384 N.C.—No. 1 Pages 1-193

ORDER CONCERNING CITATION FORM; ORDER CONCERNING APPELLATE DIVISION STAFF; GENERAL RULES OF PRACTICE; RULES OF APPELLATE PROCEDURE; DISCIPLINE AND DISABILITY OF ATTORNEYS; PROCEDURES FOR ADMINISTRATIVE COMMITTEE; PREPAID LEGAL SERVICES PLANS; RULES OF PROFESSIONAL CONDUCT; STATE BAR STANDING COMMITTEES AND BOARDS; IOLTA; STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS; RULES OF MEDIATION FOR FARM NUISANCE DISPUTES; RULES OF MEDIATION FOR MATTERS IN DISTRICT CRIMINAL COURT; RULES FOR SETTLEMENT PROCEDURES IN DISTRICT COURT FAMILY FINANCIAL CASES; RULES FOR MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS; RULES OF MEDIATION FOR MATTERS BEFORE THE CLERK OF SUPERIOR COURT

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE 15, 2023

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

THE SUPREME COURT
OF
NORTH CAROLINA

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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 6 APRIL 2023

ORDERS

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

HEADNOTE INDEX

APPEAL AND ERROR

Discretionary review improvidently allowed—no precedential value of lower appellate decision—The Supreme Court concluded that discretionary review had been improvidently allowed; therefore, the decision of the Court of Appeals was left undisturbed but without precedential value. **Mole' v. City of Durham, 78.**

ATTORNEY FEES

Complex business case—motion for fees as part of costs—section 6-21.5—nonjusticiable case—In a complex business case involving a limited partnership —in which several limited partners (plaintiffs) sued the general partner (an ambulatory surgery center) and its owner (together, defendants)—the trial court did not abuse its discretion either by granting defendants' motion for award of attorney fees as part of their costs under Civil Procedure Rule 41(d) pursuant to N.C.G.S. § 6-21.5 or by entering an order that required plaintiffs to pay $599,262.00 in attorney fees as costs. The court's unchallenged findings and conclusions established that defendants were the prevailing party pursuant to section 6-21.5 because plaintiffs lacked standing to bring their claims as direct, individual actions, and therefore had no justiciable case. **Woodcock v. Cumberland Cnty. Hosp. Sys., Inc., 171.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Adjudication—abuse and neglect—grossly inappropriate discipline—parents unrepentant—The trial court did not err by adjudicating a nine-year-old child as abused under N.C.G.S. § 7B-101(1) where, according to the trial court's findings, which were supported by clear, cogent, and convincing evidence (in a large part from respondents' own admissions), respondents mother and stepfather used "cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior" by whipping the child with a belt severely enough to inflict visible physical injuries, forcing her to stand in a corner for many hours at a time, and making her sleep on the floor without any covers—all for days at a time, possibly for as long as two months. The trial court also did not err by adjudicating the same child as neglected under N.C.G.S. § 7B-101(15) based on the home environment being "injurious to the juvenile's welfare" where respondents saw nothing wrong with their discipline of the child, even after months of working with social services. **In re A.J.L.H., 45.**

Adjudication—hearsay analysis—remaining evidentiary findings—In its review of the trial court's adjudication and disposition order in a child abuse case, the Court of Appeals erred in holding that some of the trial court's findings relied on inadmissible hearsay statements from the abused child (which were almost entirely duplicative of other evidence) and that the order must be vacated and remanded because the abuse adjudication heavily relied upon the inadmissible hearsay statements. In the first place, the out-of-court statements at issue were admissible for the purpose of explaining why social services began to investigate respondent-parents (rather than for the truth of the matter asserted), and the Court of Appeals should have presumed the trial court's ruling on respondents' objection to be correct where the trial court did not expressly state the reason it was admitting the evidence. Second, when the Court of Appeals concluded that the statements were erroneously admitted, that court should have simply disregarded the statements and examined whether the remaining findings supported the trial court's determination. **In re A.J.L.H., 45.**

Adjudication—neglect—siblings of abused child—parents' unwillingness to remedy the injurious environment—Where the trial court properly adjudicated respondents' nine-year-old daughter as abused and neglected based on respondents' cruel and grossly inappropriate discipline of her, the trial court did not err by also adjudicating respondents' two younger children (then three years old and six months old) as neglected based on respondents' refusal to acknowledge that the discipline of the nine-year-old was inappropriate and their inability to make a commitment that they would not repeat the discipline, creating a substantial risk that the two younger children would be harmed if they stayed in the home. I**n re A.J.L.H., 45.**

Appellate review—role of appellate court—various procedural postures—In a child abuse case, where the Court of Appeals vacated and remanded the adjudication order with respect to all children involved, that court should not have addressed the disposition phase, and its instruction that the trial court must "order generous and increasing visitation between Margaret and her mother" was improper. On remand from the Supreme Court's decision holding that the trial court's adjudications were not erroneous (reversing the Court of Appeals' decision), the Court of Appeals was reminded to apply the abuse of discretion standard to the disposition order. If the trial court's order meets the high bar for abuse of discretion, the remedy is to vacate the disposition order and remand—without expressing an opinion as to the ultimate result of the best interests determination on remand, which is a decision that belongs to the trial court. **In re A.J.L.H., 45.**

Neglect—injurious environment—death of sibling from suspected neglect—other siblings in DSS custody—ultimate findings—The trial court properly adjudicated a minor child as neglected based on its ultimate findings that the minor child lived in an environment injurious to her welfare and did not receive proper care or supervision pursuant to N.C.G.S. § 7B-101(15), including that the minor child lived with her mother, who had previously been convicted of misdemeanor child abuse; the minor child's older siblings had previously been adjudicated abused, neglected, and dependent; and the minor child's younger sibling had died from asphyxiation after the mother left him alone for three hours in his crib with blankets, even though the parents had previously been instructed on proper sleeping arrangements for infants. Therefore, the Court of Appeals erred by reversing the trial court's order for failure to make a specific written finding of a substantial risk of impairment. Further, the Supreme Court clarified that the term "ultimate fact" means "a finding supported by other evidentiary facts reached by natural reasoning," and overturned prior caselaw that did not adhere to this definition. **In re G.C., 62.**

HOMICIDE

Second-degree murder—malice—jury verdict—sentencing—In defendant's trial for second-degree murder, where the jury indicated on the verdict sheet its finding that all three forms of malice supported defendant's conviction—actual malice (a B1 felony), "condition of mind" malice (a B1 felony), and "depraved-heart" malice (a B2 felony)—the trial court properly imposed a B1 felony sentence (which is more severe than a B2 felony sentence). There was no ambiguity in the jury's verdict, which the trial court reviewed and confirmed with the jury, and the relevant statute, N.C.G.S. § 14-17(b), was unambiguous that a Class B2 sentence is required only when a second-degree murder conviction hinges on a finding of depraved-heart malice. **State v. Borum, 118.**

JURISDICTION

Personal—specific—nonresident corporate officers—resident employee terminated—insufficient contacts—In a suit brought by a former employee after he was terminated, in which he sued both his corporate employer and two individual defendants who worked for the corporation (neither of whom lived in North Carolina), plaintiff did not establish sufficient minimum contacts between the individual defendants and the state of North Carolina to subject them to personal jurisdiction in this state, and his complaint lacked specific allegations that the individual defendants were the primary participants in the alleged wrongdoing that gave rise to the suit. **Schaeffer v. SingleCare Holdings, LLC, 102.**

Personal—specific—nonresident corporation—resident employee terminated—entire relationship considered—In a suit brought by a former employee after he was terminated, nonresident corporate defendants were subject to personal jurisdiction in North Carolina because they purposefully availed themselves of the privileges of conducting business-related activities in this state and those activities arose from or were related to plaintiff's claims. Although defendants initiated the employment relationship with plaintiff in California where plaintiff was then living, defendants established minimum contacts with North Carolina to survive constitutional analysis through multiple voluntary and intentional acts, including subsequently approving of and assisting in plaintiff's move to North Carolina, communicating

SCHEDULE FOR HEARING APPEALS DURING 2023

NORTH CAROLINA SUPREME COURT

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

January 31
February 1, 2, 7, 8, 9
March 14, 15, 16
April 25, 26, 27
September 12, 13, 14, 19, 20, 21
October 31
November 1, 2, 7, 8, 9

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

REBECCA HARPER; AMY CLARE OSEROFF; DONALD RUMPH; JOHN ANTHONY BALLA; RICHARD R. CREWS; LILY NICOLE QUICK; GETTYS COHEN, JR.; SHAWN RUSH; JACKSON THOMAS DUNN, JR.; MARK S. PETERS; KATHLEEN BARNES; VIRGINIA WALTERS BRIEN; DAVID DWIGHT BROWN

v.

REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING; SENATOR WARREN DANIEL, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR RALPH HISE, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR PAUL NEWTON, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES TIMOTHY K. MOORE; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE PHILIP E. BERGER; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, IN HIS OFFICIAL CAPACITY

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTIER; TALIA FERNOS; KATHERINE NEWHALL; R. JASON PARSLEY; EDNA SCOTT; ROBERTA SCOTT; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS; YARBROUGH WILLIAMS, JR.; REVEREND DELORIS L. JERMAN; VIOLA RYALS FIGUEROA; AND COSMOS GEORGE

From N.C. Court of Appeals
P21-525

From Wake
21CVS015426
21CVS500085

v.

REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING; SENATOR WARREN DANIEL, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR RALPH E. HISE, JR., IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR PAUL NEWTON, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; REPRESENTATIVE TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; SENATOR PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; STELLA ANDERSON, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; JEFF CARMON III, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; STACY EGGERS IV, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; TOMMY TUCKER, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; AND KAREN BRINSON BELL, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS

No. 413PA21

ORDER

This matter comes before the Court pursuant to a petition for rehearing filed by legislative-defendants and a corresponding motion to dismiss petition for rehearing filed by plaintiff-intervenor Common Cause.

The Rules of Appellate Procedure provide that a petition for rehearing "shall state with particularity the points of fact or law that, in the opinion of the petitioner, the court has overlooked or misapprehended . . . ." N.C. R. App. P. 31(a). Further, the Rules provide that "[a] determination to grant or deny [the petition] will be made solely upon the written petition; no written response will be received from the opposing party . . . ." N.C. R. App. P. 31(c).

Plaintiff-intervenor's filing responds substantively to legislative-defendants' petition for rehearing. Such a filing is expressly not permitted

by the Rules of Appellate Procedure and plainly violates Rule 31(c) and Rule 37(a). Accordingly, we dismiss as frivolous plaintiff-intervenor's motion to dismiss, and the filing is hereby stricken because it grossly violates appellate rules.

In exercising our duty and authority to address alleged errors of law, this Court has granted rehearing of cases under both Rule 31 and its historical predecessor, former Rule 44. In *Nowell v. Neal*, this Court provided guidance on when a litigant has satisfied the criteria for rehearing under Rule 31. 249 N.C. 516, 521, 107 S.E.2d 107, 111 (1959). In addressing rehearing under a predecessor version of Rule 31 with nearly identical operative language, the Court observed that a recently issued opinion appropriately is reheard if the petitioner makes a satisfactory showing that the opinion may be erroneous: "No petition to rehear was filed. That is the appropriate method of obtaining redress from errors committed by this Court." *Id.*

This Court has consistently allowed a petition for rehearing when the petitioner has made the showing required by *Nowell*. *See*, *e.g.*, *Bailey v. Meadows Co.*, 154 N.C. 71, 69 S.E. 746 (1910) (modifying prior opinion upon grant of rehearing); *Clary v. Alexander Cty. Bd. of Educ.*, 286 N.C. 525, 212 S.E.2d 160 (1975) (withdrawing prior opinion upon grant of rehearing); *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977) (same); *Lowe v. Tarble*, 313 N.C. 460, 329 S.E.2d 648 (1985) (affirming prior opinion upon grant of rehearing); *Alford v. Shaw*, 320 N.C. 465, 358 S.E.2d 323 (1987) (withdrawing prior opinion upon grant of rehearing); *Wilson v. State Farm Mut. Auto. Ins. Co.*, 329 N.C. 262, 404 S.E.2d 852 (1991) (withdrawing in part and affirming in part prior opinion upon grant of rehearing); *Swanson v. State*, 330 N.C. 390, 410 S.E.2d 490 (1991) (affirming prior opinion upon grant of rehearing), *vacated and remanded*, 509 U.S. 916 (1993); and *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 517 S.E.2d 874 (1999) (superseding prior opinion upon grant of rehearing).

Upon consideration of legislative-defendants' petition and the arguments therein, this Court allows the petition for rehearing. The parties are hereby directed as follows:

(1) Legislative-defendants shall file supplemental briefs with this Court on or before 17 February 2023.

(2) All plaintiffs and shall file supplemental briefs with this Court on or before 3 March 2023.

(3) In addition to the issues raised in the petition for rehearing, the parties shall also brief the following issues:

(a) Whether congressional and legislative maps utilized for the 2022 election, which were drawn at the direction of this Court, are effective for future elections;

(b) What impact, if any, the following provisions of the North Carolina Constitution have on our analysis: Article II, Section 3(4) and Article II, Section (5)(4); and

(c) What remedies, if any, may be appropriate.

This matter shall be placed on the 14 March 2023 calendar for rehearing.

By order of the Court in Conference, this the 3rd day of February 2023.

/s/ Allen, J.
For the Court

Justices Morgan and Earls dissent as set out in the attached statement.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of February 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

Justice EARLS dissenting.

The majority's order fails to acknowledge the radical break with 205 years of history that the decision to rehear this case represents. It has long been the practice of this Court to respect precedent and the principle that once the Court has ruled, that ruling will not be disturbed merely because of a change in the Court's composition. Indeed, data from the Supreme Court's electronic filing system indicate that, since

January 1993, a total of 214 petitions for rehearing have been filed, but rehearing has been allowed in only two cases.[1]

It has been the understood practice of this Court that rehearing is not allowed solely because a Justice may have had a change of heart after the opinion in the case has been issued or because an opinion was controversial. Moreover, this Court has respected the idea that "even if judges have ideological preferences and methodological differences . . . partisan loyalties [should] fade away after investiture to reveal a judiciary of men and women bound together by collegiality norms and the rule of law." Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. Rev. 1373, 1375 (2021). For these reasons, rehearing under our rules is meant to be limited to the rare occasions when the Court was initially unaware of material evidence already in the record or makes an obvious and indisputable error.

To be clear, whether one considers the entire 205 years that this Court has been in existence or the most recent thirty years, there has been no shortage of politically controversial cases, and it is not unusual for the partisan balance of the court to shift. Respect for the institution and the integrity of its processes kept opportunities for rehearing narrow in scope and exceedingly rare. Today, that tradition is abandoned.

Nothing has changed since we rendered our opinion in this case on 16 December 2022: The legal issues are the same; the evidence is the same; and the controlling law is the same. The only thing that has changed is the political composition of the Court. Now, approximately one month since this shift, the Court has taken an extraordinary action: It is allowing rehearing without justification.

More troubling still, today this Court grants not one but two petitions for rehearing. *See Holmes v. Moore*, 2022-NCSC-122 (Feb. 3, 2023) (order on motion for rehearing) [hereinafter *Holmes* Order]. This means that in a single day, the majority has granted more petitions for rehearing than it has over the past twenty years. There is nothing constitutionally conservative about the Court's decisions to allow rehearing in these cases.

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1. The Court most recently granted rehearing in *Jones v. City of Durham*, 361 N.C. 144 (2006). There, the Court granted rehearing for the limited purpose of reconsidering specific evidence in a negligence action that involved a single plaintiff, rather than to consider abolishing a constitutional right that belongs to millions of voters. There was no dissent to the per curiam final opinion of the Court, indicating the absence of any partisan divide over the issue. The other case in which the Court permitted rehearing was *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805 (1999). That case similarly did not involve a fundamental issue central to the structure of our democracy and had no impact whatsoever on elections.

Going down this path is a radical departure from the way this Court has operated, and these orders represent a rejection of the guardrails that have historically protected the legitimacy of the Court. Not only does today's display of raw partisanship call into question the impartiality of the courts, but it erodes the notion that the judicial branch has the institutional capacity to be a principled check on legislation that violates constitutional and human rights.

