4 would render superfluous the statutory language utilized by the General Assembly that expressly mentions certain discrete methods of proof. This argument ignores the fact that the statute gives the State the benefit of a rebuttable presumption if the defendant's prior convictions are, in fact, proven by the admission of original or certified copies of the judgments evidencing those convictions. The statute makes clear that if the State elects to utilize these modes of proof, there will exist "prima facie evidence that the defendant named therein is the same as the defendant before the court, and . . . prima facie evidence of the facts set out therein." N.C.G.S. § 14-7.4. This presumption does not apply if alternative methods are utilized by the State to prove the defendant's prior convictions. Thus, while the admission of either the actual judgment or a certified copy may be the preferred methods of proof, they are not the only permissible means of establishing the defendant's prior convictions.

Based on its apparent inability to obtain the actual judgment of defendant's 4 June 2001 conviction, the State opted to prove the existence of

that conviction by introducing an ACIS printout. This Court recently explained the nature and purpose of the ACIS database as follows:

> The Automated Criminal/Infraction System (ACIS) is an electronic compilation of all criminal records in North Carolina. While the North Carolina Administrative Office of the Courts (AOC) administers and maintains ACIS, the information contained in ACIS is entered on a continuing, real-time basis by the individual Clerks of Superior Court, or by an employee in that Clerk's office, from the physical records maintained by that Clerk. Any subsequent modifications to that information are under the exclusive control of the office of the Clerk that initially entered the information, so that personnel in one Clerk's office cannot change records entered into ACIS by personnel in a different Clerk's office. In other words, the information in ACIS both duplicates the physical records maintained by each Clerk and constitutes the collective compilation of all records individually entered by the one hundred Clerks of Court.

LexisNexis, 368 N.C. at 181, 775 S.E.2d at 652.

During the habitual felon phase of defendant's trial, the Clerk of Court, Melissa Adams, testified as to the process used for entering information derived from criminal records into ACIS. She stated that the ACIS database contains information that includes the name, judgment, offense date, and conviction date for a defendant and that this information is manually entered into the ACIS system by herself or other employees of the Clerk's office. Adams further testified that the ACIS database is accessible statewide and that the information contained therein is relied upon by courts and law enforcement agencies in the discharge of their duties. She stated that her recordkeeping duties included ensuring that information from court records was accurately entered into the ACIS database. Upon being presented with the ACIS printout showing defendant's 4 June 2001 conviction for felonious breaking and entering, Adams testified that the printout was "a certified true copy of the ACIS system . . . that shows the conviction."

As noted above, defendant does not contend that the ACIS printout constituted inadmissible hearsay or that it was not properly authenticated. He does argue, however, that the State failed to comply with the best evidence rule contained in Rule 1005 of the North Carolina Rules

of Evidence before seeking the admission of the printout into evidence. Rule 1005 states as follows:

> The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

N.C.G.S. § 8C-1, Rule 1005.

Defendant argues that in the present case the State sought to prove the contents of the original judgment of his 4 June 2001 conviction, which is an "official record" for purposes of Rule 1005, and the ACIS printout constituted "secondary evidence" of those contents. Based on this reasoning, defendant asserts that such secondary evidence in lieu of the original judgment or a certified copy would have been admissible only if the State had first demonstrated the exercise of "reasonable diligence" as required by Rule 1005. Only then, defendant asserts, could "other evidence of the contents" of the judgment be offered in its place. N.C.G.S. § 8C-1, Rule 1005.

But defendant's argument collapses given our determination that the methods of proof listed in N.C.G.S. § 14-7.4 are not exclusive. Although defendant is correct that the ACIS printout was not the original judgment of his prior conviction or a certified copy of the judgment, neither was required to be produced. Rather, the State was permitted to prove the fact of defendant's 4 June 2001 conviction by other means. The State was not using the ACIS printout to prove the *contents* of the original judgment of defendant's prior conviction. Instead, the printout was utilized simply to show that the conviction had occurred. Thus, the State was not required to comply with the reasonable diligence provision contained in Rule 1005 for the simple reason that Rule 1005 has no application here.

The dissent reaches a different conclusion in an analysis that can only be described as self-contradictory. While initially claiming to accept the proposition that the methods of proof set out in N.C.G.S. § 14-7.4 are not exclusive, the dissent then proceeds to repeatedly express a preference for the use of original judgments, or certified copies thereof, to the exclusion of other ways of proving a defendant's prior convictions.

The dissent's analysis reflects a misunderstanding of the best evidence rule. While not actually saying so, the dissent appears to be operating under the misconception that the best evidence rule limits the State's proof to the "best" available evidence bearing upon the fact at issue. But such an interpretation of the rule is incorrect.

As this Court has made clear, "[t]he best evidence rule applies *only* when the contents of a writing are in question." *State v. Clark*, 324 N.C. 146, 156, 377 S.E.2d 54, 60 (1989) (emphasis added). As a leading commentator has noted, "[i]t is sometimes stated, as if it were a general rule of evidence, that when a fact is to be proved the best evidence must be produced which the nature of the case admits. There is, however, no such general rule[.]" 2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 253, at 997 (7th ed. 2011) (footnotes omitted).

The dissent ignores the distinction between a conviction and a judgment. The issue here was *not* what was contained in the 4 June 2001 written judgment. Rather, the question was whether defendant had been convicted of the offense memorialized in the judgment. As a result, the State was not required to prove the contents of the written judgment. Instead, the State used the ACIS printout as an alternative method of proving the *conviction itself*. Thus, the best evidence rule does not apply here.

While the use of the original judgment may well be—as the dissent asserts—the preferred method of proving a prior conviction, it is by no means the only permissible way of doing so. Therefore, given that § 14-7.4 is nonexclusive, any other type of admissible evidence may be used to establish a defendant's prior conviction.

As discussed above, this Court explained the nature and purpose of the ACIS database in *LexisNexis*. In our opinion, we made clear that this database serves as "an electronic compilation of all criminal records in North Carolina" and "duplicates the physical records maintained by each Clerk[.]" *LexisNexis*, 368 N.C. at 181, 775 S.E.2d at 652. As such, the ACIS database serves as a court record—albeit an electronic one. As a court record in and of itself, the ACIS printout was not merely "other evidence" of the contents of defendant's original judgment regarding his 4 June 2001 conviction so as to invoke the best evidence rule contained in Rule 1005. It simply makes no sense to suggest that the best evidence rule should operate to preclude the admission into evidence of one court record under the misguided belief that the record in question is nothing more than evidence of the contents of a separate court record.

The dissent fails to offer a persuasive reason why a printout from this database is not admissible pursuant to N.C.G.S. § 14-7.4. Instead, the dissent merely notes that an original judgment is more reliable because it is reviewed not only by the Clerk of Court but also by the trial judge and by counsel. But even assuming that the original judgment is, in fact, the most reliable way of proving a prior conviction, N.C.G.S. § 14-7.4 does not require that the most reliable method be utilized. Instead, it permits the use of any admissible evidence on this issue. If the most reliable method of proof (i.e., the original judgment or a certified copy) was required, then the modes of proof set out in the statute *would* be exclusive.

In short, the dissent cannot have it both ways. Either the methods of proof contained in N.C.G.S. § 14-7.4 are exclusive or they are not. Our decision today makes clear that they are not exclusive—a ruling with which the dissent purports to agree. Because the State used a valid alternative method of proving defendant's prior conviction by introducing a printout of a court record that contained this information, the best evidence rule never became applicable.

Furthermore, the dissent's assertion that based on our decision the State will have no reason to ever offer the original judgment or a certified copy ignores the rebuttable presumption expressly stated in N.C.G.S. § 14-7.4. As noted above, in order for the State to obtain the benefit of that presumption, it must use these specified methods of proof, which serves as an incentive for it to do so.

While the dissent speculates about the possibility of error in the ACIS database as the result of a mistake in data entry,[1] nothing prohibits a defendant from making a similar argument to the jury during a habitual felon proceeding and expressly noting the prosecutor's failure to introduce the original judgment of the defendant's prior conviction. If the State wishes to use a less persuasive method of proof, it certainly has the right to do so subject to the risk that the jury will find that the evidence upon which it chose to rely is not credible. In other words, the State's choice of a less optimal method of proof goes to the weight—rather than the admissibility—of the evidence.

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1. We observe that neither at trial nor on appeal has defendant asserted that the information contained in the ACIS database regarding his 4 June 2001 conviction was inaccurate. Moreover, while the dissent claims that the database contains little to no information about the underlying offense for which a defendant was convicted, no such additional information is necessary under N.C.G.S. § 14-7.4. Instead, all that is required is a showing that the conviction occurred.

Finally, we note that in the event the General Assembly wishes to limit the methods that are available to the State for proving a defendant's prior convictions, it is, of course, free to do so by amending N.C.G.S. § 14-7.4. Based on the current language of the statute, however, we are satisfied that the admission of the ACIS printout for this purpose under the circumstances set out in the record before us was permissible.

Conclusion

For the reasons set out above, we affirm the decision of the Court of Appeals with respect to the issue of whether the admission of the ACIS printout for the purpose of establishing defendant's habitual felon status was proper. As for the issue raised in defendant's petition for discretionary review regarding whether the admission of Officer Ashe's testimony constituted plain error, we conclude that discretionary review was improvidently allowed. Therefore, the decision of the Court of Appeals on that issue remains undisturbed.

AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

Chief Justice BEASLEY, concurring.

Although I agree with the majority's conclusion that the State may prove the existence of a defendant's prior felony convictions by methods other than those expressly set out in the Habitual Felons Act, I write separately to note that as the State introduced the ACIS printout to prove the contents of the ACIS report, the State was required to comply with Rule 1005 of the North Carolina Rules of Evidence.

The majority mischaracterizes the purpose for introducing the ACIS printout, attempting to distinguish between the contents of the ACIS printout and its introduction solely to show that a prior conviction had occurred. The Habitual Felon Statute provides that "[a]ny person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon." N.C.G.S. § 14-7.1(a) (2019). Thus, the State must prove that the defendant did, in fact, commit three prior felony offenses. To do so requires the court to consider the contents of the record to be introduced for the purpose of confirming "that said person has been convicted of former felony offenses." N.C.G.S. § 14-7.4.