Despite its brevity, the Court's order is riddled with inaccuracies. It misleadingly states, for example, that this Court's previous decision in *Nowell v. Neal*, 249 N.C. 516 (1959), "provide[s] guidance on when a litigant has satisfied the criteria for rehearing." *Harper v. Hall*, No. 13P19, at 3 (Feb. 3, 2023) (order on motion for rehearing) [hereinafter Order] (emphasis added). Notably, the granting or denial of a petition for rehearing was not at issue in *Nowell*—none of the parties there requested rehearing nor did the Court consider granting as much. Rather than defining the showing a petitioner must make before a petition for rehearing is properly granted, *Nowell* simply pointed out the unremarkable fact that such a petition is "the appropriate method of obtaining redress from errors committed by this Court." *Nowell*, 249 N.C. at 521.

The Court's order then makes the bold claim that "[t]his Court has *consistently* allowed a petition for rehearing when the petitioner has made the showing required by *Nowell*."[2] Order at 3. The Court cites eight cases in support of its assertion, none of which were decided in this millennium and none of which mention *Nowell* or its fictitious standard.

The first of those cases, *Bailey v. Meadows Co.*, 154 N.C. 71 (1910), was decided in 1910—forty-nine years before *Nowell* defined the "showing" that *Bailey* supposedly applied. Moreover, *Bailey* was decided 113 years ago, highlighting the scarcity of cases from which the majority can draw in attempting to downplay the radical action it has taken today. Finally, the *Bailey* Court granted reconsideration for the narrow purpose of reviewing evidence that it failed to consider initially. By contrast, today's order does not constrain review to limited evidentiary questions but instead grants in full a motion that seeks to reverse the *entirety of two separate decisions* of this Court. *See Harper v. Hall*, 380 N.C. 317, *cert. granted sub nom.*, *Moore v. Harper*, 142 S. Ct. 2901 (2022); *Harper v. Hall*, 383 N.C. 89, 2022 N.C. LEXIS 1100 (Dec. 16, 2022).

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2. To repeat, *Nowell* did not define any "showing" that must be made, and the only "guidance" it provides is its recognition that Rule 31—what was then Rule 44—is the means by which a party asks one of this State's appellate courts to review one of its own decisions. 249 N.C. at 521.

The other cases the majority cites are similarly unavailing. For example, the Court permitted rehearing in *Clary v. Alexander County Board of Education*, 286 N.C. 525 (1975), after the plaintiffs brought to light evidence to which the parties had stipulated and agreed "would be considered as having been introduced in evidence without the necessity of putting [it] in 'one by one.' " *Id.* at 529. Despite the stipulation, the evidence was overlooked. *Id.* But these facts were "prerequisite to recovery by plaintiff[s]. In the absence thereof," the defendant's motions for directed verdicts were granted. *Id.* Reconsideration was therefore necessary to consider the stipulated evidence. *Id.* In *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 181 (1977), the Court granted rehearing and withdrew its first opinion because it did not apply the controlling legal statute. The defendant in *Wilson v. State Farm Mutual Automobile Ins. Co.*, 329 N.C. 262 (1991) (per curiam), "petitioned for a rehearing 'for the purpose of correcting a very specific and limited error of fact and law, rather than for the purpose of affecting the Court's ultimate conclusion.' " *Id.* at 263. And in *Alford v. Shaw*, 320 N.C. 465 (1987), the Court granted rehearing because it originally misunderstood the pertinent legal issue.

Rather than supporting the majority's position, these cases demonstrate that rehearing in this Court is used cautiously; it is rarely permitted, and when allowed, it is limited in scope. Legislative Defendants' motion, by contrast, seeks to upend the constitutional guarantee that voters in the State will enjoy "substantially equal voting power," regardless of their political affiliations. *See Harper*, 380 N.C. at 376. Such a change would fundamentally alter the political rights of every voter in North Carolina.

The consequences of this Court's orders are grave. The judiciary's "authority . . . depends in large measure on the public's willingness to respect and follow its decisions." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 446 (2015). The public's trust in this Court, in turn, depends on the fragile confidence that our jurisprudence will not change with the tide of each election. Yet it took this Court just one month to send a smoke signal to the public that our decisions are fleeting, and our precedent is only as enduring as the terms of the justices who sit on the bench. The majority has cloaked its power grab with a thin veil of mischaracterized legal authorities. I write to make clear that the emperor has no clothes. Because this Court's decision today is an affront to the jurisprudence of this State and to the citizens it has sworn an oath to serve "impartially," "without favoritism to anyone or to the State," I dissent. *See* N.C.G.S. § 11-11 (2022).

Justice MORGAN joins in this dissenting opinion.

HOKE COUNTY BOARD OF EDUCATION; ET AL., PLAINTIFFS

AND

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, PLAINTIFF-INTERVENOR

AND

RAFAEL PENN, ET AL., PLAINTIFF-INTERVENORS

V.

STATE OF NORTH CAROLINA AND THE STATE BOARD OF EDUCATION, DEFENDANTS

AND

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, REALIGNED DEFENDANT

From N.C. Court of Appeals
P21-511

From Wake
95CVS1158

No. 425A21-1

ORDER

This matter is before the Court on the State Controller's motion to dissolve or lift a stay of the writ of prohibition previously issued by this Court, and legislative-intervenors' motion for leave to brief additional issues, motion to confirm reinstatement of the writ of prohibition, and conditional petition for writ of certiorari.

On 4 November 2022, this Court issued its opinion in No. 425A21-2, *Hoke County Board of Education, et al. v. State of North Carolina, et al.*, 382 N.C. 386, 879 S.E.2d 193 (2022). Prior to the issuance of that opinion, the State moved to consolidate that case, No. 425A21-2, with this case, No. 425A21-1. The State's motion to consolidate was resolved by this Court's 4 November 2022 order, which stated in relevant part:

> Now, on our own motion, the Court hereby treats the Writ of Prohibition filed 30 November 2021 by the Court of Appeals in 425A21-1 as consolidated with 425A21-2 to the extent necessary for the Court to address the arguments pertaining to the Writ made

> by the parties here; further, we hereby stay the Writ of Prohibition pending any further filings in 425A21-1 pertaining to issues not already addressed in the opinion filed on this day in 425A21-2. The State's motion to consolidate is otherwise dismissed as moot.

Upon review of the Controller's motion to lift the stay and the arguments set forth therein, this Court concludes that the motion constitutes a "filing[ ] in 425A21-1 pertaining to issues not already addressed in the opinion" filed 4 November 2022. Specifically, the Controller argues that there are many issues presented in this case that were left unaddressed in the Court's earlier opinion in No. 425A21-2. The Controller further argues that "it would be fundamentally unfair for a court to subject him, his staff, and the recipient agency staff to criminal and civil liability before the basic elements of procedural due process were met including notice, an opportunity to respond, counsel, and the right to an appeal including a hearing on these issues."

Because the Controller's motion is a further filing in 425A21-1 pertaining to issues not already addressed by this Court, and because the Controller has made a sufficient showing of substantial and irreparable harm should the stay remain in effect, we lift the stay, thereby reinstating the writ of prohibition, until this Court has an opportunity to address the remaining issues in this case.

In addition, this Court notes that legislative-intervenors properly intervened as of right in the related case, No. 425A21-2. However, they did not move to intervene in the case at hand, No. 425A21-1, and this Court's 4 November 2022 order does not relieve them of this procedural requirement. Therefore, we dismiss legislative-intervenors' filings for failure to intervene.

By order of the Court in Conference, this the 3rd day of March 2023.

/s/ Allen, J.
For the Court

Justice Morgan and Justice Earls dissent as set out in the attached statement.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of March 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

Justice EARLS dissenting.

I agree that the Legislative-Intervenors' motions and petition for a writ of certiorari should be dismissed. However, I dissent from this Court's extraordinary, unprincipled, and unprecedented action allowing the Controller's motion in this matter. Today's order abandons the concepts of respect for precedent, law of the case, stare decisis, and the rule of law all in the name of preventing the State from complying with its constitutional duty to provide a sound basic education to the children of this state.

Though this motion is styled as a motion to "dissolve or lift stays entered . . . by the Court of Appeals," in substance it is an attempt to make an end run around the Rules of Appellate Procedure regarding rehearing and merely seeks rehearing on issues this Court has already decided. In fact, the Controller's position represents a stunning reversal from prior arguments to this Court, as the Controller previously argued that the issues related to the Controller's collateral attack on the trial court's order necessarily would be addressed in *Leandro IV*. Controller's Resp. Br. at 3, n.1, *Hoke Cnty. Bd. Of Educ. v. State*, 382 N.C. 386 (2022) (No. 425A21-2) (stating that "the resolution of the second case [425A21-2] will resolve the issues arising from the first case [425A21-1]") [hereinafter Controller's Resp. Br.]. And indeed, as detailed below, those issues were addressed in the Court's opinion in *Leandro VI*. Yet the Controller now asserts that many issues were left unaddressed in the Court's opinion and repeats the illogical argument already rejected by this Court that, by complying with the ruling of the North Carolina Supreme Court, the Controller could be subject to criminal and civil liabilities.[1] The new Court majority adopts this tortured misrepresentation of the proceedings to date without so much as a mention of any of the arguments made by the other parties to the case.

1. This was previously argued by the Controller and rejected by this Court by our Order directing him to comply with the trial court's transfer directive. *See* Controller's Resp. Br. at 12-13.

However, as the record reflects all too well, the only issues not already addressed in *Leandro IV* relate to whether Plaintiffs were denied a meaningful opportunity to be heard when the Court of Appeals majority shortened the time for Plaintiffs to respond to the Controller's filing in that court and used what the dissent identifies as a "shadow docket" to grant relief. Order on Writ of Prohibition at 2 (P21-511) (2022). These procedural issues were not expressly addressed in *Leandro IV* but were made irrelevant by this Court's ruling. Contrary to the Controller's new argument, the Court made clear in its Consolidation Order that it was addressing the merits of both the trial court's November 2021 and April 2022 Orders and the 30 November 2021 Writ of Prohibition issued by the Court of Appeals. 4 November 2022 Order of the North Carolina Supreme Court in *Hoke Cnty. Bd. of Educ. v. State*, Nos. 425A21-1 and 425A21-2 [hereinafter 4 November 2022 Order]. If the Controller believed in good faith that the Court failed to properly or adequately consider an issue in the case, he had but one option; that is, to petition for rehearing pursuant to N.C. R. App. P. 31(a).

Although the Controller has failed to seek rehearing under Rule 31 of the North Carolina Rules of Appellate Procedure, this motion asks the Court to do exactly that: to decide again, and in a contrary manner, issues that were already decided in *Leandro IV*. This is not allowed under our appellate rules. *See*, *e.g.*, *Nowell v. Neal*, 249 N.C. 516, 521(1959) (stating "the appropriate method of obtaining redress from errors committed by this Court" is a petition for rehearing).

To be clear, Rule 31 is the only mechanism by which a party can ask this Court to rehear or address issues they allege the Court has not properly or adequately considered. N.C. R. App. P. 31. Rule 31 petitions have a firm deadline, which cannot be extended. *See* N.C. R. App. P. 27(c) (The "Court may not extend the time for . . . filing . . . a petition for rehearing"). The deadline to seek rehearing in this case, as in all other cases, expired "fifteen days after the mandate of the court [was] issued." *See* N.C. R. App. 31(a). The Controller's motion effectively raises rehearing despite being time barred from doing so. *See* N.C. R. App. 31(a). The North Carolina Rules of Appellate Procedure do not allow for such gamesmanship. The Controller cannot legitimately request a "do over" with a newly constituted Court in order to obtain a different result. And even more importantly, this Court cannot legitimately allow such a procedure.

First and foremost, the Controller misconstrues this Court's 4 November 2022 Order. In that Order, this Court "stay[ed] the Writ of Prohibition pending any further filings in 425A21-1 pertaining to issues

not already addressed in this opinion filed on this day in 425A21-2." 4 November 2022 Order. The Controller asserts "the stay was issued because the Writ of Prohibition *may* interfere with the rights of the parties in the superior court proceedings." The Controller also notes the Order is ambiguous because it "anticipates the Controller may need to make additional filings to protect his rights as well."

However, this Court explicitly stated its reasons for staying the Writ of Prohibition at least three times in *Leandro IV*, 382 N.C. 129 (2022). The Court explained that the case was remanded for further proceedings and instructed the trial court to "recalculat[e] the amount of funds to be transferred in light of the State's 2022 Budget" and subsequently "order those State officials to transfer those funds to the specified State agencies." *Leandro IV*, 382 N.C. at 391. Accordingly, "[t]o enable the trial court to do so" this Court "stay[ed] the 30 November 2021 Writ of Prohibition issued by the Court of Appeals." *Id.* To be sure, this Court then reiterated this reasoning two additional times. *Leandro IV*, 382 N.C. at 429, 476.

Even more fundamentally, the central question resolved by this Court in *Leandro IV* was whether the judiciary has the inherent authority to compel compliance with state constitutional guarantees when the responsible branches of government fail to act. *See*, *e.g.*, *Leandro IV*, 382 N.C. at 429. The Order granting the Writ of Prohibition addressed the exact same question. It is impossible to reconcile our decision in *Leandro IV*, that yes, the judiciary has that authority, *Id.*, with the Court's decision today to reinstate the Writ of Prohibition.

The Controller asks this Court to rehear issues about the Court's personal jurisdiction over him. This issue, along with any due process concerns the Controller raises in his motion, were addressed by the Court in *Leandro IV*. There, this Court rejected those concerns by noting that "[a] court cannot reasonably add as a party to a case every state official who may be involved in implementing a remedy; instead, the interests of those officials are represented by that agency, branch, or the State as a whole." *Leandro IV*, 382 N.C. at 466. Indeed, these issues were also a source of disagreement between the majority and dissent. *See id.* ("the dissent contends that affirming the November 2021 Order would violate the rights of the Controller. But as an executive branch official, the Controller's interests have been adequately represented throughout this litigation."); *see also id.* at 529-30 (Berger, J., dissenting).

The Controller also asks this Court to rehear issues that were addressed by the Remedial Order affirmed in *Leandro IV*. These questions pertain to how the transfer of funds complies with the State Budget

Act. But in *Leandro IV* this Court stated that "the Controller . . . [was] directed to treat the . . . funds as an appropriation from the General Fund as contemplated within [N.C.G.S] 143C-6-4(b)(2)(a) and to carry out all actions necessary to effectuate those transfers. *Leandro IV*, 382 N.C. at 423 (quoting Remedial Order). N.C.G.S. 143C-6-4(b)(2)(a) of the State Budget Act allows a "State agency," with "approval of the Director of the Budget" to "spend more than was apportioned in the certified budget by adjusting the authorized budget" where "[r]equired by a court . . . order." Thus, this Court's reference to that section addresses the administrative issues the Controller raises.

Additionally, while the Controller asks this Court to lift or dissolve the stay of the Writ of Prohibition, granting the motion will lead to an absurd result. First, lifting the stay is premature given our Court's reason for staying the Writ of Prohibition, which was to "enable the trial court to comply with" the order "reinstat[ing] the trial court's order directing certain state officials to transfer the funds required to implement years two and three of the CRP." *Leandro IV*, 382 N.C. at 466. Thus, the stay must remain until the transfer directive is reinstated. That has not happened.

Next, lifting the stay will result in two contradictory appellate court orders—the Court of Appeals' Writ of Prohibition and this Court's *Leandro IV* Opinion and Order—being in effect simultaneously. While this Court's opinion requires further proceedings, mandates entry of the remedial order, and confirms the trial court has jurisdiction, the Writ of Prohibition divests the trial court of jurisdiction, prevents further trial court proceedings, and prohibits entry of the trial court's remedial order. But because an earlier Court of Appeals decision must yield to on point precedent from this Court, lifting or dissolving the stay cannot have the effect the movant wants. *See State v. Leaks*, 240 N.C. App. 573 (2015) ("[t]his Court is bound to follow the precedent of our Supreme Court [.]") (citing *State v. Scott*, 180 N.C. App. 462, 465 (2006). The trial court must follow this Court's *Leandro IV* opinion, despite the requested relief being granted.

To the extent the Controller purports to identify issues that could arise in subsequent proceedings, these issues have already been decided, or, if they have not, are not ripe for decision. For example, the Controller's motion raises a number of questions unrelated to the trial court's transfer directive. Instead, these questions relate to the particulars of disbursing the funds moving forward. Furthermore, this Court is asked to determine whether the trial court's order is contrary to the General Statutes and whether state and local agency officials who transfer funds can be

liable civilly or criminally under N.C.G.S. § 14C-10.1. These questions are addressed by the Remedial Order, which was affirmed by *Leandro IV*. 382 N.C. at 423, 2022-NCSC-108, ¶ 77. To the extent that any of the presented questions might require judicial intervention in the future, proper procedure requires they first be presented to a superior court judge as this Court does not receive testimony or facts, *Nale v. Ethan Allen*, 199 N.C. App. 511, 521 (2009) ("It is not the role of the appellate courts to make findings of fact."); *Cutter v. Wilkerson*, 544 U.S. 709, 718 n.7 (2005) ("we are a court of review, not of first review"), or issue advisory opinions. *Wise v. Harrington Grove Cmty. Ass'n, Inc.*, 357 N.C. 396, 408 (2003) ("It is no part of the function of the courts to issue advisory opinions."); *see also*, *Leandro IV*, 382 N.C. at 510 (Berger, J., dissenting) ("[i]t is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions.").