ACIS is "an electronic compilation of *all* criminal records in North Carolina" that "both duplicates the physical records maintained by each [Superior Court] Clerk and constitutes the collective compilation of all records individually entered by the one hundred Clerks of Court." *LexisNexis Risk Data Mgmt. v. N.C. Admin. Office of the Courts*, 368 N.C. 180, 181, 775 S.E.2d 651, 652 (2015) (emphasis added). Thus, the State introduced the ACIS printout to prove the *contents* of the ACIS report.

As the dissent correctly states, quoting N.C.G.S. § 8C-1, Rule 1101, "[t]he rules of evidence apply at a trial on a habitual felon indictment in the same way that they apply to 'all actions and proceedings in the courts of this State.' " Here, because the State introduced the ACIS printout as evidence of defendant's prior convictions, it must comply with the rules of evidence. The dissent, however, misconstruing the intended purpose of the ACIS printout, fails to properly apply Rule 1005.

Rule 1005 provides that the contents of "a document authorized to be recorded or filed and actually recorded or filed, *including data compilations in any form* . . . may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original." N.C.G.S. § 8C-1, Rule 1005 (emphasis added). "If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given." *Id.*

The dissent treats the ACIS printout as a document introduced to prove the contents of the original judgment. Instead, the State introduced the ACIS printout to prove that a judgment had occurred—information that is contained in the ACIS report itself. This is an important distinction because Rule 1005 is self-referential. The certified copy contemplated by the Rule is of the document offered for admission itself—here, that is the ACIS report. Thus, the second sentence of Rule 1005, which allows for the introduction of "other evidence" only if neither a certified copy nor a copy testified to be correct by a person who has compared it to the original can be obtained by reasonable diligence, has no applicability here.

During trial, the State called the Clerk of the McDowell County Superior Court as a witness. The Clerk identified the ACIS printout as "a certified true copy of the ACIS system" and explained that the information in the ACIS printout was consistent with the actual judgment. The State, however, admitted that the original judgment could not be located. As the information in ACIS is entered by the Clerk or "an employee in

that Clerk's office," *LexisNexis*, 368 N.C. at 181, 775 S.E.2d at 652, the Clerk could not testify to the accuracy of the ACIS printout without confirming that she (1) entered that exact information into the system or (2) compared the printout to the judgment. She did not claim to have taken either action.

Although the Clerk could not testify to the accuracy of the ACIS printout introduced at trial, the copy could be authenticated pursuant to Rule 1005 by certification in compliance with Rule 902. The Rule provides that "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to" certified copies of public records. N.C.G.S. § 8C-1, Rule 902(4). An unsealed public record is considered certified when it bears the signature of the custodian or other person authorized to make the certification, who certifies that the data compilation is correct. *Id.* Here, the custodian of ACIS, the Clerk of Court for McDowell County, certified that the ACIS printout was a true copy. Thus, the ACIS printout is a self-authenticating document properly introduced pursuant to Rule 1005.

I respectfully concur.

Justice MORGAN joins in this concurring opinion.

Justice EARLS concurring in part and dissenting in part.

Identical language in two statutes about how a prior conviction may be proved should be interpreted the same way even if one statute has been repealed and even if the language in the repealed statute applies to sentencing proceedings while in the statute at issue here, the language applies to trials on the charge of having obtained the status of a habitual felon. *Compare* N.C.G.S. § 15A-3040.4(e) (Supp. 1993) (repealed 1994) ("A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction."), *with* N.C.G.S. § 14-7.4 (2019) ("A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction."). I can even accept that this Court should follow its precedents in *State v. Graham*, 309 N.C. 587, 308 S.E.2d 311 (1983), and *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983), on the question of how that statutory language should be interpreted, despite the fact that neither party cited nor discussed these precedents in their briefs in this Court. What I cannot accept is the proposition that the North Carolina Rules of Evidence, and in particular, Rules 1002 through 1005, do not apply to the State's use of the ACIS printout to

prove Mr. Waycaster's prior convictions beyond a reasonable doubt in this case.

The rules of evidence apply at a trial on a habitual felon indictment in the same way that they apply to "all actions and proceedings in the courts of this State." N.C.G.S. § 8C-1, Rule 1101(a) (2019). A trial on a habitual felon indictment is not a sentencing proceeding. It is a trial in front of a jury in which the rules of evidence apply. Ironically, the trial court applied other rules of evidence to exclude other documents the State offered at trial to prove Mr. Waycaster's prior convictions. When the State offered to admit into evidence a copy of a certified original "Order on Violation of Probation" to prove the same conviction alleged to be shown by the ACIS printout, the trial court excluded the evidence under Rule 403. The trial court therefore recognized that N.C.G.S. § 14-7.4 does not expressly or implicitly repeal the rules of evidence in this context. Nevertheless, in one citation-free paragraph, the majority holds that the State was not required to comply with the requirements of Rule 1005 because it is not applicable here. That holding is incorrect.

Rule 1005 states:

> The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

N.C.G.S. § 8C-1, Rule 1005. The majority reasons that this rule does not apply because the State was not using the ACIS printout to prove the contents of the original judgment but rather to prove that a conviction had occurred. But such sleight of hand, purporting to meaningfully distinguish between the contents of a court record and the fact of a conviction, should have no place in our jurisprudence.

First, as the dissenting opinion in the Court of Appeals pointed out,[1] the State certainly thought it was offering the ACIS printout to prove the contents of the original judgment of conviction:

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1. I agree with and incorporate by reference the arguments made and positions taken in the dissenting opinion below. I have generally limited this opinion to the few remaining points worth adding.

> The best evidence rule applies here because the ACIS printout was admitted to prove the contents of a judicial record (i.e. a "writing") that the State indicated was unavailable. In response to Defendant's objection, the State admitted that they had originally intended to use Defendant's judgment and commitment record to prove his conviction, but were using the ACIS printout (submitted as State's Exhibit 4) because the original could not be found.
>
> > *The State*: I'll tell you Your Honor that when we were gathering these documents, 4A had come from microfilming and they said that they didn't have the original of 4. So 4 is the record of the original judgment.

State v. Waycaster, 260 N.C. App. 684, 694–95, 818 S.E.2d 189, 197 (2018) (Murphy, J., concurring in part and dissenting in part). Moreover, the ACIS printout has no source of information independent of the court file. In other words, without "the contents" of the original judgment of conviction, there would be no ACIS printout showing the fact of the conviction. *LexisNexis Risk Data Mgmt. Inc.*, 368 N.C. 180, 181, 775 S.E.2d 651, 652 (2015) ("[T]he information contained in ACIS is entered on a continuing, real-time basis by the individual Clerks of Superior Court, or by an employee in that Clerk's office, from the physical records maintained by that Clerk.").

Finally, the testimony in this case is further proof that this is an illusory distinction. The Court of Appeals summarized that testimony as follows:

> The Clerk of McDowell County Superior Court, the individual tasked with maintaining the physical court records in McDowell County, testified that the printout was a certified true copy of the information in ACIS regarding this judgment. She also explained the information was 'the same as the judgment' and affirmed it 'is a different way of recording what's on a judgment[.]' The Clerk's certification of the ACIS printout as a true copy of the original information is significant due to her responsibility and control over the physical court records, copies, and ACIS entries, as described in *LexisNexis Risk Data Mgmt. Inc.*

State v. Waycaster, 260 N.C. App. at 691, 818 S.E.2d at 195. The truth is that, in this case, the State is attempting to prove the fact of a prior judgment of conviction against defendant, and when the original court file was not available, the State reasonably looked to other sources of

information to prove that a judgment convicting the defendant of crimes in the past existed. Rule 1005 is applicable here. The burden under that rule is not extreme, the party offering the evidence simply must make a showing that a copy of the official record "cannot be obtained by the exercise of reasonable diligence." N.C.G.S. § 8C-1, Rule 1005.

The majority states that "[a]s a court record in and of itself, the ACIS printout was not merely 'other evidence' of the contents of defendant's original judgment regarding his 4 June 2001 conviction so as to invoke the best evidence rule contained in Rule 1005." To the contrary, based on the testimony in this case and our prior decisions, that is exactly what an ACIS printout is: a court employee takes the original judgment and enters its information into a computer. Pretending that this is somehow separate, substantive evidence of defendant's conviction, rather than merely a secondary rendition of the contents of an official judgment, abrogates the best evidence rule in the absence of any legislative intent to do so.[2]

We have long held that introducing an original judgment into evidence is the "preferred method for proving a prior conviction." *State v. Maynard*, 311 N.C. 1, 26, 316 S.E.2d 197, 211 (1984) (citing *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981)). By holding that the best evidence rule does not apply here, that principle is severely undermined, making it a function of the State's discretion whether to offer the ACIS printout or a certified copy of the original judgment as proof of the prior conviction.

The danger of the majority's reasoning is two-fold. First, the fallacious logic employed to reach this result would apply to every instance in which a party seeks to prove a prior conviction for any purpose whatsoever. If the fact that a conviction has occurred is different from the contents of a court judgment for the purposes of the applicability of Rule 1005, then there never needs to be a showing that due diligence was pursued to find the original court records.[3] Any evidence, not the

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2. The concurring opinion's attempt to create a distinction between the "contents of the original judgment" and information "to prove that a judgment has occurred" fares no better. They are the same thing. The status offense of being a habitual felon requires proof of prior convictions. Here, the ACIS printout is being offered as evidence of a prior judgment of conviction, but it is not the official record. It does not matter whether you call it "information proving that a judgment has occurred" or proof of "the contents of the original judgment."

3. It is important to remember, as noted above, that Rule 1005 does not completely prohibit a party from offering into evidence an ACIS printout to prove the contents of a court record; it simply requires that the party make a showing that the original or a

best evidence, is admissible. The majority effectively rewrites Rule 1005 to say "the contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original, *unless the official record is a judgment of conviction, in which case the official record is not needed*." The General Assembly in its wisdom may wish to rewrite the statute that way, but this Court should not.

Second, the ACIS printout is not as reliable as the official record. Though this Court has stated that ACIS "duplicates" the physical records maintained by the clerk's office, *LexisNexis Risk Data Mgmt. Inc.*, 368 N.C. at 181, 775 S.E.2d at 652, that is only true when the records are completely and accurately entered into the database. It is undeniable that there is a potential for a data entry error. A criminal judgment is prepared by a clerk, reviewed, signed by a judge, and scrutinized by counsel for each party. However, similar procedural safeguards do not exist to guarantee the accuracy and completeness of the data entered into ACIS. That data is not verified by a third party after the staff member of the clerk's office has entered it into the system. An ACIS printout is not the judicial record of the criminal trial but rather a new record generated by the clerk's office independent of the criminal proceeding.

If there was to be a data entry error, proving a negative, for example, that a particular individual was not convicted of a particular crime on a certain date in the past, would be extremely difficult, depending on the circumstances. Even with a defendant's testimony that he was not convicted of a particular offense, the ACIS printout provides precious few details to allow an effective rebuttal of the truth or falsity of the information contained therein. This is the ACIS printout introduced into evidence in this case:

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certified copy of the original record is unavailable after the "exercise of reasonable diligence." N.C.G.S. § 8C-1, Rule 1005.

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580 MCDOWELL                    ICA INQUIRY 01  01CR 001216     FILM: 0200100023
DISPOSED                        R  S DOB/AGE      CR      FILING DATE: 030901
WARRANT                         W  M 12011982 DL#:
WAYCASTER,JEFFERY,DANIEL                          CIT#:          TRIAL DATE: 042402
213 TRIPLE J MHP       LOT #23          CSLR:          CSLRC:          AM
MARION            NC  28752  DEF ATTY: NEIGHBORS,RUSSELL          TYP: A    VRA:
CHG/ARRN OFFN: F BREAKING AND OR ENTERING (F)                  14-54(A)
COMPLAINANT: SHOOK,D                          SFF ISSUED: 030801   SERVED: 030801
OFFN DATE: 022001    ARRN DATE:          MOTIONS DATE:          DISP DATE: 060401
CONT. D: 08 S: 00 C: 00 NR: 00 INT?:   FRM:    RSONCO:      GANG REL:    DV CV: N

PLEA VER MOD      FINE         COSTS    WCC    REST     JUDGE   PAID   TO-BE-PAID
 GU  GU  JU   $            $  190.00       $  7009.00  DS      NO       060403
CONV OFFN: F BREAKING AND OR ENTERING (F)                  14-54(A)         CAB:
SENT LEN: 005 M - 006 M  SENT TYPE: C                  CONS F/JGMT:
PROB: 024 M       SUPERVISED   WITHDRAWN:              APPEALED TO SUPERIOR:
AREA CD:    ACCD:    HWY:          V LIC:                TRANS TO SUPERIOR:
CDL: N  CMV: N  HAZ: N   TRP/DIST:    V ST:     V TYP:        APPELLATE:
NO CONTACT W T HOLLIFIELD DR CL CAC 420.00


ARREST DATE: 030801 CHECK DIGIT: LW0638E SID: NC0913517A LID:
NEXT#:                      PF2 - NAME INQUIRY                 ADDL CHARGES: Y
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This particular printout contained a case number, the complainant's name, an offense date and disposition date, and the fine and restitution ordered, but very little information about the underlying offense. The ACIS printout was not signed by a judge. No judge, prosecutor, or court reporter was identified in the printout.

An official court record has significantly greater indicia of reliability and hence, the best evidence rule is a part of our law. Secondary evidence of the content of the original is only admissible if the State establishes that the original or a copy thereof is unavailable. *See* N.C.G.S. § 8C-1, Rule 1005. In this case, the State failed to show that the original judgment, or a copy of the original judgment, could not be obtained through reasonable diligence. *See State v. York*, 347 N.C. 79, 91, 489 S.E.2d 380, 387 (1997) ("The best evidence rule requires that secondary evidence offered to prove the contents of a recording be excluded whenever the original recording is available"). Rule 1005 exists for a reason, and this Court exceeds its authority by unilaterally declaring that the rule will not apply for this purpose in these proceedings.

Having concluded that the Rule 1005 applies to this trial and to the evidence of Mr. Waycaster's prior conviction, I agree with the dissent below that the evidence in this case failed to establish that the State engaged in due diligence to find the official record of the original court judgment. *Waycaster*, 260 N.C. App. at 695, 818 S.E.2d at 197 ("Here, there was an inadequate foundation regarding the State's exercise of 'reasonable diligence' to obtain a copy of the 4 June 2001 judgment record.") (Murphy, J., concurring in part and dissenting in part). Moreover, because this was the only evidence of Waycaster's prior conviction, the erroneous

admission of this evidence without the required findings was prejudicial. *See* N.C.G.S. § 15A-1443(a) (2019) (stating that to establish reversible error a defendant must show that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial").

I would reverse the decision of the Court of Appeals on the question of whether the trial court properly admitted the ACIS printout in this case without the foundation required by Rule 1005 of the North Carolina Rules of Evidence. We should vacate the judgment and habitual felon verdict and remand for a new trial on that charge. Accordingly, I concur with that portion of the majority opinion which holds that N.C.G.S. § 14-7.4 (2019) must be interpreted as permissive and not exclusive with regard to the methods of proof of prior convictions. I agree that an ACIS printout is admissible as evidence of prior convictions under that statute.

However, I do not read N.C.G.S. § 14-7.4 as evincing any intent to abrogate the requirements of Rules 1002 to 1005 of the North Carolina Rules of Evidence. Reading these statutes *in pari materia*, N.C.G.S. § 14-7.4 is not exclusive and permits use of the ACIS printout as evidence of prior convictions, but because the ACIS printout is wholly derivative of the contents of a judgment, it must also comply with the best evidence rule. Therefore, I respectfully dissent from that part of the majority opinion which holds that the best evidence rule does not apply to an ACIS printout when offered as evidence of a prior conviction.

Justice HUDSON joins in this opinion concurring in part and dissenting in part.

GWENDOLYN DIANETTE WALKER, WIDOW OF ROBERT LEE WALKER, DECEASED EMPLOYEE
v.
K&W CAFETERIAS, EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 99PA19

Filed 14 August 2020

Insurance—commercial underinsured motorist policy—endorsement—choice of law clause—third-party settlement—subrogation

Where a commercial uninsured/underinsured motorist (UIM) policy included an endorsement that specifically invoked South Carolina law, UIM proceeds paid to a widow on behalf of her husband's estate (in a settlement with a third party in a South Carolina wrongful death action) were not subject to subrogation under South Carolina law. The insurer was therefore not entitled to reimbursement from the UIM proceeds of worker's compensation death benefits paid in a previous action before the North Carolina Industrial Commission.

Justice NEWBY dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of the unanimous decision of the Court of Appeals, 264 N.C. App. 119, 824 S.E.2d 894 (2019), affirming an Opinion and Award entered on 27 February 2018 by the North Carolina Industrial Commission. On 11 June 2019, the Supreme Court allowed plaintiff's petition for discretionary review. Heard in the Supreme Court on 6 January 2020.

The Sumwalt Law Firm, by Vernon Sumwalt, for plaintiff-appellant.

Cranfill Sumner & Hartzog, LLP, by Roy G. Pettigrew, for defendant-appellees.

HUDSON, Justice.

Pursuant to plaintiff's petition for discretionary review, we review the decision of the Court of Appeals, which affirmed the 27 February 2018 Opinion and Award of the North Carolina Industrial Commission (the Commission). The Commission found that the uninsured/underinsured motorist (UIM) proceeds that plaintiff received on behalf of her husband's estate through the settlement of a South Carolina wrongful death lawsuit were subject to defendants' subrogation lien under

N.C.G.S. § 97-10.2. We conclude that, by an endorsement to the UIM policy covering the vehicle that decedent was driving when he was killed, South Carolina insurance law applies, and it bars subrogation of UIM proceeds. S.C. Code § 38-77-160 (2015). Therefore, the UIM proceeds that plaintiff recovered from the wrongful death lawsuit may not be used to satisfy defendants' workers' compensation lien under N.C.G.S. § 97-10.2. Accordingly, we reverse and remand for further proceedings not inconsistent with this opinion.[1]

Factual and Procedural Background

On 16 May 2012, Robert Lee Walker (decedent), plaintiff's husband and an employee of defendant K&W Cafeterias (K&W), was involved in a motor vehicle accident with a third-party in Dillon, South Carolina. Decedent died as a result of his injuries. The vehicle that decedent was driving was owned by K&W, a North Carolina corporation headquartered in Winston-Salem, North Carolina.

Prior to the occurrence of the accident in which Mr. Walker died, the vehicle insurance policy applicable here was modified by an endorsement, pertinent parts of which are quoted below:

> THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.
>
> SOUTH CAROLINA UNDERINSURED MOTORISTS COVERAGE
>
> For a covered "auto" licensed or principally garaged in, or "garage operations" conducted in South Carolina, this endorsement modifies insurance provided under the following:
>
> BUSINESS AUTO COVERAGE FORM
> GARAGE COVERAGE FORM
> MOTOR CARRIER COVERAGE FORM
> TRUCKERS COVERAGE FORM
>
> With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

1. Because of this holding, we need not—and do not—reach the issue of whether the Commission erred in ordering that any workers' compensation lien could be satisfied by distributing UIM proceeds held for wrongful death beneficiaries who never received workers' compensation benefits.

> A. Coverage
>
> 1. We will pay in accordance with the South Carolina Underinsured Motorists Law all sums the "insured" is legally entitled to recover as damages from the owner or driver of an "underinsured motor vehicle."
>
> . . . .
>
> E. Changes In Conditions
>
> . . . .
>
> 5. The following provision is added:
>
> CONFORMITY TO STATUTE
>
> This endorsement is intended to be in full conformity with the South Carolina Insurance Laws. If any provision of this endorsement conflicts with that law, it is changed to comply with the law.

Decedent's widow, Gwendolyn Dianette Walker, filed a workers' compensation claim with the North Carolina Industrial Commission (the Commission) for medical expenses and death benefits resulting from decedent's death under N.C.G.S. § 97-38–40. On 7 January 2013, the Commission entered a Consent Opinion and Award ordering defendants to pay $333,763 in workers' compensation benefits to plaintiff.[2]

In 2014, plaintiff, as representative of decedent's estate, filed a new and separate civil action in South Carolina—a wrongful death case seeking damages from the driver of the motor vehicle (the third-party) who was at fault in the accident that resulted in Mr. Walker's death. In 2016, plaintiff and the third-party reached a settlement agreement, according to which plaintiff recovered a total of $962,500 on behalf of decedent's estate. The recovery included: (1) $50,000 in liability benefits from the third-party's insurer; (2) $12,500 in personal UIM proceeds from plaintiff's and decedent's own personal UIM policy; and (3) $900,000 in UIM proceeds from a commercial UIM policy that K&W purchased with its automobile insurance carrier.