Finally, the majority accepts the outlandish proposition that, although all of these issues were fully briefed,[2] the Controller argued before this Court at oral argument, and the Court issued its ruling in *Leandro IV* resolving all of the issues in the appeal, somehow the basic elements of procedural due process have not been afforded to the Controller and therefore the Court of Appeals' Writ of Prohibition effectively overruling *Leandro IV* must go into effect. Rather, allowing this motion strikes another nail in the coffin for the rule of law. Our legal system is based on the premise that this Court's orders and opinions will be treated as final and binding interpretations of North Carolina law and its constitution. The "law of the case" has long been a tenant of our jurisprudence. *See, e.g.*, *In re J.A.M.*, 375 N.C. 325, 332 (2020) ("Our decision in *J.A.M. II* constitutes 'the law of the case' and is binding as to the issues decided therein . . . Accordingly, we overrule respondent's arguments insofar as they concern the trial court's prior adjudication of neglect.") (citing *Shores v. Rabon*, 253 N.C. 428, 429 (1960) (per curiam)); *Hayes v. City of Wilmington*, 243 N.C. 525 (1956) ("[W]hen 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

2. For example, issues regarding the Court's personal jurisdiction over the Controller, the General Assembly, and procedural due process requirements were previously briefed by the Controller. Controller Resp. Br. at 12-16, 18-22. In that same filing, the Controller represented that "[u]nlike the other parties, [Controller] requests the Court to simply affirm the 28 April Order and dismiss the remainder of the appeals including any further appellate review of the Writ of Prohibition." Controller's Resp. Br. at 3. The fact that this Court denied that request does not give the Controller the right to come back to this Court asking us to reverse that decision.

and the same questions . . . are involved in the second appeal"). Without principled explanation or justification, the majority abandons this rule.

"Today, education is perhaps the most important function of the state and local governments . . . It is the very foundation of good citizenship. *Leandro IV*, 382 N.C. at 476 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). Assuring that our children are afforded the chance to become contributing, constructive members of society is paramount. Whether the State meets this challenge remains to be determined." *Id.* (quoting *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 649 (2004) ("Leandro II")). Unfortunately, we have waited much too long to see whether the State will abide by its constitutional mandate to provide our children, including at-risk children struggling in under-resourced schools, with a basic, sound education. Thus far, at least twenty-eight classes of students "have already passed through our state's school system without benefit of relief." *Leandro IV*, 382 N.C. at 475. Not only is it true that justice delayed is justice denied, but denying adequate educational opportunities "entails enormous losses, both in dollars and in human potential, to the State and its citizens." *Id.* If our Court cannot or will not enforce state constitutional rights, those rights do not exist, the constitution is not worth the paper it is written on, and our oath as judicial officers to uphold the constitution is a meaningless charade. For the reasons stated herein, I dissent.

Justice MORGAN joins in this dissenting opinion.

JABARI HOLMES, FRED CULP, DANIEL E. SMITH, BRENDON JADEN PEAY, AND PAUL KEARNEY, SR.

v.

TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; DAVID R. LEWIS, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON ELECTIONS FOR THE 2018 THIRD EXTRA SESSION; RALPH E. HISE, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE SENATE SELECT COMMITTEE ON ELECTIONS FOR THE 2018 THIRD EXTRA SESSION; THE STATE OF NORTH CAROLINA; AND THE NORTH CAROLINA STATE BOARD OF ELECTIONS

From N.C. Court of Appeals
19-762

From N.C. Court of Appeals
22-16

From Wake
18CVS15292

No. 342PA19-2

ORDER

This matter comes before the Court on a petition for rehearing filed by the Legislative Defendants.

A petition for rehearing is governed by Rule 31 of the Rules of Appellate Procedure. Under Rule 31, a petition for rehearing "shall state with particularity the points of fact or law that, in the opinion of the petitioner, the court has overlooked or misapprehended" and must be accompanied by certifications from two qualifying, disinterested attorneys stating "that they consider the decision in error on points specifically and concisely identified." N.C. R. App. P. 31(a).

In exercising our duty and authority to address alleged errors of law, this Court has granted rehearing of cases under both Rule 31 and its historical predecessor, former Rule 44. In *Nowell v. Neal*, this Court provided guidance on when a litigant has satisfied the criteria for rehearing. 249 N.C. 516, 521, 107 S.E.2d 107, 111 (1959). Under a predecessor version of Rule 31 with nearly identical operative language, the Court observed that a recently issued opinion appropriately is reheard if the petitioner makes a satisfactory showing that the opinion may be erroneous: "No petition to rehear was filed. That is the appropriate method of obtaining redress from errors committed by this Court." *Id.*

This Court has consistently allowed a petition for rehearing when the petitioner has made the showing required by *Nowell*. *See*, *e.g.*, *Bailey v. Meadows Co.*, 154 N.C. 71, 69 S.E. 746 (1910) (modifying prior opinion upon grant of rehearing); *Clary v. Alexander Cty. Bd. of Educ.*, 286 N.C. 525, 212 S.E.2d 160 (1975) (withdrawing prior opinion upon grant of rehearing); *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977) (same); *Lowe v. Tarble*, 313 N.C. 460, 329 S.E.2d 648 (1985) (affirming prior opinion upon grant of rehearing); *Alford v. Shaw*, 320 N.C. 465, 358 S.E.2d 323 (1987) (withdrawing prior opinion upon grant of rehearing); *Wilson v. State Farm Mut. Auto. Ins. Co.*, 329 N.C. 262, 404 S.E.2d 852 (1991) (withdrawing in part and affirming in part prior opinion upon grant of rehearing); *Swanson v. State*, 330 N.C. 390, 410 S.E.2d 490 (1991) (affirming prior opinion upon grant of rehearing), *vacated and remanded*, 509 U.S. 916 (1993); and *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 517 S.E.2d 874 (1999) (superseding prior opinion upon grant of rehearing).

We conclude that the petition for rehearing in this matter satisfies the criteria in Rule 31 and allow the petition. The parties are directed as follows:

1. Appellants shall file supplemental briefing with this Court on or before 17 February 2023.

2. Appellees shall file supplemental briefing with this Court on or before 3 March 2023.

3. In their supplemental briefing, the parties shall address the following issues: (1) the issues raised in the petition for rehearing and (2) whether the operation of the challenged statute is impacted by the pending legal challenge to N.C. Const. Art. VI, Sec. 3(2), addressed by this Court in *N.C. State Conf. NAACP v. Moore*, 382 N.C. 129 (2022). The parties also may address any other issues raised in the original petition for discretionary review prior to determination by the Court of Appeals.

This matter will be placed on the 14 March 2023 calendar for rehearing.

By order of the Court in Conference, this the 3rd day of February 2023.

/s/ Allen, J.
For the Court

Justices Morgan and Earls dissent as set out in the attached statement.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of February 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

Justice MORGAN dissenting.

I respectfully dissent from this Court's allowance of the Petition for Rehearing. There is no aspect of the case at issue which is presented by petitioners in their Petition for Rehearing which meets the historically and purposely high standards to qualify for this Court's exceedingly rare extension of the opportunity for a party which has already been fully heard by this Court through written submissions and oral arguments—followed by a studious and thorough analysis of the matters at issue which culminates in this Court's issuance of its binding opinion—to be afforded yet another opportunity to be heard by this Court upon the party's original unsuccessful efforts. The allowance of this extraordinary remedy to petitioners in this case, under the existent circumstances, may serve to foment concerns that North Carolina's highest state court is engaged in the determination of challenging and legitimate legal disputes with a perceived desire to reach outcomes which are inconsistent with this Court's well-established principles of adherence to legal precedent, stare decisis, and the rule of law.

Rule 31 of the North Carolina Rules of Appellate Procedure governs the subject of "Petition for Rehearing." Rule 31(a) states, in pertinent part: "The petition shall state with particularity the points of fact or law that, in the opinion of the petitioner, the court has overlooked or misapprehended and shall contain such argument in support of the petition as petitioner desires to present." In my view, in light of the exhaustive coverage and discussion of the subject matter of the case as addressed by this Court in its written opinion, there is no factual or legal component of this case which was overlooked; in my view, while the matters in controversy in this case were exacting, there is no factual or legal component of this case which was misapprehended by this Court. In sum, there is nothing demonstrably remarkable or sensational about petitioners' arguments in this case under North Carolina Appellate Rule

31 which warrants the colossal distinction to join the scant few cases for rehearing which span the twenty-one decades of this Court's resolution of this state's most significant cases, when the mammoth majority of such cases were duly considered to fail to satisfy the Court's elevated standards for a petition for rehearing to be granted.

As support for this observation, I note that petitioners have cited only four occasions in which this Court has found it to be appropriate to allow a case to be reheard: (1) *Bailey v. Meadows Co.*, 152 N.C. 603, 603, 68 S.E. 11, 12, *modified on reh'g*, 154 N.C. 71, 71, 69 S.E. 746, 747 (1910), a case addressing employer liability for employee injury; (2) *Clary v. Alexander Cnty. Bd. of Educ.*, 285 N.C. 188, 195, 203 S.E.2d 820, 825 (1974), *op. withdrawn sub nom. Clary v. Alexander Cnty. Bd. of Educ.*, 286 N.C. 525, 533, 212 S.E.2d 160, 165 (1975), a personal injury case; (3) *Branch Banking & Tr. Co. v. Gill*, 286 N.C. 342, 352, 211 S.E.2d 327, 335 (1975), *on reconsideration*, 293 N.C. 164, 190, 237 S.E.2d 21, 37 (1977), a case based on contract law; and (4) *Alford v. Shaw*, 318 N.C. 289, 349 S.E.2d 41 (1986), *on reh'g*, 320 N.C. 465, 358 S.E.2d 323 (1987), a case arising out of corporate law. It is readily ascertainable from the subject areas of the law which spawned these cases that there were no characteristics about any of them which contained or otherwise harbored any considerations which rendered this Court's allowance of petitions for rehearing in those cases to be peculiar or questionable, whereas such astonishment looms for me in the present case where petitioners merely reassert the same contentions which they unsuccessfully argued, albeit now rehashing these positions before a Supreme Court of North Carolina which has a different judicial composition than that which existed when the case was originally decided by this Court.

In *Weisel v. Cobb*, this Court opined:

> As the highest principles of public policy favor a finality of litigation, rehearings are granted by us only in exceptional cases, and then every presumption is in favor of the judgment already rendered. . . . A partial change in the personnel of the Court affords no reason for a departure from the rule, but rather emphasizes the necessity of its application[.]

122 N.C. 67, 69-70 (1898).

I respectfully dissent.

Justice EARLS joins in this dissent.

DUSTIN MICHAEL McKINNEY, GEORGE JERMEY McKINNEY, AND JAMES ROBERT TATE, PLAINTIFFS

STATE OF NORTH CAROLINA, INTERVENOR

v.

GARY SCOTT GOINS AND THE GASTON COUNTY BOARD OF EDUCATION, DEFENDANTS

From N.C. Court of Appeals
22-261

From Wake
21CVS7438

No. 109PA22

ORDER

On 12 April 2022, plaintiffs and the State intervenor petitioned this Court for discretionary review prior to a determination by the Court of Appeals. On 5 July 2022, this Court entered an order allowing that petition.

This Court now rescinds the 5 July 2022 order improvidently granting discretionary review prior to a determination by the Court of Appeals and remands this case to the Court of Appeals for hearing at the earliest convenience of that court. To expedite consideration, we direct the Court of Appeals to accept the parties' briefs previously filed in this Court as the basis for review in the Court of Appeals.

By order of the Court in Conference, this the 1st day of March 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of March 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. BELL

[384 N.C. 21 (2023)]

STATE OF NORTH CAROLINA v. BRYAN CHRISTOPHER BELL	From Onslow 01CRS2990 01CRS2991 01CRS2989

No. 86A02-2

ORDER

The State filed a motion to hold the briefing schedule in abeyance and to remand this matter to Superior Court for an evidentiary hearing. This Court allowed the State's motion to hold the briefing schedule in abeyance on 11 February 2022 and remanded this case to the trial court for an evidentiary hearing by order of this Court dated 17 February 2022.

The trial court having conducted an evidentiary hearing and transmitted its order to this Court on 25 January 2023, it is therefore ordered that the 11 February 2022 order holding the briefing schedule in abeyance is hereby rescinded, and the appellant shall file its brief within sixty days of the entry of this order. The appellee shall thereafter have sixty days within which to file its response. The appellant shall thereafter file a reply brief, if any, within thirty days.

By order of the Court in Conference, this the 1st day of March 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of March 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 20-534
v.	
SCOTT WARREN FLOW	From Gaston 18CRS3691 18CRS56251 18CRS56323 18CRS56326-27 19CRS5616

No. 202PA21

ORDER

This Court, on its own motion, will dispose of this case on the record and briefs without oral argument pursuant to Rule 30(f)(1) of the Rules of Appellate Procedure. Accordingly, defendant's motion to continue oral argument is dismissed as moot.

By order of the Court in Conference, this the 7th day of February 2023.

/s/ Allen, J.
For the Court

Justices Morgan and Earls dissent from this order.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of February 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

Justice MORGAN dissenting.

I disagree with the Court majority's decision, on its own motion, to dispose of this case on the record and briefs as its chosen approach in which to dispose of defendant's motion to continue due to the illness of defendant's counsel; therefore, I respectfully dissent. Rule 30(f)(1) of the North Carolina Rules of Appellate Procedure states, in pertinent part, that "[a]t any time that the Supreme Court concludes that oral argument in any case pending before it will not be of assistance to the Court, it may dispose of the case on the record and briefs." Under the

circumstances governing this Court's actions pursuant to Rule 30(f)(1) and in light of the issues presented in this case, I dissent from the actions of the majority of the Court to conveniently relegate this case to a determination on the record and briefs without the benefit of oral argument. Furthermore, the opposing party described its position regarding the motion as declining to register a "strong objection" to the request. Finally, the Court's actions result in the inability of defendant to utilize his opportunity to present his oral argument to the Court merely because his counsel has suffered the misfortune of contracting an illness. Because this Court has compelled defendant to sacrifice his opportunity to present his oral argument to the Court as a direct result of his counsel's sudden and unexpected illness, I dissent.

Justice EARLS joins in this dissent.

FRANKIE DELANO WASHINGTON AND FRANKIE DELANO WASHINGTON, JR.	From N.C. Court of Appeals 18-1069
v.	From N.C. Court of Appeals 13-224 13-224-2
TRACEY CLINE, ANTHONY SMITH, WILLIAM BELL, JOHN PETER, ANDRE T. CALDWELL, MOSES IRVING, ANTHONY MARSH, EDWARD SARVIS, BEVERLY COUNCIL, STEVEN CHALMERS, PATRICK BAKER, THE CITY OF DURHAM, NC, AND THE STATE OF NORTH CAROLINA	From Durham 11CVS5051

No. 148PA14-2

ORDER

The parties have filed a notice of death of a party and a joint supplemental notice of death of a party. This Court, on its own motion, removes this case from its calendar currently set for Thursday, 2 February 2023. This matter will be re-calendared after a personal representative is appointed for plaintiff and substituted as a party in this case. Counsel is directed to initiate and complete the process for appointing and substituting a personal representative for plaintiff as soon as practicable and to submit an update to the Court on the status of this process on or before Friday, 10 March 2023.

By order of the Court in Conference, this the 30th day of January 2023.