On 21 March 2016, Liberty Mutual Insurance Co.—the workers' compensation insurance carrier for K&W and co-defendant in this

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2. Because all of the decedent's children were adults at the time of his death, under the statute, only the widow was entitled to the death benefit. N.C.G.S. § 97-39; N.C.G.S. § 97-2(12) (" 'Child,' 'grandchild,' 'brother,' and 'sister' include only persons who at the time of the death of the deceased employee are under 18 years of age.").

case—filed a request for a hearing with the North Carolina Industrial Commission in which it sought repayment of the workers' compensation death benefits it had paid to plaintiff beginning in 2013, claiming a lien under N.C.G.S. § 97-10.2 on the UIM proceeds that she recovered from the South Carolina wrongful death settlement in 2016.

On 30 March 2016, plaintiff filed a declaratory judgment action against defendants in South Carolina, asserting that S.C. Code § 38-77-160 precluded subrogation and assignment to defendants of the UIM proceeds that plaintiff had been awarded in the settlement. On 2 May 2016, defendants removed the action to the United States District Court for the District of South Carolina on the basis of diversity jurisdiction. The United States District Court ultimately abstained from hearing the declaratory judgment action.

Meanwhile, on 13 June 2016, plaintiff filed a motion in the North Carolina Industrial Commission to stay all proceedings on defendants' subrogation claim there, pending the result of the federal litigation. Plaintiff's motion was denied on 28 June 2016. Plaintiff then filed a motion to reconsider, which the Commission denied on 18 July 2016. Plaintiff appealed and filed another motion for stay. Plaintiff's appeal was heard by a Deputy Commissioner.

In its 10 July 2017 Opinion and Award, the Deputy Commissioner denied plaintiff's motion to stay the proceedings and ordered the distribution of plaintiff's entire recovery from the South Carolina wrongful death settlement with the at-fault driver (the third-party recovery). The Deputy Commissioner concluded that defendants were entitled to subrogation under N.C.G.S. § 97-10.2(f)(1)(c), (h), and ordered that defendants be reimbursed out of the third-party recovery for the $333,763 in workers' compensation benefits that they had paid to Mrs. Walker under the 7 January 2013 Consent Opinion and Award.

Plaintiff appealed the 10 July 2017 Opinion and Award to the Full Commission, which affirmed the Deputy Commissioner's decision. Plaintiff then appealed to the Court of Appeals.

The Court of Appeals affirmed, holding in pertinent part that "[t]he Full Commission correctly concluded Defendants could assert a subrogation lien for workers' compensation benefits paid to Plaintiff on the UIM policy proceeds obtained by Plaintiff in the South Carolina wrongful death action." *Walker v. K&W Cafeterias*, 264 N.C. App. 119, 133, 824 S.E.2d 894, 904 (N.C. Ct. App. 2019). As explained below, we conclude that defendants may not satisfy their workers' compensation lien by collecting from plaintiff's recovery of UIM proceeds in her South

Carolina wrongful death settlement. Accordingly, we reverse the decision of the Court of Appeals.

Analysis

First, we emphasize that this case is not plaintiff's workers' compensation claim. That claim was fully resolved in 2013 when death benefits were paid to plaintiff under the Workers' Compensation Act due to Mr. Walker's work-related death. Instead, here we review what should happen to over $900,000 that was paid to plaintiff in the South Carolina wrongful death settlement with the at-fault driver. That settlement was reached in 2016, and to date, the money remains in the trust account of plaintiff's attorneys.

Because the 2012 workers' compensation case was brought in North Carolina, Liberty Mutual sought to have the Commission order plaintiff to reimburse the workers' compensation benefits she had been paid with the as-yet-undistributed recovery she received in her South Carolina wrongful death settlement. Although the Commission and the Court of Appeals concluded that Liberty Mutual could be reimbursed with plaintiff's wrongful death UIM proceeds, we disagree.

For the reasons below, we conclude that the South Carolina UIM policy—a contract to which defendants are party and according to which the wrongful death settlement proceeds were paid—controls the outcome here. That policy requires the application of South Carolina law to the payment of UIM proceeds. Under South Carolina UIM law, an insurer is barred, without exception, from seeking to be reimbursed with UIM proceeds for benefits it has previously paid. S.C. Code § 38-77-160 ("Benefits paid pursuant to this section are not subject to subrogation and assignment."). Accordingly, we reverse the decision of the Court of Appeals and remand to the Commission for proceedings not inconsistent with this opinion.

This case presents a single issue of law, i.e., a conclusion of law by the Commission, which we review de novo. N.C.G.S. § 97-86 ("The award of the Industrial Commission . . . shall be conclusive and binding as to all questions of fact; but either party to the dispute may, within 30 days . . . appeal from the decision of the Commission . . . for errors of law . . . . The procedure for the appeal shall be as provided by the rules of appellate procedure.").

We must determine whether to apply North Carolina or South Carolina law to the attempted subrogation of plaintiff's wrongful death settlement UIM proceeds. The Court of Appeals analyzed this question

as an abstract choice of law issue and concluded that North Carolina law applies. *See Walker*, 264 N.C. App. at 131, 824 S.E.2d at 902–03 (discussing *Anglin v. Dunbar Armored, Inc.*, 226 N.C. App. 203, 742 S.E.2d 205 (2013)). We do not agree with the conclusion that this case presents a choice of law issue; instead we conclude that this issue is properly analyzed under contract law interpreting a choice-of-law clause. As we are basing our decision on contractual terms rather than legal principles related to choice of law, we need not—and do not—go beyond the contract as modified by its endorsement; by the explicit terms of that contract, the UIM proceeds are paid and governed by South Carolina law.

The dissent maintains that plaintiff's stipulation in 2012 to the jurisdiction of the Commission over her workers' compensation claim carries significance here. As noted above, this case is not the workers' compensation claim, but involves the settlement proceeds paid under a UIM policy to settle a civil action filed in South Carolina against the at-fault driver. Here, in the proceedings before the Commission, the parties' stipulations included the following:

> 1. . . . However, Plaintiff disputes if the Industrial Commission has personal or *in rem* jurisdiction to exercise authority over underinsured motorist ("UIM") proceeds paid under a South Carolina UIM policy . . . and whether those proceeds can be attached to satisfy Defendant's subrogation interest under N.C.[G.S.] § 97-10.2.
>
> 2. All parties are subject to and bound by the provisions of the North Carolina Workers' Compensation Act, N.C.[G.S.] § 97-1 *et seq.* ("the Act"), except to the extent that Plaintiff contends the Industrial Commission's jurisdiction might be limited because of the circumstances expressed in paragraph 1.

Unlike the stipulations entered in the workers' compensation claim, the ones above, which are included in the Full Commission's 2017 Opinion and Award, specifically reserve the arguments plaintiff raises here.

Defendants argue that the commercial UIM policy purchased by K&W is not a South Carolina UIM policy. Specifically, they point out that the parties stipulated before the Commission that the commercial UIM policy was purchased and entered into in North Carolina. Defendants argue that this fact is dispositive because, under N.C.G.S. § 58-3-1, an insurance policy is "deemed to be made" in North Carolina if it is the state where "applications for [the policy] are taken." N.C.G.S. § 58-3-1 (2019).

More significantly, defendants' argument overlooks the effect of the endorsement that was added to the commercial UIM policy on 7 July 2011, titled "South Carolina Underinsured Motorist Coverage." Specifically, the endorsement states that it "changes the policy."[3] The endorsement also states that it "is intended to be in full conformity with the South Carolina Insurance Laws" and that "[i]f any provision of this endorsement conflicts with that law, it is changed to comply with the law." Further, the endorsement states that "[the insurance carrier] will pay in accordance with the South Carolina Underinsured Motorists Law." The clear intent and effect of this endorsement was to provide for the application of South Carolina law to all UIM payments under the policy.

Furthermore, the vehicle operated by decedent at the time of the accident fell within the categories of vehicles for which the policy endorsement intended to apply South Carolina law. The endorsement modified the insurance policy for "a covered 'auto' licensed or principally garaged in" South Carolina. As found by the Commission in the 10 July 2017 Opinion and Award, the vehicle decedent was driving at the time of the accident was registered, garaged, and driven in South Carolina. These factors, and the fact that the policy endorsement explicitly provided as a matter of contract that South Carolina UIM law would apply to payments made under the commercial UIM policy, demonstrate that South Carolina law should apply here. Accordingly, we hold that the endorsement requires South Carolina UIM law to apply here.[4]

The applicable South Carolina statutes include the following:

> All contracts of insurance on property, lives, or interests in this State are considered to be made in the State . . . and are subject to the laws of this State.

S.C. Code § 38-61-10 (2015).

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3. Even under North Carolina insurance law, an endorsement like this one that "changes the contract" becomes part of that contract and is treated as such. *See e.g.*, *Scottsdale Ins. Co v. Travelers Indem. Co.*, 152 N.C. App. 231, 234, 566 S.E.2d 748, (2002) (treating the endorsement as part of the contract for the purposes of construing ambiguity in favor of the insured).

4. The dissent suggests that the intent of the North Carolina General Assembly in its Workers' Compensation Act controls the distribution of the UIM proceeds in the South Carolina civil case. However, K&W purchased the UIM policy and specifically agreed therein that any such payments be covered by South Carolina law. Because we conclude that the UIM payments here are governed by South Carolina law under the terms of the policy contract, we conclude that the intent of the North Carolina General Assembly does not control.

> Additional uninsured motorist coverage; underinsured motorist coverage. Automobile insurance carriers shall offer, at the option of the insured, uninsured motorist coverage [and] underinsured motorist coverage, up to the limits of the insured liability coverage. . . . Benefits paid pursuant to this section are not subject to subrogation and assignment.

S. C. Code § 38-77-160.

By its plain language, S.C. Code § 38-77-160 prohibits subrogation of UIM payments like those paid to plaintiff in her wrongful death settlement. Accordingly, having concluded that South Carolina law applies to proceeds paid under Liberty Mutual's UIM insurance policy, defendants' subrogation lien under N.C.G.S. § 97-10.2 cannot be satisfied by the UIM proceeds that plaintiff received as part of the wrongful death settlement.

The dissent here proposes, without explanation or authority, that applying South Carolina law as required by the contract would allow for "double recovery." There can be no double recovery in these circumstances, where Mrs. Walker was awarded workers' compensation death benefits, a limited statutory remedy designed to pay some part of lost wages, medical and funeral expenses only. The UIM proceeds, limited by statute to one million dollars, are also provided by law as a limited remedy to give at least some recovery to the victims of an underinsured at-fault driver. Neither remedy (nor the two combined) purports to fully compensate Mrs. Walker or her six grown children for their losses due to Mr. Walker's death, let alone to exceed any actual damages they have suffered. Moreover, if defendants here were permitted to recover more than $300,000 out of the UIM proceeds, the grown children (who were not eligible to receive the workers' compensation benefits) would be deprived in significant part of even that limited remedy. We see no indication of a double recovery here.

Conclusion

Because we conclude that South Carolina law applies and prohibits the subrogation of the UIM proceeds paid on account of decedent's death, we reverse and remand to the Commission for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Justice NEWBY dissenting.

This case asks whether a plaintiff who seeks benefits under the North Carolina Workers' Compensation Act (the Act) subjects herself to North Carolina's accompanying remedial laws, including those concerning subrogation. Under the General Assembly's carefully crafted statutory scheme, when a plaintiff chooses to file for benefits under the Act, the plaintiff also accepts the accompanying provisions regarding subrogation. Plaintiff had the option to proceed under either North Carolina or South Carolina's workers' compensation acts; plaintiff chose the more generous North Carolina Act. In her initial proceeding to obtain benefits under North Carolina's Act, plaintiff stipulated that she was "subject to and bound by the provisions of the North Carolina Workers' Compensation Act" and that "[t]he North Carolina Industrial Commission has jurisdiction over the parties and the subject matter involved in this case." Having availed herself of the benefits under the Act, she is also bound by the terms of North Carolina's remedial laws, including those allowing an employer to subrogate recoveries from third-parties which prevent double recoveries. Because plaintiff received a separate third-party recovery after defendants had provided benefits under the Act, defendants are entitled to proceed under the Act to seek subrogation of those proceeds. As such, the Court of Appeals properly affirmed the Industrial Commission's holding that plaintiff's wrongful death proceeds were subject to subrogation.

To reach its outcome, the majority, however, mischaracterizes the issue here and relies solely on what it terms as contract law and South Carolina insurance law. The majority ignores that plaintiff chose to file for workers' compensation in North Carolina and, as such, subjected herself to all aspects of the Act. The majority allows a plaintiff to choose the best parts of the Act, permitting plaintiff to obtain the full benefits of the Act without being subject to the accompanying subrogation provisions designed to prevent double recovery. By doing so, the majority essentially rewrites the North Carolina Workers' Compensation Act by deleting the comprehensive nature of its provisions. The majority ultimately concludes that so long as there is a rider to the insurance policy applying a state's law that prohibits subrogation, a plaintiff who has an accident outside of North Carolina but files for benefits in North Carolina may be eligible for double recovery.[1] Because plaintiff chose to

1. Moreover, the full ramifications of the majority decision are unclear given that there are numerous companies located in North Carolina that do business in other states and have similar riders on their insurance policies conforming the policies to the laws of the other states. The majority's holding will certainly have a significant impact on the insurance premiums that North Carolina companies pay.

proceed under North Carolina Workers' Compensation Act, she is bound by the subrogation provision of N.C.G.S. § 97-10.2(f) (2019). As the Court of Appeals held, the proceeds from the separate third-party recovery she obtained are subject to subrogation by the employer. Accordingly, I respectfully dissent.

Decedent, a South Carolina resident, was killed in a vehicular accident in South Carolina, driving a truck owned by his employer, K&W Cafeterias, Inc., a North Carolina corporation. A third party caused the accident. K&W had insured the truck under a blanket vehicular insurance policy purchased and entered into within North Carolina. Because K&W conducted business in South Carolina, the policy contained a required endorsement providing the coverage to be in conformity with "South Carolina Insurance Laws."[2]

The deceased employee's widow (plaintiff), a South Carolina resident, could have pursued workers' compensation benefits under North Carolina or South Carolina law, because the deceased was employed by a North Carolina corporation. On 21 August 2012, plaintiff decided to file for death benefits under North Carolina's Workers' Compensation Act. As a part of plaintiff's initial action seeking death benefits under the Act, the parties stipulated the following:

> 1. The date of the admittedly compensable injury that is the subject of this claim is May 16, 2012. On that date, Employee-Plaintiff died as the result of a motor vehicle accident arising out of and in the course of his employment with Defendant-Employer.
>
> 2. At all relevant times, the parties hereto were subject to and bound by the provisions of the North Carolina Workers' Compensation Act.
>
> . . . .
>
> 6. The North Carolina Industrial Commission has jurisdiction over the parties and the subject matter involved in this case.

Based on the stipulations and other evidence, the Industrial Commission entered an order requiring defendants to pay plaintiff a total of $333,763 in benefits.

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2. K&W, doing business in multiple states, had multiple endorsements in its UIM policy, including endorsements or financial responsibility identification cards for Florida, West Virginia, and Virginia.

On 26 August 2014, after accepting benefits under the North Carolina Workers' Compensation Act, plaintiff, the appointed representative of decedent's estate, filed a wrongful death and survival action in South Carolina against the at-fault driver and his father. In March 2016, about a year and a half after plaintiff filed the action, the parties settled the lawsuit, from which plaintiff received $962,500 (the third-party settlement). The settlement consisted of (1) $50,000 in liability benefits from the at-fault driver's insurer under a South Carolina insurance policy; (2) $12,500 from the underinsured motorist (UIM) coverage of plaintiff and decedent's own personal vehicle from their automobile insurance carrier; and (3) $900,000 in commercial UIM coverage from employer K&W's automobile insurance carrier pursuant to their commercial UIM coverage for the vehicle decedent was driving when the accident occurred. Throughout the proceeding, plaintiff has conceded that the $50,000 in benefits provided from the at-fault driver's insurer through a South Carolina insurance policy is subject to subrogation under both North Carolina law and South Carolina law.

On 21 March 2016, defendants filed the appropriate form with the North Carolina Industrial Commission for a subrogation lien of $333,763 against the $962,500 that plaintiff had received from the third-party settlement. Defendants proceeded under the relevant portion of the Act that allows a defendant to be subrogated against any recovery. Plaintiff had initially stipulated that she was subject to the North Carolina Industrial Commission's jurisdiction when she filed to receive benefits. However, after receiving full benefits, when defendants filed for subrogation, plaintiff for the first time disputed whether the Industrial Commission had jurisdiction over the UIM policy proceeds, and whether those proceeds were subject to subrogation under N.C.G.S. § 97-10.2.[3] On 10 July 2017, the deputy commissioner ruled in defendants' favor, finding that plaintiff must satisfy defendants' $333,763 subrogation lien from the $962,500 third-party settlement.

Plaintiff then appealed to the full Industrial Commission, which ultimately held that defendants were entitled to a subrogation lien of the entire third-party settlement proceeds, "not just [plaintiff's] share of the Third-Party Recovery." The Commission reasoned that "[p]laintiff voluntarily triggered the Commission's jurisdiction by filing a claim for benefits under the Act and obtaining a final award of

3. The majority does not discuss the stipulations entered into initially by the parties and seems to confuse those stipulations with the stipulations made later when plaintiff was contesting defendants' subrogation rights.

benefits via the Consent Opinion and Award, in which [p]laintiff explicitly acknowledged the applicability of the Act and the jurisdiction of the Commission." Moreover, because plaintiff was seeking relief in North Carolina, where she willingly chose to file for benefits under the Act, and because N.C.G.S. § 97-10.2 is remedial in nature, the Commission concluded as a matter of law that the statute allowed defendants to seek subrogation of the relevant portion of the wrongful death proceeds. Essentially, plaintiff's choice to subject herself to the benefits of the Act also warranted the application of the relevant procedural subrogation provision as provided by the North Carolina legislature.

The Court of Appeals upheld the full Commission's decision, holding that defendants were entitled to a lien against the third-party settlement proceeds. *Walker v. K&W Cafeterias*, 824 S.E.2d 894, 904 (N.C. Ct. App. 2019). The Court of Appeals reasoned, *inter alia*, that regardless of whether the UIM policy was a South Carolina policy, plaintiff had chosen North Carolina as the forum state in which to file for benefits, and thus North Carolina law would apply as the law of the forum state. *Id.* at 903–04. This rationale is consistent with *Anglin v. Dunbar*, which reaffirmed that remedial rights are determined by the law of the forum state. *Id.* (citing *Anglin v. Dunbar Armored, Inc.*, 226 N.C. App. 203, 204–05, 209–10, 824 S.E.2d 894, 206–07, 209 (2013)). As such, the Court of Appeals in this case concluded that defendants were entitled to seek subrogation of the wrongful death proceeds. *Id.* at 904.

The question presented here is whether the General Assembly intended for someone who receives benefits under the Act to be bound by its remedial provisions. "The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998)). "The best indicia of that intent are the language of the statute[,] . . . the spirit of the act[,] and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citation omitted).

The North Carolina legislature has chosen to provide generous compensation for injured workers and their heirs through the North Carolina Workers' Compensation Act. "[T]he purpose of the North Carolina Workers' Compensation Act is not only to provide a swift and certain remedy to an injured worker, but is also to ensure a limited and determinate liability for employers." *Estate of Bullock v. C.C. Mangum Co.*, 188 N.C. App. 518, 522, 655 S.E.2d 869, 872 (2008) (citing *Barnhardt v. Cab Co.*, 266 N.C. 419, 427, 146 S.E.2d 479, 484 (1966)).