/s/Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 30th day of January 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

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

3 MARCH 2023

1P23	State v. Chris Shawn Williams	Def's Pro Se Motion to Dismiss (Jurisdiction Challenge)	Dismissed
2P23	State v. Damonte Maeson Larsen	Def's Pro Se Motion to Dismiss All Charges	Dismissed
3P23	State v. Joseph Edwards Teague, III	1. Def's Motion for Temporary Stay (COA21-10) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/04/2023** 2. 3.
4P23	State v. Bucky Scott Smith	1. Def's Pro Se Motion for Extension of Time to File Notice of Appeal (COA22-247) 2. Def's Pro Se Motion for Extension of Time to File PDR 3. Def's Pro Se Motion to Proceed *In Forma Pauperis* 4. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question 5. Def's Pro Se PDR Under N.C.G.S. § 7A-31 6. State's Motion to Dismiss Appeal 7. Def's Pro Se Motion to Appoint Counsel	1. Dismissed as moot 2. Dismissed as moot 3. Allowed 4. --- 5. Denied 6. Allowed 7. Dismissed as moot **Dietz, J., recused**
7P23	State v. Dennis D. Ramsey	Def's Pro Se Motion for PDR (COAP22-226)	Dismissed
8P23	State v. Chad Terrell Kendrick	Def's Pro Se Petition for Writ of Habeas Corpus and Mandamus	Denied **01/06/2023**
9P23	State v. Travis James Tudor	Def's Pro Se Petition for Writ of Certiorari	Dismissed
11A22	State v. Jaqualyn Robinson	1. Def's Notice of Appeal Based Upon a Dissent (COA21-144) 2. Def's Conditional Petition for Writ of Certiorari to Review Order of the COA 3. State's Motion to Dismiss Appeal 4. Def's Motion to Amend Petition for Writ of Certiorari	1. --- 2. Denied 3. Allowed 4. Allowed
13PA22	Wing v. Goldman Sachs Trust Company, et al.,	Parties' Motion for Continuance of Oral Argument (COA21-133)	Allowed **02/17/2023**

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

3 MARCH 2023

15P22	State v. Keith Aaron Bucklew	1. Def's Motion for Temporary Stay (COA20-556) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/12/2022** Dissolved 2. Denied 3. Denied **Dietz, J., recused**
16A23	State v. Ernest Paul Jones	1. State's Motion for Temporary Stay (COA22-518) 2. State's Petition for Writ of Supersedeas	1. Allowed **01/11/2023** 2. Allowed **02/02/2023**
17P23	State v. Robyn Lynn Noffsinger	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA21-566) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
19P23	State v. Audwin Pierre Lindsay, Jr.	Def's Pro Se Petition for Writ of Habeas Corpus (COAP17-233)	Denied **01/18/2023**
24P22	State v. Marcus Antwon Parks	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-832) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
26P23	State v. Jermelle Levar Smith	Def's PDR Under N.C.G.S. § 7A-31 (COA22-257)	Denied
32P23	In the Matter of the Adoption of B.M.T., a minor	1. Petitioners' PDR Under N.C.G.S. § 7A-31 (COA22-377) 2. Petitioners' Motion for Temporary Stay 3. Petitioners' Petition for Writ of Supersedeas	1. 2. Allowed **02/14/2023** 3.
35P23	State v. Jose M. Estrada Perdomo	Def's Pro Se Motion for Emergency Mandamus and Prohibition	Denied **01/26/2023**
36A22	Cedarbrook Residential Center, Inc., et al. v. N.C. Department of Health & Human Services	Plts' Petition for Rehearing (COA21-194)	Denied **02/13/2023** **Dietz, J., recused**
38P23	Jean-Laurent v. James	Petitioner's Pro Se Petition for Writ of Habeas Corpus (COAP22-545)	Denied **01/30/2023** **Dietz, J., recused**

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

3 MARCH 2023

39P23	State v. Bobby Leshawn Byrd	Def's PDR Under N.C.G.S. § 7A-31 (COA22-527)	Denied **Dietz, J., recused**
41P17-10	Arthur O. Armstrong v. Armstrong Estate, et al.	1. Plt's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wilson County 2. Plt's Pro Se Motion for Relief	1. Dismissed 2. Dismissed
42P23	State v. Larry Timothy Abrams	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-347)	Denied
43P18-3	Jonathan H. Bynum v. State of North Carolina	1. Plt's Pro Se Motion for Wiretapping 2. Plt's Pro Se Motion for Discrimination 3. Plt's Pro Se Motion to Proceed as a Veteran	1. Dismissed 2. Dismissed 3. Dismissed
45P23	Smith v. Wisniewski	1. Plt's Pro Se Motion for Temporary Stay 2. Plt's Pro Se Petition for Writ of Supersedeas 3. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question 4. Plt's Pro Se PDR Under N.C.G.S. § 7A-31	1. Allowed **02/02/2023** 2. 3. 4.
46P23	State v. David Raeford Tripp, Jr.	1. Def's Motion for Temporary Stay (COA21-688) 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Constitutional Question 4. Def's PDR Under N.C.G.S. § 7A-31 5. State's Motion to Dismiss Appeal	1. Allowed **02/02/2023** 2. 3. 4. 5.
47P23	State v. Malcolm Leon Tripp	Def's Pro Se Motion for Relief from Excessive Bail	Dismissed
53P23	Cox v. Sadovnikov	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas	1. Allowed **02/06/2023** 2. **Dietz, J., recused**
56P23-1	Cumberland County v. Hall	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **02/14/2023**

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

3 MARCH 2023

56P23-2	Cumberland County v. Hall	1. Def's Pro Se Petition for Writ of Habeas Corpus 2. Def's Pro Se Motion for Demand for Dismissal	1. Denied **02/23/2023** 2. Dismissed **02/23/2023**
57P22	Joseph Fleming and Rebecca Garland, on behalf of themselves and all others similarly situated v. Cedar Management Group, LLC	1. Plts' PDR Under N.C.G.S. § 7A-31 2. Def's Conditional PDR Under N.C.G.S. § 7A-31 (COA21-213)	1. Denied 2. Dismissed as moot
57P23	R.I. North, LLC v. Monette Baldwin a/k/a Nell Monette Baldwin	1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COAP23-95) 2. Def's Pro Se Motion for Temporary Injunction 3. Def's Pro Se Motion for a Bond of $1.00 be Assessed 4. Def's Pro Se Notice of Appeal 5. Def's Pro Se PDR Prior to a Decision of the COA 6. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA 7. Def's Pro Se Motion to Suspend the Rules for Expedited Review	1. Denied **02/17/2023** 2. Denied **02/17/2023** 3. Dismissed as moot **02/17/2023** 4. Dismissed *ex mero motu* **02/17/2023** 5. Denied **02/17/2023** 6. Denied **02/17/2023** 7. Denied **02/17/2023** **Morgan, J., recused**
58P23	Hwang v. Cairns, et al.	Plt's Motion for Extension of Time to File PDR (COA22-31)	Denied **02/20/2023**
63P23	Azevedo v. Onslow County DSS	Petitioner's Motion for Temporary Stay (COA22-376)	Allowed **02/27/2023**
64A22	Howard, et al., v. IOMAXIS, LLC, et al.	1. Def's (IOMAXIS, LLC) Motion for Closed Oral Arguments 2. Def's (IOMAXIS) Motion to Seal Document	1. Denied **01/20/2023** 2. Allowed **01/31/2023**
72P12-3	State v. Michael Scott Sistler	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Johnston County 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot

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

3 MARCH 2023

73P22	State v. Harden Junior Viers	Def's PDR Under N.C.G.S. § 7A-31 (COA20-806)	Denied
86A02-2	State v. Bryan Christopher Bell	State's Motion to Hold Appeal in Abeyance and Remand for Evidentiary Hearing	Special Order
91P14-8	State v. Salim Abdu Gould	1. Def's Pro Se Motion for Notice of Appeals as of Right Sub. Const. Ques. (COA18-425) 2. Def's Pro Se Petition for Writ of Habeas Corpus	1. Dismissed *ex mero motu* **12/15/2022** 2. Denied **12/15/2022** **Dietz, J., recused**
91P14-9	State v. Salim Abdu Gould	1. Def's Pro Se Motion for Notice of Appeal as of Right Sub. Const. Ques. (COA18-425) 2. Def's Pro Se Petition for Writ of Habeas Corpus 3. Def's Pro Se Motion for Temporary Stay 4. Def's Pro Se Motion for Notice of Transfer	1. Dismissed *ex mero motu* **01/10/2023** 2. Denied **01/10/2023** 3. Dismissed **01/10/2023** 4. Dismissed **01/10/2023** **Dietz, J., recused**
91P22	State v. Joseph Orland Murdock	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-547) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
102P13-5	State v. Charles Anthony Ball	1. Def's Pro Se Petition for Writ of Mandamus 2. Def's Pro Se Motion to Compel 3. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Warren County 4. Def's Pro Se Motion to Proceed *In Forma Pauperis* 5. Def's Pro Se Motion for Petition for Rehearing	1. Dismissed 2. Dismissed 3. Denied **02/14/2023** 4. Allowed 5. Denied
105P18-2	Nathaniel R. Webb v. North Carolina State Highway Patrol	Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA21-570)	Dismissed *ex mero motu* **Dietz, J., recused**

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

3 MARCH 2023

109PA22	McKinney, et al. v. Goins, et al.	1. Plts and Intervenor's PDR Prior to a Determination by the COA (COA22-261) 2. Student Victims of Sexual Abuse's Motion for Leave to File Amicus Brief	1. Special Order 2. Allowed **02/09/2023**
113A22	Estate of Graham v. Lambert, et al.	North Carolina Association of Defense Attorneys' Motion for Extension of Time to File Amicus Brief	Allowed **02/24/2023**
121P04-2	State v. Mitchell Danyell Banks	Def's Pro Se Motion for New Sentencing Hearing	Dismissed
121P22	Christine Beronio v. Jon P. Henry	Def's Pro Se Motion and Notice of Hearing for Modification of Child Support Order	Dismissed
126P22	State v. Zaire Ali Muhammad	1. Def's Pro Se Motion for Court Date for a Lawyer 2. Def's Pro Se Motion for Arraignment Date	1. Dismissed 2. Dismissed
129P22	State v. William Scott Davis, Jr.	1. Def's Pro Se Motion for PDR 2. Def's Pro Se Motion for Indigent Copy of N.C. Supreme Court Rules 3. Def's Pro Se Motion for Indigent Copy of N.C. Court of Appeals Rules 4. Def's Pro Se Motion to Compel Clerks to Produce All Transcripts and Records 5. Def's Pro Se Motion to Compel Judge to Perfect Record on Appeal 6. Def's Pro Se Motion for Indigent Copies of Sample Documents 7. Def's Pro Se Motion for PDR 8. Def's Pro Se Petition for Writ of Mandamus 9. Def's Pro Se Motion to Appoint Counsel and Guardian ad Litem 10. Def's Pro Se Petition for Writ of Mandamus 11. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed 6. Dismissed 7. Dismissed 8. Dismissed 9. Dismissed as moot 10. Dismissed 11. Dismissed as moot
131P16-24	State v. Somchai Noonsab	Def's Pro Se Motion for Immediate Release and Monetary Sums Tax Free	Dismissed **02/13/2023**
147P22	State v. Sharon Whitford	Def's PDR Under N.C.G.S. § 7A-31 (COA20-725)	Denied **Dietz, J., recused**

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

3 MARCH 2023

148PA14-2	Washington v. Cline	Notice	Special Order **01/30/2023**
155P22	State v. Travis Lamont Davenport	1. State's Motion for Temporary Stay (COA20-628) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **05/20/2022** 2. Allowed 3. Allowed 4. Denied **Dietz, J., recused**
157P22	State v. Tevin Demetrius Vann	1. State's Motion for Temporary Stay (COA20-907) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/20/2022** 2. Allowed 3. Allowed
163P22	Warren Paul Kean v. Amy Delene Kean	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-102) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31 3. Def's Motion for Temporary Stay 4. Def's Petition for Writ of Supersedeas	1. Denied 2. Dismissed as moot 3. Allowed **06/07/2022** Dissolved 4. Denied
164P22	State v. Todd Emerson Collins, Jr.	1. Def's Pro Se Motion for Temporary Stay (COA21-404) 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se PDR Under N.C.G.S. § 7A-31	1. Denied **05/26/2022** 2. Denied 3. Denied **Dietz, J., recused**
165P16-2	State v. Simaron Demetrius Hill	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Randolph County	Dismissed **Berger, J., recused**
174P21	State v. Phillip Brandon Daw	1. State's Motion for Temporary Stay (COA20-680) 2. State's Petition for Writ of Supersedeas 3. Def's Conditional PDR Under N.C.G.S. § 7A-31 4. State's PDR Under N.C.G.S. § 7A-31 5. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **05/25/2021** 2. Allowed 3. Denied 4. Allowed 5. Denied

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

3 MARCH 2023

176P22	Farron Jerome Upchurch v. Harp Builders, Inc. and Valentine Joseph Cleary	Defs' PDR Under N.C.G.S. § 7A-31 (COA21-472)	Allowed **Dietz, J., recused**
178P22	State v. James Matthew Kitchen	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA21-297) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
182P22	State v. William Enoch Thomas	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-396) 2. Def's Motion for Petition for Review Pursuant to Rule 2 3. Def's Motion to File Amended Petition 4. Def's Amended PDR Under N.C.G.S. § 7A-31 5. Def's Amended Motion for Petition for Review Pursuant to Rule 2	1. Dismissed as moot 2. Dismissed as moot 3. Allowed 4. Denied 5. Denied **Dietz, J., recused**
187A22	State v. Jahzion Wilson	1. Def's Notice of Appeal Based Upon a Dissent (COA20-108) 2. Def's PDR as to Additional Issues	1. --- 2. Denied
197PA20-2	State v. Jeremy Johnson	State's Emergency Motion to Continue Argument	Allowed **02/06/2023** **Berger, J., recused** **Dietz, J., recused**
200PA21	In the Matter of J.M. & N.M.	1. Petitioner and Guardian ad Litem's Motion to Amend Record on Appeal (COA20-667) 2. Respondent-Mother's Motion to Continue Oral Argument 3. Respondent-Mother's Motion for Extension of Time to File Brief	1. Denied **12/13/2022** 2. Denied **01/04/2023** 3. Denied **01/04/2023**
202PA21	State v. Scott Warren Flow	Def's Motion to Continue Oral Argument (COA20-534)	Special Order **02/07/2023**
202P22	State v. Kenneth Louis Walker	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-535) 2. Def's Petition for Writ of Certiorari to Review Decision of the COA	1. Dismissed 2. Allowed

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

3 MARCH 2023

206P22	Roy Johnson v. James Nieland, DC and Family Chiropractic, PC	Plt's PDR Under N.C.G.S. § 7A-31	Denied
210P22	Kevin Scott Violette and Violette Family Farm, LLC a North Carolina Limited Liability Company v. The Town of Cornelius, a North Carolina body politic and corporate, Bluestream Partners, LLC, a North Carolina Limited Liability Company, Jacob a/k/a Jake J. Palillo, and Wayne Herron	Plts' PDR Under N.C.G.S. § 7A-31 (COA21-648)	Denied **Dietz, J., recused**
215P22	State v. Quashaun Niajel Slade	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-209) 2. Def's Motion to Deem PDR Timely Filed 3. Def's Petition in the Alternative for Writ of Certiorari to Review Decision of the COA	1. Denied 2. Allowed 3. Dismissed as moot
229P22	State v. Ernest Mario Roach	Def's PDR Under N.C.G.S. § 7A-31 (COA21-517)	Denied
231P22	Tutterow v. Hall	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA21-326) 2. Plt's Motion to Deem PDR Timely Filed 3. Plt's Petition for Writ of Certiorari to Review Decision of the COA	1. Dismissed 2. Denied 3. Denied **Dietz, J., recused**
233P22	State v. Wallace Earl Anderson	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-664 2. State's Conditional PDR Under N.C.G.S. § 7A-31)	1. Denied 2. Dismissed as moot **Dietz, J., recused**

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

3 MARCH 2023

237P04-3	State v. James Edward Bell, Jr.	1. Def's Pro Se Motion for Notice of Appeal (COAP21-327) 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA	1. Dismissed 2. Dismissed 3. Dismissed
243P21	State v. Thomas McCaskill	Def's Pro Se Motion to Make Court Follow the Law	Dismissed
244P21-4	Meyers v. Jacobs, et al.	1. Petitioner's Pro Se Petition for Writ of Habeas Corpus 2. Petitioner's Pro Se Motion for Consolidated Objections and Notice of Appeal	1. Denied **02/09/2023** 2. Denied **02/09/2023**
244P22	Brenda Warley v. AutoMoney, Inc.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-249) 2. Def's Motion to Amend PDR 3. Def's Motion to Withdraw PDR	1. Dismissed as moot 2. Dismissed as moot 3. Allowed
250P08-6	State v. Gregory Robinson, Jr.	1. Def's Pro Se Motion for Notice of Appeal 2. Def's Pro Se Motion for PDR	1. Dismissed 2. Dismissed
252P22	Rupa Vickers Russe and Ara L. Vickers v. William Anthony Youngblood, individually and William Anthony Youngblood in his official capacity as a Sheriff for the Henderson County Sheriff Department and County of Henderson	1. Plt's (Rupa Vickers Russe) Pro Se Notice of Appeal Based Upon a Constitutional Question (COA21-799) 2. Plt's (Rupa Vickers Russe) Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
253P08-2	State v. William McDougald	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-286) 2. Def's Motion to Amend PDR	1. Denied 2. Allowed **09/20/2022**
255P22	Eastpointe Human Services v. N.C. Department of Health and Human Services, et al.	1. Plt's Motion for Temporary Stay (COA21-264) 2. Plt's Petition for Writ of Supersedeas 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/10/2022** Dissolved 2. Denied 3. Denied