Notably, the Act is comprehensive. Given the fact that the Act provides extensive and generous benefits to individuals, the legislature has balanced an employer's duty to provide compensation with its right to subrogate those benefits where an individual or estate receives a second, separate recovery for the same injury. "The legislative intent behind the Workers' Compensation Act is not to provide an employee with a windfall of a recovery from both the employer and the third-party tortfeasor." *Id.* (citing *Radzisz v. Harley Davidson of Metrolina*, 346 N.C. 84, 89, 484 S.E.2d 556, 569 (1997)). Thus, section 97-10.2 provides that an employer may obtain a subrogation lien, to the extent of the amount of benefits paid, against certain third-party recovery amounts. The statute sets forth that:

> (f)(1) . . . if an award final in nature in favor of the employee has been entered by the Industrial Commission, *then any amount obtained by any person by settlement with*, *judgment against*, or otherwise from the third party by reason of such injury or death *shall* be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority:
>
> . . . .
>
> c. Third to the reimbursement of the employer for all benefits by way of compensation or medical compensation expense paid or to be paid by the employer under award of the Industrial Commission.
>
> . . . .
>
> (h) *In any . . . settlement with the third party*, *every party to the claim for compensation shall have a lien to the extent of his interes*t under (f) hereof upon any payment made by the third party by reason of such injury or death . . . and such lien may be enforced *against any person receiving such funds.*

N.C.G.S. § 97-10.2 (emphases added).

Whether this statute applies here also depends on if section 97-10.2 is substantive or remedial. *Lex loci*, or the "law of the jurisdiction in which the transaction occurred or circumstances arose on which the litigation is based," governs substantive laws. *Cook v. Lowe's Home Centers*, *Inc.*, 209 N.C. App. 364, 366, 704 S.E.2d 567, 569 (2011) (citing *Charnock v. Taylor*, 223 N.C. 360, 361, 26 S.E.2d 911, 913 (1943)).

Alternatively, *lex fori*, or "the law of the forum in which the remedy is sought," governs when the statute at issue is remedial. *Id.*

"Where a lien is intended to protect the interests of those who supply the benefit of assurance that any work-related injury will be compensated, it is remedial in nature." *Id.* at 367, 704 S.E.2d at 570. Because N.C.G.S. § 97-10.2(f), like N.C.G.S. § 97-10.2(j), "is remedial in nature and remedial rights are determined by the law of the forum," *Anglin*, 226 N.C. App. at 209, 742 S.E.2d at 209 (cleaned up) (citation omitted), North Carolina law applies.

Here plaintiff chose to pursue workers' compensation benefits in North Carolina instead of pursuing benefits in her home state, which was also the location of the accident. As a part of her initial filing with the Industrial Commission seeking benefits under the Act, plaintiff explicitly stipulated that she was "subject to and bound by the provisions of the North Carolina Workers' Compensation Act" and that "the North Carolina Industrial Commission had jurisdiction over the parties and the subject matter involved in this case." Thus, plaintiff subjected herself to North Carolina jurisdiction by initially filing for benefits in North Carolina. In order to receive employer provided benefits under the Act, plaintiff necessarily consented to the application of North Carolina's remedial laws, as North Carolina is the forum state in this dispute.

Because N.C.G.S § 97-10.2(f) is remedial in nature, and because plaintiff consented to the application of North Carolina's remedial laws when she initially filed to receive benefits under the Act, plaintiff is bound by N.C.G.S § 97-10.2. Plaintiff chose to file for benefits in North Carolina, under the Act which provides generous benefits, but those benefits are also balanced by the corresponding subrogation provisions. On the other hand, South Carolina does not allow subrogation of UIM proceeds, but that balances the more limited benefits that it provides through its own workers' compensation act. Had plaintiff wanted the benefit of South Carolina's policy which prevents subrogation, she should have, and could have, filed for workers' compensation benefits in South Carolina. Simply put, the General Assembly did not intend for a plaintiff to choose to subject herself to North Carolina's jurisdiction to receive benefits, but reject North Carolina's jurisdiction when it comes to the remedial aspects of North Carolina's Workers' Compensation scheme, including an employer's ability to subrogate any proceeds that a plaintiff or estate receives from a third-party.

The majority concludes that plaintiff did not stipulate to the application of North Carolina law to the UIM proceeds since she did not

stipulate to this fact in the full Industrial Commission proceeding. In doing so, the majority ignores that plaintiff chose the forum state by filing for benefits under the Act, and by stipulating to the application of North Carolina's jurisdiction at that point, which results in the application of North Carolina remedial laws. The majority instead treats this case in a vacuum as one solely involving an insurance contract interpreting a choice-of-law clause. The majority also fails to acknowledge the comprehensive nature of the North Carolina Workers' Compensation Act, allowing a plaintiff to choose only the best portions of the Act.

Moreover, though the application is not entirely clear, it seems the majority's analysis will result on one hand in a North Carolina resident who has an accident in South Carolina achieving a double recovery by receiving workers' compensation benefits without subrogation. On the other hand, a North Carolina resident who has an accident in North Carolina would not achieve a double recovery as he would be subject to the subrogation statutes, even when both parties choose to file for benefits in North Carolina. Surely the North Carolina legislature did not intend to provide this windfall recovery to some individuals while limiting the recovery for others. The intent of the North Carolina legislature is relevant where a plaintiff subjects herself to benefits under the Act by filing in North Carolina, despite the majority's contention to the contrary.[4]

Plaintiff's policy and the rider here cannot be viewed in a vacuum as presenting only a question of contract law as the majority contends. By filing for benefits under the Act, plaintiff is bound by North Carolina's clearly established statutory provisions allowing subrogation of any third-party proceeds. N.C.G.S. § 97-10.2(f)(1), (h). The decision of the Court of Appeals upholding the decision of the Industrial Commission should be affirmed. I respectfully dissent.

4. The majority contends that since the recovering parties under workers' compensation and the UIM policy may be different, some may be deprived of recovery through subrogation under North Carolina law. This is a policy determination appropriately made by the legislature.

IN RE D.A.A.R.

[375 N.C. 269 (2020)]

IN RE D.A.A.R. AND S.A.L.R.	)	Guilford County

No. 224A20

ORDER

Respondent-Appellant Father's Motion to Dismiss his appeal is Allowed. Costs associated with this appeal shall be taxed as set forth in the mandate following issuance of an opinion in this matter.

By order of the Court in conference, this the 15th day of July 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of July 2020.

AMY L. FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy L. Funderburk
Clerk, Supreme Court of
North Carolina

IN RE G.G.M.

[375 N.C. 270 (2020)]

IN THE MATTER OF G.G.M.	)	
	)	
	)	CABARRUS COUNTY
IN THE MATTER OF S.M.	)	
	)	

No. 248A20 & 249A20

ORDER

On 9 June 2020, respondent-father moved for consolidation of *In re: G.G.M.* (248A20) and *In re: S.M.* (249A20). Pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure these motions are allowed. The cases are consolidated for all purposes including oral argument if the cases are argued. The parties will henceforth make their filings under file number 248A20 with a combined caption showing both file numbers and these cases also shall be calendared under file number 248A20.

By Order of this Court in Conference, this 10th day of June, 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 June, 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk
~~Assistant~~ Clerk

STATE v. CLARK

[375 N.C. 271 (2020)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Pitt County
	)	
JAMES CLAYTON CLARK, JR.	)	

No. 286A20

ORDER

Defendant's petition for discretionary review of additional issues is denied with respect to Issue No. I and allowed with respect to Issue Nos. II and III.

Accordingly, the new brief of the Defendant shall be filed with this Court not more than 30 days from the date of certification of this order.

Therefore the case is docketed as of the date of this order's certification. Briefs of the respective parties shall be submitted to this Court within the times allowed and in the manner provided by Appellate Rule 15(g)(2).

By order of the Court in conference, this the 12th day of August 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 14th day of August 2020.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
Clerk, Supreme Court of
North Carolina

STATE OF NORTH CAROLINA	)	
v.	)	Clay County
JOHN D. GRAHAM	)	

No. 155P20

ORDER

Defendant's petition for discretionary review is decided as follows: Allowed as to Issue No. II and denied as to Issue No. I.

Accordingly, the new brief of the Defendant shall be filed with this Court not more than 30 days from the date of certification of this order.

Therefore the case is docketed as of the date of this order's certification. Briefs of the respective parties shall be submitted to this Court within the times allowed and in the manner provided by Appellate Rule 15(g)(2).

By order of the Court in conference, this the 12th day of August 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 14th day of August 2020.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
Clerk, Supreme Court of
North Carolina

STATE v. HEWITT

[375 N.C. 273 (2020)]

STATE OF NORTH CAROLINA	)	
v.	)	Catawba County
EVERETTE PORSHAU HEWITT	)	

No. 230P18

SPECIAL ORDER

Defendant's motion to amend the petition for discretionary review is allowed. The State's motion to dismiss the appeal is allowed and the motion to amend the notice of appeal is dismissed as moot. Defendant's petition for discretionary review is allowed as to Issues I and II for the limited purpose of remanding to the Court of Appeals for reconsideration in light of *State v. Hobbs*, 841 S.E.2d 492 (N.C. 2020).

By order of the Court in Conference, this the 12th day of August, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 14th day of August, 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

STATE v. OLDROYD

[375 N.C. 274 (2020)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Yadkin County
	)	
MARC PETERSON OLDROYD	)	

No. 260A20

SPECIAL ORDER

The Motion to Withdraw as Counsel Based on Defendant-Appellee's Request filed herein on 3 August 2020 by Emily Holmes Davis, Assistant Appellate Defender and Glenn Gerding, Appellate Defender, Attorneys for Defendant is denied without prejudice to defendant's right to make a timely further showing of good cause for the relief sought whether on the record or in an *ex parte* motion by the Appellate Defender as permitted by Rule 3.5 of the Indigent Defense Services Rules.