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

3 MARCH 2023

266P22	Grooms Property Management, Inc., et al. v. Muirfield Condominium Association, et al.	Def/Third-Party Plt's (Muirfield Condominium Association) PDR Under N.C.G.S. § 7A-31 (COA22-49)	Denied
272A14	State v. Jonathan Douglas Richardson	Def's Motion to Reschedule Oral Argument to Next Available Sitting	Denied **01/04/2023**
275P22	In the Matter of T.S.	Respondent's PDR Under N.C.G.S. § 7A-31 (COA21-710)	Denied
279P22	Wesley Walker v. Wake County Sheriff's Department; Gerald M. Baker, in his official capacity as Wake County Sheriff; Eric Curry (individually); Western Surety Company; WTVD, Inc.; WTVD Television, LLC; Shane Deitert	Plt's PDR Under N.C.G.S. § 7A-31 (COA21-661)	Allowed
280P22	Kody Kinsley, in his official capacity as Secretary of the North Carolina Department of Health and Human Services v. Ace Speedway Racing, LTD., After 5 Events, LLC, 1804-1814 Green Street Associates Limited Partnership, Jason Turner, and Robert Turner	Plt's PDR Under N.C.G.S. § 7A-31 (COA21-428)	Allowed
281A22	N.C. Farm Bureau Mutual Insurance Company, Inc. v. Matthew Bryan Hebert	1. Plt's Notice of Appeal Based Upon a Dissent (COA22-82) 2. Plt's PDR as to Additional Issues	1. --- 2. Allowed **Dietz, J., recused**
281P06-11	Joseph E. Teague, Jr., P.E., C.M. v. NC Department of Transportation, J.E. Boyette, Secretary	1. Plt's Pro Se Motion to Hear Exonerating Evidence (COA05-522) 2. Plt's Pro Se Motion for Petition for Rehearing	1. Dismissed 2. Dismissed

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

3 MARCH 2023

293P22-2	State v. Harry Lee Hunter, Jr.	1. Def's Pro Se Motion to Remove Judge from Case 2. Def's Pro Se Motion for Court-Appointed Attorney	1. Dismissed 2. Dismissed as moot
295P22	Gaston County Board of Education, Plaintiff v. Shelco, LLC, S&ME, Inc., Boomerang Design, P.A. (f/k/a MBAJ Architecture, Inc.), and Campco Engineering, Inc., Defendants/ Crossclaim and Third-Party Plaintiff v. Hoopaugh Grading Company, LLC; Hart Wall and Paver Systems, Inc.; Worldwide Engineering, Inc.; and Lincoln Harris, LLC, Third-Party Defendants	1. Def's (Campco Engineering, Inc.) PDR Under N.C.G.S. § 7A-31 (COA21-618) 2. Def's (S&ME, Inc.) PDR Under N.C.G.S. § 7A-31 3. Carolinas AGC, Inc.'s Motion for Leave to File Amicus Brief in Support of Petitions for Discretionary Review	1. Denied 2. Denied 3. Dismissed as moot
298P22	Lisa Biggs, Individually and as Administrator, Estate of Kelwin Biggs v. Daryl Brooks, Nathaniel Brooks, Sr., Kyle Ollis, Individually, and Boulevard Pre-Owned, Inc.	Plt's Petition for Rehearing	Dismissed **01/05/2023** **Dietz, J., recused**
307P21	State v. Theodore Williams, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA20-713)	Denied
311P21	State v. Garrett Jordan Vann	Def's PDR Under N.C.G.S. § 7A-31 (COA20-182)	Denied
313P22	Clarence Richards, Employee v. Harris Teeter, Inc., Employer, Self-Insured (Sedgwick Claims Management Services, Third-Party Administrator)	Defs' PDR Under N.C.G.S. § 7A-31 (COA21-804)	Denied

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

3 MARCH 2023

314P22	State v. Yon Hwar See	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-9) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
316P22	Joseph Lannan and Landry Kuehn, on behalf of themselves and others similarly situated v. Board of Governors of the University of North Carolina, known and distinguished by the name of the University of North Carolina, a body politic and corporate	1. Def's Motion for Temporary Stay (COA21-554) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. North Carolina Association of Defense Attorneys' Conditional Motion for Leave to File Amicus Brief	1. Allowed **10/21/2022** 2. Allowed 3. Allowed 4. Allowed
318P22	State v. Charles Singleton	1. State's Motion for Temporary Stay (COA22-114) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/25/2022** 2. Allowed 3. Allowed
319P22	State v. Laquan Leon Williams	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-647) 2. Def's Motion to Deem PDR Timely Filed 3. Def's Petition in the Alternative for Writ of Certiorari to Review Decision of the COA	1. Denied 2. Allowed 3. Dismissed as moot
322P22	HD Hospitality, LLC v. Live Oak Banking Company	Plt's PDR Under N.C.G.S. § 7A-31 (COA21-795)	Denied
324P22	State v. Ronald Preston Harper	Def's PDR Under N.C.G.S. § 7A-31 (COA21-752)	Denied
327P02-13	State v. Guy Tobias LeGrande	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **01/20/2023**
328P22	Scott Waters v. William Pumphrey	1. Def's Motion for Temporary Stay (COA20-816) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/07/2022** Dissolved 2. Denied 3. Denied

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

3 MARCH 2023

329A09-4	State v. Martinez Orlando Black	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County (COA08-1180) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel 4. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA 5. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA	1. Dismissed 2. Allowed 3. Dismissed as moot 4. Dismissed 5. Dismissed **Dietz, J., recused**
330P22	State v. Michael Anthony Leslie	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP22-263)	Dismissed **Dietz, J., recused**
331PA21	Community Success Initiative, et al. v. Moore, et al.	1. Legislative-Defs' Motion for Extended Briefing Schedule (COA22-136) 2. Institute for Innovation in Prosecution at John Jay College's Motion to Admit Lloyd B. Chinn Pro Hac Vice 3. Institute for Innovation in Prosecution at John Jay College's Motion to Admit Joseph C. O'Keefe Pro Hac Vice 4. District of Columbia, et al.'s Motion to Admit Caroline S. Van Zile Pro Hac Vice 5. Legislative-Defs' Motion for Extension of Time to File Reply Brief 6. District of Columbia, et al.'s Motion to Amend Exhibit A to Motion for Admission of Counsel 7. Plts' Motion to Set Oral Argument	1. Dismissed as moot 2. Allowed **08/19/2022** 3. Allowed **08/19/2022** 4. Allowed **08/31/2022** 5. Special Order **09/02/2022** 6. Allowed **08/31/2022** 7. Special Order **10/06/2022**
335P22	State v. Wesley Clayton Rhom, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA22-68)	Denied
336P22-2	William D. Woolens v. Charlene D. Cliborne	Plt's Pro Se Motion for Supreme Court Case	Dismissed
342PA19-3	Holmes, et al. v. Moore, et al.	Defs' Petition for Rehearing	Special Order **02/03/2023**

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

3 MARCH 2023

343A22	Sylvia Corry v. The North Carolina Division of Health and Human Services, Division of Child Development and Early Education	1. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-47) 2. Def's Motion to Dismiss Appeal 3. Plt's Pro Se Motion for Extension of Time to File Brief	1. --- 2. Allowed 3. Dismissed as moot **Dietz, J., recused**
344P22	State v. Raymond L. Dumas	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Guilford County 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
345P22	State v. Jonathan Omar Kelly	Def's PDR Under N.C.G.S. § 7A-31 (COA22-70)	Denied
347P22	State v. Denaud Manscel Egana	Def's Pro Se Motion for Notice of Appeal (COAP22-514)	Dismissed
349P22	State v. Nathan Gabriel McBryde	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 4. Def's Motion for Leave to File Amended Record on Appeal	1. Allowed **12/06/2022** Dissolved 2. Denied 3. Denied 4. Dismissed as moot
352P22	Robert Alan Lillie v. William C. Farris, Chief Judge of Wilson County District Court	1. Petitioner's Pro Se Petition for Writ of Mandamus 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
353P22	State v. Marvin Bruce Phillips	Def's Pro Se Motion for Review	Dismissed
354P22	State v. Arlington Efrin Ashley	1. Def's Pro Se Motion for Petition for Writ of Error *Coram Nobis* 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
355P22	State v. Eric Douglas Moore	Def's PDR Under N.C.G.S. § 7A-31 (COA22-220)	Denied
357P15-2	State v. James David Nanney	Def's Pro Se Motion to Dismiss and Pardon Habitual Felon Sentence and to Reimburse	Dismissed

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

3 MARCH 2023

359P22	In the Matter of I.B.M. & P.J.S.	Respondent-Father's PDR Under N.C.G.S. § 7A-31 (COA22-327)	Denied **12/29/2022** **Dietz, J., recused**
361P22	State v. Trentair Bingham	1. Def's Pro Se Motion for Appeal (COAP22-612) 2. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA	1. Dismissed 2. Dismissed
363P22	State v. Jamaal Gittens	1. Def's Pro Se Motion for Petition for Mandamus Certiorari 2. Def's Pro Se Motion to Dismiss Case	1. Dismissed 2. Dismissed **Dietz, J., recused**
367P22	Jonathan Huff v. State Trooper Derrick Banks, Clerk of Superior Court, Dare County Courthouse	1. Plt's Pro Se Motion to Intervene with an Injunction 2. Plt's Pro Se Motion to Intervene with an Injunction	1. Dismissed 2. Dismissed
368A22	U.S. Bank Trust, as Trustee for LSF10 Master Participation Trust v. Raleigh G. Rogers, Dreama Louise Rogers, and Jonathan J. Rogers	Def's (Raleigh G. Rogers) Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-889)	Dismissed *ex mero motu* **Dietz, J., recused**
369P22	State v. Buckman and Brady	1. Def's (Mikel E. Brady, II) Petition for Writ of Supersedeas 2. Def's (Mikel E. Brady, II) Petition for Writ of Certiorari to Review Order of Superior Court, Dare County 3. Def's (Mikel E. Brady, II) Petition in the Alternative for Writ of Mandamus 4. Def's (Mikel E. Brady, II) Motion for Temporary Stay	1. Denied **12/16/2022** 2. Denied **12/16/2022** 3. Denied **12/16/2022** 4. Denied **12/16/2022**
371P22	State v. Kwain Hawkins	Def's PDR Under N.C.G.S. § 7A-31 (COA22-97)	Denied
372P22	In the Matter of D.D.H.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA22-67)	Denied **Dietz, J., recused**
373P22	State v. Delbert Almonzo Kurtz	Def's PDR Under N.C.G.S. § 7A-31 (COA22-233)	Denied

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

3 MARCH 2023

374P22	Town of Boone and Marshall Ashcraft, in his individual capacity as a resident and taxpayer of the Town of Boone, Plaintiffs v. Watauga County, Town of Seven Devils, and Town of Blowing Rock, Defendants and Town of Beech Mountain, Intervenor	Plts' PDR Under N.C.G.S. § 7A-31 (COA21-586)	Denied **Dietz, J., recused**
375P22	State v. Nathan Pike	1. Def's Pro Se Motion to Appoint Counsel 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
377P22	State v. Marty Douglas Rogers	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/22/2022** 2. 3. **Dietz, J., recused**
378P22	Palacios v. White, et al.	Petitioner's Motion to Unseal Docket for Moving Counsel (COA22-295)	Allowed **02/03/2023**
381P22-1	In re Matthew Safrit	1. Petitioner's Pro Se Motion for PDR (COAP22-495) 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied **12/28/2022** 2. Allowed **12/28/2022** **Dietz, J., recused**
381P22-2	In re Matthew Safrit	1. Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP22-495) 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied **01/24/2023** 2. Allowed **01/24/2023** **Dietz, J., recused**

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

3 MARCH 2023

383P20-3	State v. Derek Lynn Hendricks	1. Def's Pro Se Motion for Appeal 2. Def's Pro Se Motion to Assign New Appellate Counsel 3. Def's Pro Se Motion for Reconsideration 4. Def's Pro Se Motion to Expedite Preliminary Injunction and Intervention	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed
387P21	State v. Jennifer Lynn Pierce	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-494) 2. Def's Motion to Withdraw as Counsel and Appoint Office of Appellate Defender	1. Denied 2. Allowed **06/27/2022**
397A18-2	State v. Bobby Dewayne Helms	Def's PDR Under N.C.G.S. § 7A-31 (COA20-295)	Denied
399P15-2	State v. Devon Armond Gayles	Def's Pro Se Petition for Writ of Mandamus (COA13-1005)	Dismissed
402A21	State v. Montez Gibbs	1. State's Motion for Temporary Stay (COA20-591) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent 4. Def's Motion to Strike Portions of the State's Brief 5. Def's Motion to Stay Briefing Until Resolution of the Motion 6. State's Petition for Writ of Certiorari to Review Decision of the COA	1. Allowed **11/19/2021** 2. Allowed **03/09/2022** 3. --- 4. Denied 5. Dismissed as moot 6. Allowed
413PA21-2	Harper, et al. v. Hall, et al.	1. Legislative-Defs' Petition for Rehearing 2. Plt-Intervenor's (Common Cause) Motion to Dismiss Frivolous Petition 3. Legislative-Defs' Motion to Admit Richard Raile Pro Hac Vice	1. Special Order **02/03/2023** 2. Special Order **02/03/2023** 3. Allowed **02/15/2023**

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

3 MARCH 2023

425A21-1	Hoke County Board of Education, et al., Plaintiffs and Charlotte-Mecklenburg Board of Education, Plaintiff-Intervenor and Rafael Penn, et al., Plaintiff-Intervenors v. State of North Carolina and State Board of Education, Defendants and Charlotte-Mecklenburg Board of Education, Realigned Defendant	1. Plts' Notice of Appeal Based Upon a Dissent (COAP21-511)	1. ---
		2. Plts' Notice of Appeal Based Upon a Constitutional Question	2. Special Order **3/18/2022**
		3. Plts' PDR Under N.C.G.S. § 7A-31	3. Special Order **3/18/2022**
		4. Plts' Petition in the Alternative for Writ of Certiorari to Review Order of the COA	4. Special Order **3/18/2022**
		5. Plt-Intervenors' (Rafael Penn, et al.) Motion to Admit David Hinojosa Pro Hac Vice	5. Dismissed as moot **2/23/2023**
		6. Plt-Intervenors' (Rafael Penn, et al.) Notice of Appeal Based Upon a Dissent	6. ---
		7. Plt-Intervenors' (Rafael Penn, et al.) Notice of Appeal Based Upon a Constitutional Question	7. Special Order **3/18/2022**
		8. Plt-Intervenors' (Rafael Penn, et al.) PDR Under N.C.G.S. § 7A-31	8. Special Order **3/18/2022**
		9. Plt-Intervenors' (Rafael Penn, et al.) Petition for Writ of Certiorari to Review Order of the COA	9. Special Order **3/18/2022**
		10. Controller's Motion to Dismiss Appeals	10. Special Order **3/18/2022**
		11. Controller's Conditional Petition for Writ of Supersedeas	11. Special Order **3/18/2022**
		12. Legislative-Intervenors' Motion to Dismiss Appeals	12. Special Order **3/18/2022**
		13. Controller's Motion to Dissolve or Lift Stays	13. Special Order
		14. Legislative-Intervenors' Motion for Leave to Brief Additional Issues	14. Special Order
		15. Legislative-Intervenors' Motion to Confirm Reinstatement of Writ of Prohibition	15. Special Order
		16. Legislative-Intervenors' Conditional Petition for Writ of Certiorari	16. Special Order
		17. Plt-Intervenors' (Rafael Penn, et al.) Motion to Admit David Hinojosa Pro Hac Vice	17. Allowed **2/23/2023**

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

3 MARCH 2023

		18. Plt-Intervenors' (Rafael Penn, et al.) Motion to Admit Michael Robotti Pro Hac Vice	18. Allowed **2/23/2023**
501P10-2	In the Matter of J.D.	1. Respondent-Father's Pro Se Petition for Writ of Certiorari to Review Decision of District Court, Wake County (COA10-422) 2. Respondent-Father's Pro Se Motion to Appoint Counsel	1. Denied **01/20/2023** 2. Dismissed as moot **01/20/2023**
505PA20	State of North Carolina v. Rayquan Jamal Borum	1. Def's Motion to Dispose of the Case on the Record and Briefs 2. Def's Motion in the Alternative to Withdraw and Appoint the Appellate Defender	1. Allowed **01/18/2023** 2. Dismissed as moot **01/18/2023**
518P98-3	State v. Christopher Mosby	1. Def's Pro Se Motion for Notice of Appeal (COAP21-361) 2. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA	1. Dismissed 2. Dismissed
526P20	State v. Quonshe Marquise Brimmer	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1103)	Denied **Dietz, J., recused**

IN RE A.J.L.H.