By order of the Court in Conference, this the 5th day of August, 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 August, 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
Clerk, Supreme Court of
North Carolina

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

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15P20	Bettylou DeMarco v. Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System, Carolinas Physicians Network, Inc. d/b/a Cabarrus Family Medicine, P.A., and Cabarrus Family Medicine-Harrisburg, Carolinas Medical Center-Northeast d/b/a Northeast Women's Health & Obstetrics	1. Defs' Notice of Appeal Based Upon a Constitutional Question 2. Defs' PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
52P20	State v. Chelsea Joanna Collier	1. Def's Notice of Appeal Based Upon a Constitutional Question 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
54A19-3	State v. Rogelio Albino Diaz-Tomas	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Dissent 4. Def's PDR as to Additional Issues 5. Def's Conditional Petition for Writ of Certiorari to Review Order of the COA 6. Def's Conditional Petition for Writ of Certiorari to Review Decision of District Court, Wake County 7. Def's Conditional Petition for Writ of Mandamus 8. Def's Motion to Expedite the Consideration of Defendant's Matters 9. Def's Motion to Proceed *In Forma Pauperis* 10. Def's Motion to Take Judicial Notice 11. Def's Motion for Leave to Amend Notice of Appeal 12. Def's Motion for Summary Reversal 13. Def's Motion to Supplement Record on Appeal	1. Allowed **04/21/2020** 2. Allowed **06/03/2020** 3. --- 4. 5. 6. 7. 8. 9. 10. 11. 12. 13.

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

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		14. Def's Motion to Consolidate Diaz-Tomas and Nunez Matters	14. Allowed **06/30/2020**
		15. Def's Motion to Clarify the Extent of Supersedeas Order	15.
		16. Def's Motion in the Alternative to Hold Certiorari and Mandamus Petitions in Abeyance	16.
		17. Def's Motion to File Memorandum of Additional Authority	17. Dismissed **07/08/2020**
63P20	The Trustee for Tradewinds Airlines, Inc., Tradewinds Holdings, Inc., and Coreolis Holdings, Inc. v. Soros Fund Management LLC, and C-S Aviation Services, Inc.	Plts' PDR Under N.C.G.S. § 7A-31	Denied
69P18-4	State v. Nell Monette Baldwin	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **07/10/2020** **Beasley, C.J., recused** **Morgan, J., recused**
72P17-5	State v. Lequan Fox	Def's Pro Se Motion for Writ of Prohibition	Denied **06/30/2020**
73A20	State v. Molly Martens Corbett and Thomas Michael Martens	1. State's Motion for Temporary Stay	1. Allowed **02/24/2020**
		2. State's Petition for Writ of Supersedeas	2. Allowed **03/11/2020**
		3. State's Notice of Appeal Based Upon a Dissent	3. ---
		4. Defs' Motion to Strike the State's Proposed Scope of Review	4. Denied
		5. Defs' Motion to Limit the Scope of Review to the Issues Set Out in the Dissent	5. Denied
		6. Defs' Motion to Amend the Motion to Strike the State's Proposed Scope of Review and Motion to Limit the Scope of Review to the Issues Set Out in the Dissent	6. Denied
		7. State's Petition for Writ of Certiorari to Review Decision of the COA	7. Dismissed as moot

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		8. State's Motion for Extension of Time to File Brief 9. State's Motion to Strike Portions of Defendant Molly Martens Corbett's New Brief 10. Def's (Molly Martens Corbett) Conditional Motion for Leave to Amend Citations in New Brief	8. Allowed **03/20/2020** 9. Denied 10. Dismissed as moot **Davis, J., recused**
84P20	State v. Tyrone Judea Hall, III	Def's PDR Under N.C.G.S. § 7A-31	Denied
91A20	In the Matter of I.R.M.B.	Respondent-Father's Motion to File Amended Brief	Allowed **07/10/2020**
98P20	Randy Watterson v. North Carolina Department of Public Safety	Plt's Pro Se Petition for Writ of Certiorari to Review Order of the COA	Denied
116P20	Matthew Wagner, Lianne Lichstrahl, Brad Henke, and Victoria Siravo v. City of Charlotte	1. Plts' Notice of Appeal Based Upon a Constitutional Question 2. Plts' PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
117P20	Margaret Ann Light v. Venkat L. Prasad, M.D., and UNC Physicians Network, L.L.C. d/b/a Rex Family Practice of Wakefield, Fan Dong, P.A., and Fastmed Urgent Care, P.C.	Plt's PDR Under N.C.G.S. § 7A-31	Denied **Newby, J., recused**
119PA18	State v. Christopher B. Smith	1. Def's Motion for Appropriate Relief 2. State's Motion for Extension of Time to File Response to Motion for Appropriate Relief 3. State's Motion for Extension of Time to File Appellee Brief 4. Def's Motion for Judicial Notice	1. Denied 2. Allowed **07/19/2019** 3. Allowed **07/19/2019** 4. Allowed
127A20	In the Matter of H.A.J. and B.N.J.	Respondent-Mother's Motion to Amend the Record on Appeal	Allowed **06/05/2020**

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

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132P20	Shahla Rezvani, individually and Parsi Corporation, a North Carolina Corporation v. Elizabeth Carnes, and Timothy Carnes	Defs' PDR Under N.C.G.S. § 7A-31	Denied
138P20	State v. Gregory Alan Wheeling, Jr.	1. Def's Notice of Appeal Based Upon a Constitutional Question 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. Def's Motion for Leave to Amend Notice of Appeal and PDR	1. --- 2. Denied 3. Allowed 4. Allowed
139P20	State v. Jamar Mexia Davis	Def's PDR Under N.C.G.S. § 7A-31	Denied **Davis, J., recused**
142PA18	DTH Media Corporation; Capitol Broadcasting Company, Inc., The Charlotte Observer Publishing Company; The Durham Herald Company v. Carol L. Folt, in her official capacity as Chancellor of the University of North Carolina at Chapel Hill, and Gavin Young, in his official capacity as Senior Director of Public Records for the University of North Carolina at Chapel Hill	1. Defs' Motion for Extension of Time to Respond to Petition for Writ of Mandamus and Motion in the Alternative for Order to Appear and Show Cause 2. Plaintiff-Appellees' Petition for Writ of Mandamus 3. Plaintiff-Appellees' Motion in the Alternative for Order to Appear and Show Cause 4. Plts' Motion to Withdraw Petition for Writ of Mandamus and Motion in the Alternative for Order to Appear and Show Cause	1. Allowed up to and Including 27 July 2020 **07/17/2020** 2. --- 3. --- 4. Allowed **08/11/2020**
151PA18	State v. Ramar Dion Benjamin Crump	State's Motion to Reschedule Oral Argument	Allowed **07/15/2020**
155P20	State v. John D. Graham	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/03/2020** 2. Allowed 3. Special Order

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

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159A20	In the Matter of L.D.D.	1. Respondent-Father's Motion to Deem Proposed Record on Appeal Timely Served 2. Respondent-Father's Motion to Dismiss Motion	1. --- 2. Allowed
164P20-2	State v. Wilmer de Jesus Cruz	1. Def's Petition for Writ of Mandamus 2. Def's Motion to Withdraw Mandamus Petition	1. --- 2. Allowed **07/16/2020**
173P20	State v. Andre Lamar Dixon	Def's PDR Under N.C.G.S. § 7A-31	Denied
184A19	In the Matter of N.D.A.	Respondent-Father's Motion Requesting Permission to Disseminate his Brief	Allowed **07/14/2020**
190A20	Gay v. Saber Healthcare Group, L.L.C., et al.	1. Defs' Notice of Appeal Based Upon a Dissent 2. The North Carolina Advocates for Justice's Motion for Leave to File Amicus Brief	1. --- 2. Allowed **07/08/2020**
202P20	State v. Devanda Carlet Boone	1. Def's PDR Under N.C.G.S. § 7A-31 2. State's Motion to Deem Response to PDR Timely Filed	1. Denied 2. Allowed
210P20	State v. Quamaine Lee Massey	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Anson 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
211P20	State v. Gregory Richardson	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
212P20	State v. Ismael Santiago Rivera	Def's Pro Se PDR Under N.C.G.S. § 7A-31	Denied
215P20	In the Matter of C.R.R., M.N.H.	1. Respondent-Mother's Pro Se Motion for En Banc Rehearing 2. Petitioner's Motion to Release Filings by Mother	1. Dismissed 2. Allowed **07/08/2020**

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216A20	Cummings v. Carroll, et al.	1. Defs' (Brooke Elizabeth Rudd-Gaglie f/k/a Brooke Elizabeth Rudd, Margaret Rudd & Associates, Inc., and James C. Goodman) Notice of Appeal Based Upon a Dissent	1. ---
		2. Defs' PDR Under N.C.G.S. § 7A-31	2.
		3. Defs' (Robert Patton Carroll and DHR Sales Corps d/b/a ReMax Community Brokers) Notice of Appeal Based Upon a Dissent	3. ---
		4. Defs' (Berkeley Investors, LLC and George C. Bell) Motion to Stay Briefing Schedule and Set Briefing Deadlines	4. Allowed **06/18/2020**
217A19	In the Matter of E.J.B., R.S.B.	Petitioner's Motion to Dismiss Appeal	Denied **Davis, J., recused**
223P20	State v. James Albert Hayner	1. Def's Notice of Appeal Based Upon a Constitutional Question	1. ---
		2. Def's PDR Under N.C.G.S. § 7A-31	2. Denied
		3. Def's Petition for Writ of Certiorari to Review Decision of the COA	3. Denied
		4. State's Motion to Dismiss Appeal	4. Allowed
224A20	In the Matter of D.A.A.R. and S.A.L.R.	Respondent-Father's Motion to Dismiss Appeal	Special Order **07/15/2020**
225A20	State v. Robert Prince	1. State's Motion for Temporary Stay	1. Allowed **05/26/2020**
		2. State's Petition for Writ of Supersedeas	2. Allowed **06/10/2020**
		3. State's Notice of Appeal Based Upon a Dissent	3. ---
230P18	State v. Everette Porshau Hewitt	1. Def's Notice of Appeal Based Upon a Constitutional Question	1. Special Order
		2. Def's PDR Under N.C.G.S. § 7A-31	2. Special Order
		3. State's Motion to Dismiss Appeal	3. Special Order
		4. Def's Motion to Amend Notice of Appeal	4. Special Order
		5. Def's Motion to Amend PDR	5. Special Order

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230A20	In the Matter of B.T.J.	1. Petitioner's Motion to Withdraw as Counsel 2. Petitioner's Motion to Substitute Counsel	1. Allowed **07/14/2020** 2. Allowed **07/14/2020**
233A19	In the Matter of A.B.C.	1. Respondent-Mother's Motion Requesting Permission to Disseminate her Brief 2. Petitioner's Motion to Dismiss Appeal	1. Allowed **07/14/2020** 2. Denied **07/17/2020**
233A20	State v. Johnathan Ricks	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **05/27/2020** 2. Allowed **06/10/2020** 3. ---
234P20	State v. Kelvin Alphonso Alexander	Def's PDR Under N.C.G.S. § 7A-31	Allowed
246P20	State v. Dontae Nobles	Def's Pro Se Motion to be Released	Dismissed **07/10/2020**
248A20	In the Matter of G.G.M.	Respondent-Father's Motion to Consolidate Appeals	Special Order **06/10/2020**
249A20	In the Matter of S.M.	Respondent-Father's Motion to Consolidate Appeals	Special Order **06/10/2020**
251P20	State v. Pedro Reyes	Def's Pro Se Motion for Discretionary Review of Denial of Discovery and Legal Principles	Dismissed
254P18-4	State v. Jimmy A. Sevilla-Briones	1. Def's Pro Se Motion for Demonstrations of Exhaust of State Remedies 2. Def's Pro Se Motion to Appoint Counsel	1. Denied **07/09/2020** 2. Dismissed as moot **07/09/2020**
256P20	State v. Perry L. Pitts	1. Def's Notice of Appeal Based Upon a Constitutional Question 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion for Extension of Time to Respond to Notice of Appeal and PDR 4. State's Motion to Dismiss Appeal	1. 2. 3. Allowed **06/16/2020** 4.