[384 N.C. 45 (2023)]

IN THE MATTER OF A.J.L.H., C.A.L.W., M.J.L.H.

No. 35PA21

Filed 6 April 2023

1. Child Abuse, Dependency, and Neglect—adjudication—hearsay analysis—remaining evidentiary findings

In its review of the trial court's adjudication and disposition order in a child abuse case, the Court of Appeals erred in holding that some of the trial court's findings relied on inadmissible hearsay statements from the abused child (which were almost entirely duplicative of other evidence) and that the order must be vacated and remanded because the abuse adjudication heavily relied upon the inadmissible hearsay statements. In the first place, the out-of-court statements at issue were admissible for the purpose of explaining why social services began to investigate respondent-parents (rather than for the truth of the matter asserted), and the Court of Appeals should have presumed the trial court's ruling on respondents' objection to be correct where the trial court did not expressly state the reason it was admitting the evidence. Second, when the Court of Appeals concluded that the statements were erroneously admitted, that court should have simply disregarded the statements and examined whether the remaining findings supported the trial court's determination.

2. Child Abuse, Dependency, and Neglect—adjudication—abuse and neglect—grossly inappropriate discipline—parents unrepentant

The trial court did not err by adjudicating a nine-year-old child as abused under N.C.G.S. § 7B-101(1) where, according to the trial court's findings, which were supported by clear, cogent, and convincing evidence (in a large part from respondents' own admissions), respondents mother and stepfather used "cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior" by whipping the child with a belt severely enough to inflict visible physical injuries, forcing her to stand in a corner for many hours at a time, and making her sleep on the floor without any covers—all for days at a time, possibly for as long as two months. The trial court also did not err by adjudicating the same child as neglected under N.C.G.S. § 7B-101(15) based on the home environment being "injurious to the juvenile's welfare"

where respondents saw nothing wrong with their discipline of the child, even after months of working with social services.

3. Child Abuse, Dependency, and Neglect—adjudication—neglect—siblings of abused child—parents' unwillingness to remedy the injurious environment

Where the trial court properly adjudicated respondents' nine-year-old daughter as abused and neglected based on respondents' cruel and grossly inappropriate discipline of her, the trial court did not err by also adjudicating respondents' two younger children (then three years old and six months old) as neglected based on respondents' refusal to acknowledge that the discipline of the nine-year-old was inappropriate and their inability to make a commitment that they would not repeat the discipline, creating a substantial risk that the two younger children would be harmed if they stayed in the home.

4. Child Abuse, Dependency, and Neglect—appellate review—role of appellate court—various procedural postures

In a child abuse case, where the Court of Appeals vacated and remanded the adjudication order with respect to all children involved, that court should not have addressed the disposition phase, and its instruction that the trial court must "order generous and increasing visitation between Margaret and her mother" was improper. On remand from the Supreme Court's decision holding that the trial court's adjudications were not erroneous (reversing the Court of Appeals' decision), the Court of Appeals was reminded to apply the abuse of discretion standard to the disposition order. If the trial court's order meets the high bar for abuse of discretion, the remedy is to vacate the disposition order and remand—without expressing an opinion as to the ultimate result of the best interests determination on remand, which is a decision that belongs to the trial court.

Justice MORGAN concurring in part and dissenting in part.

Justice EARLS joins in this concurring in part and dissenting in part opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 275 N.C. App. 11 (2020), vacating and remanding an order entered on 13 December 2019 by Judge Tonia A.

Cutchin in District Court, Guilford County. Heard in the Supreme Court on 31 January 2023.

Mercedes O. Chut for petitioner-appellant Guilford County Department of Health and Human Services.

Matthew D. Wunsche, GAL Appellate Counsel, for appellant Guardian ad Litem.

Benjamin J. Kull for respondent-appellee father.

Leslie Rawls for respondent-appellee mother.

DIETZ, Justice.

In 2019, the trial court adjudicated nine-year-old Margaret as an abused and neglected juvenile and adjudicated Margaret's two younger siblings as neglected juveniles.

Respondents, who are Margaret's mother and stepfather, admitted that they whipped Margaret with a belt, leaving marks and bruises on her back and neck; forced Margaret to stand in the corner for many hours at a time; and made Margaret sleep on the bare floor. Respondents told social workers that they took these actions to address Margaret's misbehavior, but also admitted that they imposed this discipline—including the whippings with a belt—day after day for weeks or perhaps even months. Respondents also insisted to social workers that their actions were appropriate and that they would continue to discipline Margaret in this manner until her behavior improved.

On appeal, the Court of Appeals reversed the trial court's adjudications, holding that the trial court improperly admitted some hearsay evidence. The court held that the trial court's reasoning was so "heavily reliant and intertwined with" the hearsay evidence that the proper remedy was to vacate the trial court's order and remand for a new hearing with respect to Margaret. *In re A.J.L.H.*, 275 N.C. App. 11, 23 (2020). The Court of Appeals also ordered the trial court to dismiss the petitions directed at Margaret's younger siblings. *Id.* at 24. Finally, the Court of Appeals instructed the trial court that, if it once again adjudicated Margaret as abused or neglected, the trial court must "order generous and increasing visitation between Margaret and her mother." *Id.* at 25.

We allowed discretionary review to reaffirm the proper role of an appellate court in reviewing a trial court's adjudication and disposition in a juvenile proceeding. As explained below, if the reviewing court determines that there are findings unsupported by the record, the reviewing court simply disregards those findings and examines whether the remaining findings support the trial court's determination. The reviewing court should not speculate about how "heavily" the trial court might have relied on one finding as opposed to another. Likewise, the best interests determination during the disposition phase is a matter left to the sound discretion of the trial court. In the rare instances when a reviewing court finds an abuse of that discretion, the proper remedy is to vacate and remand for the trial court to exercise its discretion. The reviewing court should not substitute its own discretion for that of the trial court.

Applying these principles here, we hold that the trial court's order contains sufficient findings, supported by clear, cogent, and convincing evidence, to support the court's adjudications of Margaret and her two siblings. We therefore reverse the decision of the Court of Appeals and remand for that court to properly address respondents' arguments concerning the disposition order.

Facts and Procedural History

Respondent-mother is the mother of Margaret, Chris, and Anna.[1] Respondent-father lives with respondent-mother and the children but is the biological father only of the youngest child, Anna. The fathers of Margaret and Chris are not parties to this appeal.

In May 2019, the Guilford County Department of Health and Human Services received a report of inappropriate discipline of Margaret. According to the report, Margaret "became extremely upset" following an incident at school and told school personnel that "she would be getting a whipping from her step-father just like she had done the previous day." The report noted that there were three marks on Margaret's back "where the skin was broken and appeared to be from a belt mark" as well as red marks on Margaret's arms. The report further indicated that respondent-mother arrived at the school and stated that Margaret "was going to be punished again when she went home" and that Margaret "was afraid to go home."

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1. We use pseudonyms to protect the identities of the juveniles and for ease of reading.

The next day, DHHS received a second report that Margaret had a new injury on the upper part of her back or neck "that appeared to be like a silver dollar." Margaret explained that she "was hit" but would not give any details. Margaret was shaking and hiding under a desk, and she explained that she did not want to go home because "they" were "going to hurt me."

In response to this report, a social worker, Lisa Joyce, went to Margaret's school that day to speak with her. Joyce found Margaret under a desk in the school counselor's office. Margaret appeared nervous and told Joyce that she was afraid to go home. Margaret told Joyce that respondent-father hit her with a belt buckle, causing the marks on her back, and that respondents punished her by making her sleep on the floor without covers and stand in the corner for hours at a time. Joyce observed marks on Margaret's lower back and at the base of her neck, consistent with the two reports.

After speaking to Margaret, Joyce met with respondent-mother to discuss the allegations. Respondent-mother stated that Margaret "has been lying a lot lately" and that she knew about the marks on Margaret's back. She explained that the marks were "from the disciplinary action that she had asked [respondent-father] to perform" but that the marks were "accidental" due to Margaret moving around and causing respondent-father to hit her back instead of her buttocks area.

Respondent-mother also told Joyce "that she does take the bed privileges away for lying, that she does make [Margaret] stand in the corner from about 3:30 PM to around 6:00 PM," and that after stopping for dinner, "the child goes back to standing in the corner until it's bedtime." When asked about the frequency of punishment, respondent-mother stated "that recently it had been occurring about every day" due to Margaret's behavior. When Joyce expressed the view that the discipline seemed "extreme to be using on the child," respondent-mother responded that she did not feel like what she was doing was wrong and she "felt like that this was appropriate."

Joyce also spoke with respondent-father. He reported to Joyce that he had physically disciplined Margaret in the days leading up to the DHHS reports and that he did so to "discourage the child from lying." Respondent-father also confirmed that Margaret "is made to stand in the corner for two to three hours at a time" and "made to sleep on the floor" as additional forms of discipline. When asked how often these disciplinary actions were happening, respondent-father stated that "it had been occurring a lot" in the past two months. Joyce asked

whether respondent-father thought the practices were appropriate, and he responded that "he didn't see anything wrong with the disciplinary practices that they were using."

DHHS entered into a safety plan with respondents, under which Margaret was placed with her maternal grandmother. Chris and Anna remained in the home with respondents. Respondent-mother was charged with misdemeanor child abuse, and respondent-father was charged with assault on a child under the age of twelve in connection with their discipline of Margaret.

Between May and August 2019, DHHS social workers made home visits to check on Chris and Anna. They found no issues of concern. On 8 August 2019, DHHS held a meeting with respondents. The DHHS staff members explained their concerns about Margaret's discipline to respondents; however, respondents continued to defend their discipline of Margaret, with respondent-mother explaining that she was trying to "teach" Margaret that if Margaret continued misbehaving "she could end up in jail." Respondents did not commit to stop disciplining Margaret as they had in the past and did not acknowledge that these repeated, daily disciplinary measures—including whippings with a belt—were inappropriate for a nine-year-old child.

The following day, DHHS filed juvenile petitions alleging that Margaret was abused and neglected and that three-year-old Chris and three-month-old Anna were neglected. DHHS obtained custody of all three children.

After a hearing in which the trial court received evidence concerning the facts described above, the court entered an adjudication and disposition order on 13 December 2019. In the order, the trial court adjudicated Margaret an abused and neglected juvenile and adjudicated Chris and Anna as neglected juveniles. In its disposition order, the court placed Margaret with a relative and Chris and Anna in foster care. The court determined that it was not in the children's best interests for respondents to have any visitation with the children while they worked on their case plans with DHHS. The court also scheduled a review hearing for several months after the date of the order.

Respondents timely appealed. The Court of Appeals vacated and remanded the adjudication and disposition order in a written opinion. *In re A.J.L.H.*, 275 N.C. App. 11, 25 (2020). After holding that some of the trial court's findings relied on inadmissible hearsay statements from Margaret, the Court of Appeals vacated Margaret's adjudication. The court explained that it was "apparent the trial court's abuse adjudication

is heavily reliant and intertwined with its findings based on inadmissible evidence." *Id.* at 23.

The court remanded the matter "for a new hearing at which the trial court should make findings on properly admitted clear and convincing evidence and make new conclusions of whether" Margaret is an abused or neglected juvenile. *Id.* The Court of Appeals also held that the trial court's adjudications of Chris and Anna were "based solely on its conclusion Margaret was purportedly abused and neglected" and reversed the trial court's adjudication for those children. *Id.* at 24. Finally, although the court's decision to vacate the adjudication order meant there was no need to address the disposition order, the Court of Appeals held that, if the trial court again adjudicates Margaret as abused or neglected, the trial court must "order generous and increasing visitation between Margaret and her mother." *Id.* at 25.

DHHS timely filed a petition for discretionary review under N.C.G.S. § 7A-31 and the guardian ad litem joined the request for review. This Court allowed the petition.

Analysis

We allowed discretionary review on sixteen separate issues in this appeal. We begin by addressing a series of issues concerning the Court of Appeals' analysis of the findings of fact and underlying evidence in the record. We then turn to the Court of Appeals' analysis of the disposition order and its mandate to the trial court to award "generous and increasing" visitation with Margaret on remand.

I. Hearsay evidence

[1] We first address the Court of Appeals' hearsay analysis. The Court of Appeals rejected a number of findings by the trial court—all of which are located in Finding of Fact 14 in the trial court's order—on the ground that these findings relied on inadmissible hearsay. These findings address statements Margaret made to school personnel and to Lisa Joyce, the social worker who interviewed Margaret.

The relevant information in Margaret's out-of-court statements is almost entirely duplicative of other evidence admitted in the case—mainly because Joyce questioned respondents about Margaret's statements and respondents confirmed they were accurate. But the Court of Appeals nevertheless held that it was "apparent the trial court's abuse adjudication is heavily reliant and intertwined with its findings based on inadmissible evidence." *In re A.J.L.H.*, 275 N.C. App. 11, 23 (2020). Thus, the Court of Appeals vacated and remanded the trial court's adjudication

concerning Margaret "for a new hearing at which the trial court should make findings on properly admitted clear and convincing evidence." *Id.*

The Court of Appeals' analysis conflicts with this Court's precedent in several ways. First, "out-of-court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Call*, 349 N.C. 382, 409 (1998). Among the many hearsay exceptions are "statements of one person to another to explain subsequent actions taken by the person to whom the statement was made." *Id.*

Here, when respondents objected to the testimony concerning Margaret's out-of-court statements, counsel for the guardian ad litem explained that "this is all part of the reporting process and the investigation process which is not considered offered for the truth of the matter asserted." In other words, counsel argued that this testimony established *why* DHHS began to investigate respondents and to ask them specific questions about Margaret's abuse. Margaret's statements are admissible for this purpose, which is not to prove the truth of Margaret's own out-of-court statements. *Id.*

To be sure, the trial court never *expressly* stated that it was admitting this evidence solely for this permissible purpose. But a trial court's "ruling on an evidentiary point will be presumed to be correct unless the complaining party can demonstrate that the particular ruling was in fact incorrect." *State v. Herring*, 322 N.C. 733, 749 (1988). Nothing in the record indicates that the trial court admitted this testimony to impermissibly prove the truth of the matter, as opposed to permissibly establishing the sequence of events that led Joyce to interview respondents. Thus, the Court of Appeals should not have presumed that the trial court's ruling was erroneous and should have instead treated these findings as non-substantive evidentiary findings.

In any event, the Court of Appeals also erred by declining to examine the remaining evidentiary findings. Instead, the Court of Appeals held that the trial court's "adjudication is heavily reliant and intertwined with its findings based on inadmissible evidence" and therefore vacated and remanded the case for a new hearing and new fact findings. *In re A.J.L.H.*, 275 N.C. App. at 23.

Again, this conflicts with our precedent. When reviewing findings of fact in a juvenile order, the reviewing court "simply disregards information contained in findings of fact that lack sufficient evidentiary support" and examines whether the remaining findings support the trial court's determination. *In re A.C.*, 378 N.C. 377, 394 (2021). The reviewing

court should not speculate about how "heavily" the trial court might have relied on one finding as opposed to another. The sole question for the reviewing court is whether the trial court's conclusions of law are supported by adequate findings and whether those findings, in turn, are supported by clear, cogent, and convincing evidence. *In re E.H.P.*, 372 N.C. 388, 392 (2019). We thus turn to examining the trial court's substantive evidentiary findings and whether they support the trial court's adjudications of abuse and neglect.

II. Findings of fact concerning Margaret

[2] We first address the trial court's adjudication of Margaret as an abused and neglected juvenile.

Under section 7B-101, an abused juvenile is defined as one whose parent or caretaker

> a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;
>
> b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means;
>
> c. Uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior . . . .

N.C.G.S. § 7B-101(1) (2021).

DHHS alleged in the petition that Margaret was an abused juvenile under each of these three grounds. "There is a commonality present in these criteria. Each definition states that a juvenile is abused when a caretaker harms the juvenile in some way, allows the juvenile to be harmed, or allows a substantial risk of harm. The harm may be physical; emotional; or some combination thereof." *In re M.G.*, 363 N.C. 570, 573 (2009). At its core, "the nature of abuse, based upon its statutory definition, is the existence or serious risk of some nonaccidental harm inflicted or allowed by one's caretaker." *Id.* at 574.

Applying this standard to the evidentiary findings of the trial court, the court's adjudication of abuse is proper. First, the trial court found that Lisa Joyce, the DHHS social worker, investigated a child protective services report that Margaret "had three marks on her mid back where the skin was broken from what appeared to be a belt mark" and, later,

a "new injury" that was "a red bruise a little larger than a silver dollar on her lower neck between her shoulders." When Joyce examined Margaret at school, she saw "marks on her lower back and a mark near her neck area" as described by the reports.

Joyce then interviewed respondents about Margaret's injuries. The trial court recounted their statements in its findings. Both respondents confirmed that they caused the injuries to Margaret. Respondent-mother told Joyce that she "did physically discipline [Margaret] by whipping her" and that respondent-father "also physically disciplined her." Respondent-mother further explained that Margaret's injuries were "an accident because [Margaret] was moving around while [respondent-father] was trying to discipline her."

Respondent-mother also confirmed that, in addition to whipping Margaret with a belt, respondents disciplined Margaret by forcing her to stand in the corner for many hours at a time and to sleep on the floor. Respondent-mother explained that this discipline "did not normally occur every day, but had been occurring every day lately."

Respondent-father similarly told Joyce that he often "physically disciplined [Margaret] with a belt." He also confirmed that respondents often forced Margaret to "stand in the corner for 2-3 hours" and made her sleep on the floor. He told Joyce that this discipline had been "occurring a lot" for the last two months.

All of these findings are supported by clear, cogent, and convincing evidence in the record—largely from respondents' own admissions to Joyce as she investigated the reports of abuse. Moreover, these findings readily are sufficient to show that respondents used or allowed to be used on Margaret "cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior." N.C.G.S. § 7B-101(1)(c).

To be sure, when used sparingly, none of respondents' chosen forms of discipline—physically striking a child, forcing a child to stand for hours in a corner, or forcing a child to sleep on the floor—would *compel* a finding of abuse. But the trial court found that respondents did *not* use this discipline sparingly. They imposed all this discipline—whipping Margaret with a belt, making her stand in a corner for hours on end, and forcing her to sleep on the bare floor without covers—for days and days at a time, possibly as long as two months. That is abuse under our juvenile code. *Id.*

The trial court also adjudicated Margaret as a neglected juvenile. This, too, is a proper adjudication. Among other grounds, a juvenile may

be adjudicated as neglected when the juvenile "lives in an environment injurious to the juvenile's welfare." *Id.* § 7B-101(15) (2019) (amended 2021).

Here, the trial court found that both respondents told Joyce that they "did not see anything wrong" or "had no concerns" with this discipline of Margaret. Moreover, even several months after DHHS became involved, in response to DHHS workers' concerns about the discipline, respondents maintained that their disciplinary approach was appropriate and was necessary to "teach" Margaret that her misbehavior was wrong. These findings are supported by clear, cogent, and convincing evidence in the record and support the trial court's finding that respondents created "an environment injurious to the juvenile's welfare." *Id.*

III. Findings of fact concerning Chris and Anna

[3] We next address the trial court's adjudication of Chris and Anna as neglected juveniles. The neglect statute provides that in "determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile . . . has been subjected to abuse or neglect by an adult who regularly lives in the home." *Id.*

An adjudication of neglect cannot be "solely based upon previous Department of Social Services involvement relating to other children." *In re J.A.M.*, 372 N.C. 1, 9 (2019). Instead, the trial court must find "the presence of other factors to suggest that the neglect or abuse will be repeated." *Id.* at 9–10.

Here, the Court of Appeals reversed the trial court's adjudication of neglect because "[n]othing in the record indicates Chris or Anna had been harmed or were at risk of being harmed" and that, in the Court of Appeals' view, the trial court "concluded Chris and Anna were neglected based solely on its conclusion Margaret was purportedly abused and neglected." *In re A.J.L.H.*, 275 N.C. App. at 24.

This is not an accurate characterization of the trial court's findings and conclusions with respect to Chris and Anna. Although a trial court cannot rely solely on abuse of another child in the home as a basis for a neglect adjudication, we have emphasized that a trial court "need not wait for actual harm to occur to the child if there is a substantial risk of harm to the child in the home." *In re T.S., III*, 178 N.C. App. 110, 113 (2006), *aff'd per curiam*, 361 N.C. 231 (2007). This is particularly true for very young children, where the evaluation "must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re J.A.M.*, 372 N.C. at 9.

When determining the weight to be given to a finding of abuse of another child in the home, a critical factor is whether the respondent indicates a willingness to "remedy the injurious environment that existed" with respect to the older child. *In re A.W.*, 377 N.C. 238, 249 (2021). Facts that can demonstrate a parent's unwillingness to remedy the injurious environment include failing to acknowledge the older child's abuse or insisting that the parent did nothing wrong when the facts show the parent is responsible for the abuse. *See id.* at 248–49; *In re J.A.M.*, 372 N.C. at 10.

Here, the trial court adjudicated Margaret abused based on findings of cruel and grossly inappropriate discipline by respondents, as explained above. The trial court also found that respondents refused to acknowledge that this discipline was inappropriate and maintained that it was necessary to address Margaret's behavioral problems. Indeed, the trial court expressly found that, in discussions with social workers, respondent-father "never disclosed that he would not discipline [Chris and Anna] in the same manner that he had discipline[d] [Margaret]." This finding is supported by the social worker's testimony in the record.

Under our precedent, the trial court was not required to wait for Chris and Anna to reach the same age as Margaret before determining that they, too, face a substantial risk of harm from these cruel and inappropriate disciplinary measures. The key "other factor" in this case, beyond the abuse of Margaret, is respondents' inability to recognize that it *was* abuse, and their corresponding inability to commit to never repeating it. *In re J.A.M.*, 372 N.C. at 9. As in *In re J.A.M.* and *In re A.W.*, the trial court in this case found that respondents failed to acknowledge their role in the abuse determination of an older sibling and would not acknowledge that their conduct was wrong. *Id.* at 10. In light of these findings, the trial court properly determined by clear, cogent, and convincing evidence that there was a substantial risk that Chris and Anna likewise faced harm if they remained in the home and, as a result, properly adjudicated Chris and Anna as neglected juveniles. *Id.* at 9.

IV. Disposition order and visitation ruling

[4] Finally, we address the trial court's disposition order. Because the Court of Appeals vacated and remanded the adjudication order with respect to all three juveniles, there was no need for the Court of Appeals to address the disposition phase. But the Court of Appeals chose to address the disposition anyway. Specifically, the Court of Appeals instructed the trial court that, if the court again adjudicated Margaret as abused or neglected, the trial court must "order generous and increasing

visitation between Margaret and her mother." *In re A.J.L.H.*, 275 N.C. App. at 25.

This instruction to the trial court is improper and beyond the role of an appellate court. A trial court 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) (2021).

The assessment of the juvenile's best interests concerning visitation is left to the sound discretion of the trial court and "appellate courts review the trial court's assessment of a juvenile's best interests solely for an abuse of discretion." *In re K.N.L.P.*, 380 N.C. 756, 759 (2022). "Under this standard, we defer to the trial court's decision unless it is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Id.* Moreover, even in the rare cases in which we determine that a trial court acted arbitrarily and unreasonably, the remedy is to vacate the disposition order but to "express no opinion as to the ultimate result of the best interests determination on remand, as that decision must be made by the trial court." *In re R.D.*, 376 N.C. 244, 264 (2020).

On remand, the Court of Appeals should apply this standard to the disposition order. The Court of Appeals should not substitute its own judgment for that of the trial court; if it determines that the trial court's order meets the high bar for abuse of discretion, the appropriate remedy is to explain how the trial court abused its discretion, vacate the disposition order, and remand for the trial court to enter a new order in the exercise of the trial court's discretion. *Id.*

Conclusion

The trial court properly adjudicated Margaret as an abused and neglected juvenile and properly adjudicated Chris and Anna as neglected juveniles. The Court of Appeals erred by vacating or reversing those adjudications. We reverse the decision of the Court of Appeals and remand for that court to address respondents' remaining arguments concerning the disposition order.[2]

REVERSED AND REMANDED.

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2. The Court of Appeals opinion also contains a section titled "Parental Rights" that discusses respondents' constitutionally protected rights to parent their children. This Court repeatedly has held that this constitutional issue cannot be addressed on appeal unless properly preserved by the parties. *E.g.*, *In re R.D.*, 376 N.C. at 253; *In re J.N.*, 381 N.C.

Justice MORGAN concurring in part and dissenting in part.

While I concur with the majority's reversal of the portion of the Court of Appeals decision which vacated and remanded the trial court's adjudication and disposition order establishing that Margaret was an abused and neglected juvenile plus mandating the trial court's potential determinations regarding visitation, in my view the lower appellate court was correct in opining that "[n]othing in the record indicates Chris or Anna had been harmed or were at risk of being harmed." *In re A.J.L.H.*, 275 N.C. App. 11, 24 (2020). Therefore, I respectfully dissent from the conclusion reached by the majority to uphold the trial court's adjudication of Chris and Anna as neglected juveniles.[1] Accordingly, I would affirm the Court of Appeals decision to the extent that it reversed the trial court's conclusion that Chris and Anna were neglected juveniles.

While in "determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile . . . lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home," N.C.G.S. § 7B-101(15) (2021), it is well established that "[a] court may not adjudicate a juvenile neglected *solely* based upon previous Department of Social Services involvement relating to other children. Rather, . . . the clear and convincing evidence in the record must show *current circumstances* that present a risk to the juvenile." *In re J.A.M.*, 372 N.C. 1, 9 (2019) (emphases added). The abuse or neglect of a juvenile, standing alone, cannot support an allegation of neglect for the juvenile's siblings; for allegations of the neglect of siblings of an abused and neglected juvenile to be substantiated, there must also appear " 'other factors' indicating a present risk to" a juvenile for him or her to be adjudicated as neglected. *Id.* at 10.

The majority in the present case cites and quotes *In re A.W.*, 377 N.C. 238, 248–49 (2021) for the proposition that "[w]hen determining the weight to be given to a finding of abuse of another child in the home, a critical factor is whether the respondent [parent] indicates a willingness to 'remedy the injurious environment that existed' with respect to the

131, 133 (2022). Here, respondents did not assert a constitutional challenge on this basis in the trial court and did not raise the issue in their appellate briefing at the Court of Appeals. Accordingly, on remand, the Court of Appeals should not address this constitutional issue.

1. A neglected juvenile is one "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2019).

older child." In *In re A.W.*,[2] the child Anna was brought to the emergency room of a hospital at the age of two months with a severe traumatic brain injury and other significant injuries—none of which could be explained by her parents—and Anna died four days later as a result of blunt force injuries to her head. 377 N.C. at 239–40. Almost exactly one year later, A.W.—known as Abigail in this proceeding—was born to respondent-parents. The local Department of Social Services (DSS) obtained nonsecure custody of Abigail and filed a petition alleging that Abigail—much like the juveniles Chris and Anna in the present case with regard to their older sibling Margaret—

> was a neglected juvenile in that her sibling, Anna, died in the care of respondents as a result of suspected abuse and neglect. Respondents reported they were the only caregivers and gave no explanation for Anna's injuries. Respondent-father was incarcerated on charges related to Anna's death, and respondent-mother's involvement in Anna's death had not been ruled out. Because of the nature of Anna's injuries and death, Abigail was at substantial risk of abuse and neglect if she remained in respondents' care and supervision.

Id. at 241. DSS then filed a petition to terminate the mother's parental rights, alleging therein that "respondent-mother had neglected Abigail, and there was no indication that she was willing or able to correct the conditions that lead [sic] to Anna's death and the injurious environment that was present in her home, and respondent-mother was incapable of providing for the proper care and supervision of Abigail such that Abigail was a dependent juvenile." *Id.* (citing N.C.G.S. § 7B-1111(a)(1), (a)(6) (2019)). Ultimately, the trial court entered an order "concluding that grounds existed to terminate respondent-mother's parental rights in Abigail pursuant to N.C.G.S. § 7B-1111(a)(1) and (6) . . . [and] determined that it was in Abigail's best interests that respondent-mother's parental rights be terminated." *Id.* at 242.

On appeal, this Court considered the evidence adduced at trial and the trial court's subsequent findings of fact, particularly with regard to the mother's representation to law enforcement investigators of her proffered theory to the doctor who treated Anna's injuries that the

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2. Pseudonyms are used to protect the identities of children in juvenile cases and for ease of reading.

parents' large dog could have caused them, along with the mother's later deduction that the father "wasn't holding [Anna] right, and holding her with his one arm, and she slipped out of his arms." *Id.* at 246. We noted that "[i]n neglect cases *involving newborns*, 'the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case.' " *Id.* at 248 (emphasis added) (quoting *In re J.A.M.*, 372 N.C. at 9). This Court then specifically emphasized that

> although the trial court considered the fact that Abigail lived in the same home where Anna died as a result of an act of one or both respondents, this was not the sole basis for the trial court's conclusion that Abigail was a neglected juvenile. Rather, the trial court also found the presence of other factors demonstrating that Abigail presently faced a substantial risk in her living environment: respondent-mother continued to provide the implausible explanation that her dog caused Anna's head injury; respondent-mother failed to provide an explanation that accounted for Anna's other injuries; there were no means by which the court could determine what caused Anna's death and "thereby insure the safety of [Abigail]"; respondent-mother continued to be in a relationship with respondent-father; and respondents colluded to deceive the court about the status of their relationship. In conjunction with the fact that Anna died in the home at the hands of one or both respondents, the findings of respondent-mother's ongoing failure to recognize and accept the cause of Anna's injuries and resulting death, and her continued relationship with respondent-father, establish that respondent-mother was unable to ensure Abigail's safety and that Abigail was at a substantial risk of impairment. Respondent-mother did not remedy the injurious environment that existed for Anna, and the trial court properly concluded that Abigail was a neglected juvenile.

Id. at 248–49.

In my view, the Court of Appeals was correct in the instant case in determining that the trial court's adjudication of then-three-year-old Chris and six-month-old Anna as neglected was erroneous because that

decision was based *solely* upon the trial court's adjudication of their then-nine-year-old sibling Margaret, who lived in the same household, to be an abused and neglected juvenile. The lower appellate court correctly reached this determination, as I see it, based upon the forum's express and accurate determination, consistent with our directive in *In re J.A.M.*, that there were no other factors which existed in addition to Margaret's adjudication as abused and neglected which constituted a risk to the children Chris and Anna that emanated from current circumstances existing in the household at the time that Chris and Anna were adjudicated as neglected. Conversely, my distinguished colleagues in the majority unfortunately ignore the requirement for "the presence of other factors to suggest that the neglect or abuse will be repeated" which we established in *In re J.A.M.*, 372 N.C. at 9–10 (extraneity omitted), in their haste to cobble together various principles from our juvenile case opinions which are inapposite here, including the majority's regrettable conflation of "predictive" behavior with the majority's speculative projections and the majority's specter of "substantial risk of harm" as we identified for newborn juveniles in *In re A.W.*, as compared to the majority's convenient approach to siblings here who spanned ages ranging from post-toddler to preteen.

I respectfully concur in part and dissent in part.

Justice EARLS joins in this concurring in part and dissenting in part opinion.

IN RE G.C.

[384 N.C. 62 (2023)]

IN THE MATTER OF G.C.

No. 241A22

Filed 6 April 2023

Child Abuse, Dependency, and Neglect—neglect—injurious environment—death of sibling from suspected neglect—other siblings in DSS custody—ultimate findings

The trial court properly adjudicated a minor child as neglected based on its ultimate findings that the minor child lived in an environment injurious to her welfare and did not receive proper care or supervision pursuant to N.C.G.S. § 7B-101(15), including that the minor child lived with her mother, who had previously been convicted of misdemeanor child abuse; the minor child's older siblings had previously been adjudicated abused, neglected, and dependent; and the minor child's younger sibling had died from asphyxiation after the mother left him alone for three hours in his crib with blankets, even though the parents had previously been instructed on proper sleeping arrangements for infants. Therefore, the Court of Appeals erred by reversing the trial court's order for failure to make a specific written finding of a substantial risk of impairment. Further, the Supreme Court clarified that the term "ultimate fact" means "a finding supported by other evidentiary facts reached by natural reasoning," and overturned prior caselaw that did not adhere to this definition.