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258P20	State v. Kevin Jamal Haqq	1. Def's Pro Se Motion for Appropriate Relief 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
260A20	State v. Marc Peterson Oldroyd	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent 4. Def's Motion to Withdraw as Counsel and Direct Appellate Defender to Assign Different Counsel	1. Allowed **06/05/2020** 2. Allowed **06/24/2020** 3. --- 4. Special Order **08/05/2020**
262A20	In the Matter of J.E., F.E., D.E.	1. Petitioner's Motion to Withdraw as Counsel 2. Petitioner's Motion to Substitute Counsel	1. Allowed **07/14/2020** 2. Allowed **07/14/2020**
265P15-2	State v. Walter Timothy Gause	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **07/16/2020**
274P15-7	State v. Robert K. Stewart	Def's Pro Se Motion to Recuse	Dismissed
274P20	State v. Donavan Richardson	Def's PDR Under N.C.G.S. § 7A-31	Denied
277P20	State v. James Edsal Baker	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/19/2020** 2. 3.
278P20	State v. Thomas Clinton Judd, Jr.	Def's Pro Se Motion for Relief	Dismissed **06/26/2020**
279A20	State v. Demon Hamer	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Dissent	1. Allowed **06/22/2020** 2. Allowed **07/14/2020** 3. ---
284P20	State v. Jeremy Wade Dew	Def's PDR Under N.C.G.S. § 7A-31	Allowed

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286A20	State v. James Clayton Clark, Jr.	1. Def's Notice of Appeal Based Upon a Dissent 2. Def's PDR as to Additional Issues	1. --- 2. Special Order
287P20	Topping v. Meyers, et al.	1. Def's Notice of Appeal Based Upon a Constitutional Question 2. Def's PDR Under N.C.G.S. § 7A-31 3. Plt's Motion for Extension of Time to Respond to PDR and Notice of Appeal 4. Plt's Motion for Extension of Time to Respond to PDR and Notice of Appeal 5. Plt's Motion to Dismiss Appeal	1. 2. 3. Denied **06/26/2020** 4. Allowed **07/01/2020** 5.
297P20	State v. Kenneth M. Flippin	Def's Pro Se Motion for Release	Denied **06/25/2020**
299P20	State v. Divine Wheeler	Def's Pro Se Motion for Speedy Trial	Dismissed **06/29/2020**
300P20	State v. Mark Bumphus, Jr.	Def's Pro Se Petition for Writ of Mandamus	Denied
301P16-4	State v. Michael Anthony Taylor	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
305P17-2	State v. William Jesse Buchanan	1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Denied 2. Allowed 3. Dismissed as moot **Davis, J., recused**
305P20	In the Matter of Frank Anonymous	Plt's Pro Se Motion to Nullify Emergency Orders, Give Power Back to People of NC	Dismissed **07/02/2020**
306A20	Sound Rivers, Inc., et al. v. N.C. Department of Environmental Quality, et al.	1. Petitioners' Notice of Appeal Based Upon a Dissent 2. Respondent-Intervenor's PDR Under N.C.G.S. § 7A-31 3. Joint Motion to Extend Time and Set Briefing Schedule	1. --- 2. 3. Allowed **07/27/2020**

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314PA20	N.C. Bowling Proprietors Association, Inc. v. Roy A. Cooper, III	1. Def's Motion for Temporary Stay 2. Plts' Motion to Dismiss Appeal 3. Def's Petition in the Alternative for Writ of Certiorari to Review Order of Superior Court, Wake County 4. Def's Petition for Writ of Supersedeas 5. Joint Motion to Set Briefing Deadlines	1. Allowed **07/14/2020** 2 . Dismissed as moot **07/14/2020** 3. Allowed **07/14/2020** 4. Allowed **07/21/2020** 5. Allowed **07/15/2020**
317P19	In the Matter of Phillip Entzminger, Assistant District Attorney Prosecutorial District 3A	1. Respondent's Motion for Temporary Stay 2. Respondent's Petition for Writ of Supersedeas 3. Respondent's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/15/2019** Dissolved **08/12/2020** 2. Denied 3. Denied
319P20	Adrian D. Murray v. Global Tel Link and N.C. Department of Public Safety	Plt's Pro Se Petition for Writ of Mandamus	Dismissed **07/14/2020**
323P20	State v. Lance Marshall	Def's Pro Se Motion for Case Review	Denied
328P20	State of North Carolina, et al. v. Stratton	Petitioner's Pro Se Emergency Petition for Writ of Certiorari to Review Order of the COA	Denied **07/20/2020**
330A19-2	State v. Jesse James Tucker	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas 3. Def's Motion to Dissolve Temporary Stay 4. Def's Motion to Dismiss Petition for Writ of Supersedeas 5. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/02/2020** 2. Denied **07/08/2020** 3. Allowed **07/08/2020** 4. Dismissed as moot **07/08/2020** 5.

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335P20	Tony Ray Simmons, Jr. v. John Lee Wiles	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/22/2020** 2. 3.
341P20	State v. Tymik Daijon Lasenburg	1. Def's Petition for Writ of Certiorari to Review Order of the COA 2. Def's Petition for Writ of Certiorari to Review Decision of District Court, Wake County 3. Def's Petition for Writ of Habeas Corpus 4. Def's Petition for Writ of Mandamus	1. 2. 3. Denied **07/28/2020** 4.
342P20	State v. Robert Dontrel Dickerson, Jr.	Def's Pro Se Motion for Appeal for Writ of Habeas Corpus	Denied **07/30/2020**
343A20	In the Matter of M.S., W.S., E.S.	1. Respondent-Mother's Motion to Deem Proposed Record on Appeal Timely Filed 2. Respondent-Mother's Motion to Replace Pages 397 and 398 in Record on Appeal	1. Allowed **07/30/2020** 2. Allowed **08/11/2020**
349P20	State v. Clorey Eugene France	1. Def's Pro Se Motion for Temporary Stay 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Motion for Immediate Release 4. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA	1. Denied **08/06/2020** 2. Denied **08/06/2020** 3. Denied **08/06/2020** 4. Denied **08/06/2020**
354P20	State v. Tracy Wright Hakes	1. Def's Pro Se Motion to Drop Charges 2. Def's Pro Se Motion to Drop Detainer	1. Dismissed **08/10/2020** 2. Dismissed **08/10/2020**
370P04-17	State v. Anthony Leon Hoover	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **06/05/2020** **Hudson, J., recused**

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370P04-18	State v. Anthony Leon Hoover	Def's Pro Se Motion for Mandatory Injunction Mandamus Mandate	Dismissed **07/07/2020** **Hudson, J., recused**
382P19	Wymon Griffin v. Ashley Place Apartments	1. Plt's Pro Se Motion for Notice of Appeal Based Upon a Substantial Constitutional Question 2. Plt's Pro Se Motion for PDR Under N.C.G.S. § 7A-31 3. Plt's Pro Se Motion to Amend PDR and Notice of Appeal 4. Def's Motion for Christopher J. Loebsack to Withdraw as Counsel 5. Def's Motion for Substitution of Counsel within Firm 6. Plt's Pro Se Motion to Strike the Notice of Appearance and Motion for Substitution of Counsel within Firm 7. Plt's Pro Se Motion to Strike Response to PDR and Motion to Dismiss Appeal 8. Def's Motion to Strike the 18 October Motion and to Sanction Plaintiff for Its Filing 9. Plt's Pro Se Motion to Strike Unauthorized Pleadings 10. Plt's Pro Se Motion to Amend the Memorandum Filed October 18, 2019 in Support of PDR and Notice of Appeal Served and Dated October 4, 2019 11. Plt's Pro Se Motion to Strike Response in Opposition to Motion to Amend 12. Plt's Pro Se Motion for Extension of Time to File New Brief	1. Dismissed 2. Dismissed 3. Dismissed as moot 4. Dismissed as moot 5. Dismissed as moot 6. Dismissed as moot 7. Dismissed as moot 8. Dismissed as moot 9. Dismissed as moot 10. Dismissed as moot 11. Dismissed as moot 12. Dismissed as moot
416P15-2	State v. Nijel Ramsey Lee	Def's Pro Se Motion for Notice of Appeal	Denied **08/03/2020**
422P19	State v. Terrell David Thomas	1. Def's PDR Under N.C.G.S. § 7A-31 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
442P19	State v. Gabriel James Gamez	Def's PDR Under N.C.G.S. § 7A-31	Denied

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468P19	North Carolina Insurance Guaranty Association v. Weathersfield Management, LLC, f/k/a Accuforce Staffing Services, LLC, f/k/a Accuforce Smart Solutions, LLC	Def's PDR Under N.C.G.S. § 7A-31	Denied
471P19	State v. Dallas Jay Worley	Def's PDR Under N.C.G.S. § 7A-31	Denied

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