Justice EARLS dissenting.

Justice MORGAN joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 284 N.C. App. 313 (2022), vacating an order entered on 19 October 2021 by Judge Cheri Siler Mack in District Court, Cumberland County, and remanding for additional adjudicatory findings. Heard in the Supreme Court on 31 January 2023.

Patrick A. Kuchyt for petitioner-appellant Cumberland County Department of Social Services.

McGuireWoods LLP, by Anita M. Foss, for appellant Guardian ad Litem.

Sean P. Vitrano for respondent-appellee father.

BARRINGER, Justice.

In this matter, we consider whether the Court of Appeals erred by determining that the trial court's findings of fact did not support its conclusion adjudicating Glenda[1] a neglected juvenile. Appellate courts review de novo whether the findings of fact support a conclusion of law adjudicating a minor a neglected juvenile. *In re K.S.*, 380 N.C. 60, 64 (2022). Having reviewed the trial court's findings of fact and this Court's precedent, we conclude that the Court of Appeals erred and accordingly reverse the Court of Appeals' decision.

I. The Trial Court's Adjudication and Disposition Order

After an adjudication hearing in August 2021, the trial court found as follows: Glenda's mother has two older children who have been in the custody of Cumberland County Department of Social Services (DSS) since 2017. In May 2018, the older children were adjudicated abused, neglected, and dependent juveniles based on one child's bruises and severe malnourishment. Glenda's mother and that child's father had failed to feed the child. Given the circumstances that existed at the time of the adjudication hearing in those cases, the trial court in that matter relieved DSS of reunification efforts pursuant to N.C.G.S. § 7B-901(c)(1)(b) and (f). As to her two older children, Glenda's mother was also convicted of misdemeanor child abuse and placed on probation. The older children's father was convicted of felony child abuse.

In September 2018, Glenda's mother gave birth to Glenda. Glenda's birth certificate lists respondent as her father.[2] DSS provided case management services to Glenda's mother and respondent from December 2018 to August 2019. During that time, Glenda's mother and respondent abided by all safety plans, and Glenda's mother completed services as ordered by the trial court in the older children's cases.

In December 2019, Glenda's mother gave birth to another child, Gary, to whom respondent is the father. Glenda's mother, respondent, Gary, and Glenda lived together in the same residence. Respondent provided care and supervision for both children.

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1. Pseudonyms are used in this opinion to protect the juveniles' identities and for ease of reading.

2. Respondent is not the father of the two older children.

On 12 March 2020, a few months after Gary's birth, Glenda's mother placed Gary in his Pack 'n Play and propped a bottle for him to feed. Around 4:15 p.m. Glenda's mother burped Gary, laid a folded large, fuzzy, thick blanket in the bottom of his Pack 'n Play, and placed Gary on his side on the blanket in his Pack 'n Play. Two other smaller blankets were also in the Pack 'n Play. Over three hours later, around 7:38 p.m., Glenda's mother checked on Gary and found him unresponsive. Glenda's mother picked up Gary and ran to the paternal grandmother's house for help. The paternal grandmother is a nurse, and she told Glenda's mother to call 911. Glenda's mother then called 911. After arriving at respondent and Glenda's mother's home, Emergency Medical Services pronounced Gary dead. Emergency Medical Services observed Gary "foaming from the nose and the mouth, indicative of asphyxiation." The police officers who arrived on the scene also noticed two used baby bottles and several blankets in the Pack 'n Play. Respondent was at work when these events occurred.

The medical examiner's autopsy report stated that "*sleeping in an environment with blankets while less than one year of age is a risk factor for an accidental asphyxial event. An asphyxial event cannot be ruled out based on the autopsy findings*." Both respondent and Glenda's mother had been instructed about proper sleeping arrangements for children.

After Gary's death, respondent and Glenda's mother agreed to allow Glenda to be temporarily placed with Glenda's paternal grandmother. Thereafter, DSS filed a petition alleging that Glenda was a neglected juvenile. Glenda was approximately one and a half years old. The trial court found that Glenda "lived in an environment injurious to [her] welfare; and that [she] does not receive proper care, supervision, or discipline from [her] parent, guardian, [or] custodian."

Based on the foregoing findings of fact, the trial court concluded as a matter of law that Glenda is a neglected juvenile within the meaning of N.C.G.S. § 7B-101(15).

Respondent appealed. Glenda's mother also appealed the adjudication and disposition order but later moved to dismiss her appeal. The Court of Appeals allowed Glenda's mother's motion to dismiss her appeal.

II. The Court of Appeals' Decision

The Court of Appeals majority vacated the trial court's adjudication and disposition order and remanded on the ground that "the trial court

made no finding or determination Glenda suffered any physical, mental, or emotional impairment or that Glenda was at a substantial risk of such impairment as a consequence of any failure to provide proper care, supervision, or discipline to support the adjudication of Glenda as a neglected juvenile." *In re G.C.*, 284 N.C. App. 313, 319 (2022) (citing *In re J.A.M.*, 372 N.C. 1, 9 (2019)). According to the majority, unlike this Court's decision in *In re J.A.M.*, the trial court "failed to find 'the presence of other factors' indicating a present risk *to Glenda* when it reached its conclusion that *Glenda* was neglected as a matter of law." *Id.* (quoting *In re J.A.M.*, 372 N.C. at 10).

The dissent disagreed with the majority's holding and reasoning. *Id.* at 320–21 (Griffin, J., dissenting). The dissent acknowledged that this Court's precedent in *In re J.A.M.* precluded an adjudication of neglect solely based on previous department of social services involvement with other children. *Id.* at 320. According to the dissent, "other factors" suggesting that neglect will be repeated are needed. *Id.* at 320 (quoting *In re J.A.M.*, 372 N.C. at 9). However, unlike the majority, the dissent concluded that there were other factors present because the trial court also relied on and made "specific findings relating to the circumstances of Gary's death, a child who DSS had no previous involvement with, under [m]other's supervision, in the home that Glenda also resided in." *Id.* at 320. According to the dissent, "the evidence is clear that Glenda is at a substantial risk of harm in [respondent and Glenda's mother's] home based upon the trial court's findings about [m]other's older children, showing a history of neglecting children, and the findings detailing the circumstances around Gary's death, evidencing current issues with supervision and care in [respondent and Glenda's mother's] home." *Id.* at 321.

III. Standard of Review

"An appellate court reviews a trial court's adjudication to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re K.S.*, 380 N.C. at 64 (cleaned up). "A trial court's finding of an ultimate fact is conclusive on appeal if the evidentiary facts reasonably support the trial court's ultimate finding [of fact]."[3] *State v. Fuller*, 376 N.C. 862, 864 (2021).

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3. In prior cases, this Court has misused the term "ultimate fact," saying that an "ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact," *In re N.D.A.*, 373 N.C. 71, 76 (2019) (quoting *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937)), which is contrary to decades of this Court's well-established precedent. Writing for a unanimous Court in 1951, Justice S. J. Ervin Jr. explained:

"Where no [objection is made] to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *In re K.S.*, 380 N.C. at 64 (quoting *Koufman v. Koufman*, 330 N.C. 93, 97 (1991)).

Appellate courts review a trial court's conclusion of law concerning adjudication de novo. *Id.* In this context, de novo review requires the appellate court to "determin[e] whether or not, from its review, the findings of fact supported a conclusion of neglect." *Id.* at 65. In other words, the appellate court "freely substitutes" its conclusion for the trial court's conclusion concerning whether the findings of fact support or do not support that Glenda is a neglected juvenile. *See In re T.M.L.*, 377 N.C. 369, 375 (2021).

IV. Analysis

We begin our analysis with the definition of "neglected juvenile" as set forth by the legislature in N.C.G.S. § 7B-101(15). The relevant provisions for this matter are as follows:

> There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts. . . .
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> . . . .
>
> . . . Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn. An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law.
>
> When the statements of the judge are measured by this test, it is manifest that they constitute findings of ultimate facts, *i.e.*, the final facts on which the rights of the parties are to be legally determined.

Woodard v. Mordecai, 234 N.C. 463, 470, 472 (1951) (citations omitted). To avoid confusion in the future, we overturn our prior caselaw to the extent it misuses the term "ultimate fact" and clarify that, as Justice Ervin wrote in *Woodard* and consistent with well-established precedent, an ultimate finding is a finding supported by other evidentiary facts reached by natural reasoning.

> (15) Neglected juvenile.—Any juvenile less than 18 years of age . . . whose parent, guardian, custodian, or caretaker does any of the following:
>
> a. Does not provide proper care, supervision, or discipline.
>
> . . . .
>
> e. Creates or allows to be created a living environment that is injurious to the juvenile's welfare.
>
> . . . .
>
> In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C.G.S. § 7B-101(15) (2021).

Here, the trial court specifically found that Glenda "lived in an environment injurious to [her] welfare; and that [she] does not receive proper care, supervision, or discipline from [her] parent, guardian, [or] custodian." These findings are properly characterized as ultimate findings and satisfy the statutory definition of neglected juvenile.

The ultimate findings of fact that Glenda does not receive proper care, supervision, or discipline from her parents is supported by the trial court's evidentiary findings of fact and reached by natural reasoning from the evidentiary findings of fact. Specifically, Glenda lived in the same residence as Glenda's mother, respondent, and Gary. Respondent provided care and supervision for Glenda as he had for her brother Gary until his death. Glenda's mother had previously been convicted of misdemeanor child abuse, and her older children had previously been adjudicated abused, neglected, and dependent juveniles for reasons that included Glenda's mother's failure to feed one of the older children.

On 12 March 2020, respondent was at work, and only Glenda's mother was with Gary. That day, Glenda's mother left Gary, who was three months old, in his Pack 'n Play on his side with blankets for over three hours without supervision even though "*sleeping in an environment with blankets while less than one year of age is a risk factor for an accidental asphyxial event.*" When Glenda's mother did finally check on Gary around 7:38 p.m., she found Gary unresponsive. She responded

by running to the home of a relative, who was a nurse and lived nearby. Glenda's mother called 911 after the relative instructed her to do so. Gary was pronounced dead by Emergency Medical Services upon arrival at the residence. Emergency Medical Services observed Gary "foaming from the nose and the mouth, indicative of asphyxiation," and the medical examiner could not rule out an asphyxial event given the autopsy findings. Both respondent and Glenda's mother had been instructed about proper sleeping arrangements for children.

Although there is no mention of Glenda, who was approximately one and a half years old at the time, or her whereabouts on 12 March 2020 in the trial court's findings of fact, the foregoing evidentiary findings support the ultimate finding that Glenda does not receive proper care, supervision, or discipline from her parents and the conclusion of law that Glenda is a neglected juvenile. Subsection (15) of N.C.G.S. § 7B-101 provides that:

> In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C.G.S. § 7B-101(15). Here, both relevant situations are present. First, Glenda lived in the home where Gary died as a result of suspected neglect, asphyxia on account of blankets in his Pack 'n Play and a lack of supervision and care. Second, Glenda lived in the home where Gary was neglected. He was placed in an injurious environment, a Pack 'n Play with blankets, in the home he shared with Glenda's mother, respondent, and Glenda. Further, the aforementioned neglect was not based on ignorance since Glenda's mother and respondent had been instructed on proper sleeping arrangements for children.

These facts reflect "current circumstances that present a risk" to Glenda, *In re J.A.M.*, 372 N.C. at 9, not "[a] prior and closed case with other children and a different father," *In re J.A.M.*, 259 N.C. App. 810, 822 (2018) (Tyson, J., dissenting); *see In re J.A.M.*, 372 N.C. at 9 (agreeing with dissenting opinion at the Court of Appeals). Thus, similarly to this Court's decision in *In re J.A.M.*, the adjudication of neglect in this matter is not based solely on the prior adjudication that Glenda's mother's older children were abused, neglected, and dependent juveniles. *See In re J.A.M.*, 372 N.C. at 10 ("Here, the prior orders entered into the record were not the sole basis for the trial court's decision. Rather, the

trial court also properly found 'the presence of other factors' indicating a present risk to J.A.M. when it reached its conclusion that J.A.M. was neglected as a matter of law.").

This Court did not hold in *In re J.A.M.* that trial courts must make a written "finding or determination" that each juvenile "suffered . . . physical, mental, or emotional impairment" or "was at a substantial risk of such impairment as a consequence of any failure to provide proper care, supervision, or discipline" to support the adjudication of a juvenile as a neglected juvenile, *In re G.C.*, 284 N.C. App. at 319; *see In re J.A.M.*, 372 N.C. at 9. Rather, this Court previously adopted this assessment from the Court of Appeals in *In re Stumbo* to clarify that the legislature did not intend that every act of negligence on the part of parents satisfies the definition of a neglected juvenile as set forth in N.C.G.S. § 7B-101(15). *In re Stumbo*, 357 N.C. 279, 283 (2003); *cf. Troxel v. Granville*, 530 U.S. 57, 68–69 (2000) (O'Connor, J., plurality opinion) ("[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."). This assessment remains useful and remains the law—there must "be some physical, mental, or emotional impairment of the juvenile *or a substantial risk of such impairment* as a consequence of the failure to provide 'proper care, supervision, or discipline.' " *In re J.A.M.*, 372 N.C. at 9 (quoting *In re Stumbo*, 357 N.C. at 283).

However, to be clear, there is no requirement of a specific written finding of a substantial risk of impairment. As raised by DSS, a substantial risk of impairment is not contained in the statutory definition of neglect. *See* N.C.G.S. § 7B-101(15).[4] Rather, the trial court must make written findings of fact sufficient to support its conclusion of law of neglect. And in this matter, the trial court's written findings of fact support its conclusion that Glenda is a neglected juvenile.[5]

Given the foregoing, we conclude that the Court of Appeals erred by misconstruing and misapplying this Court's precedent in *In re J.A.M.* as raised by the dissent in the Court of Appeals and argued by the guardian

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4. While "substantial risk of serious physical injury" is found in the definition of "[a]bused juveniles," the legislature did not use similar language in the definition of "[n]eglected juvenile," further indicating that the legislature did not intend to require a finding of fact of substantial risk of impairment. *See* N.C.G.S. § 7B-101(1), (15) (2021).

5. To the extent any Court of Appeals' decision requires a written finding of fact by the trial court of substantial risk of impairment, such decisions are overruled.

ad litem and DSS and by vacating the trial court's order and remanding this matter when the findings of fact support the conclusion that Glenda is a neglected juvenile.

V. Conclusion

The Court of Appeals erred by requiring findings of fact from the trial court to adjudicate a juvenile neglected that are not required by statute or this Court's precedent. The Court of Appeals also appears to have discounted the statutes and our precedent that recognize that neglect of another juvenile can be relevant as to whether a juvenile is a neglected juvenile. *See* N.C.G.S. § 7B-101(15); *see, e.g.*, *In re J.A.M.*, 372 N.C. at 10–11. In this matter, as in *In re J.A.M.*, the trial court's findings of fact addressed "present risk factors in addition to an evaluation of past adjudications involving other children," *In re J.A.M.*, 372 N.C. at 11, and the findings of fact supported the trial court's adjudication and conclusion of law that Glenda was a neglected juvenile. Accordingly, we reverse the Court of Appeals' decision.

REVERSED.

Justice EARLS dissenting.

This case involves the adjudication of Glenda[1] as neglected, based on what may have been the accidental death of her infant brother, Gary. The medical examiner who examined Gary's body was uncertain of Gary's cause of death. He noted that while he could not rule out "an accidental asphyxial event," his clinical findings showed that Gary's death "could be consistent with a diagnosis of sudden infant death syndrome" (SIDS). Ultimately, the medical examiner classified Gary's death as "undetermined." Despite these facts, the majority makes no mention of SIDS or the undetermined nature of Gary's death, concluding that Gary died from asphyxiation.

The law governing termination of parental rights has one central purpose: to keep children safe. *See* N.C.G.S. § 7B-1100 (2022). But in many cases in which a child dies from SIDS, the parents have not harmed the child. *See* Kent P. Hymel, MD, & the Committee on Child Abuse & Neglect, *Distinguishing Sudden Infant Death Syndrome From Child Abuse Fatalities*, 118 Pediatrics, 421, 422 (July 2006) (hereinafter *Distinguishing SIDS from Child Abuse*) (discussing the link

1. Glenda and Gary are pseudonyms used to protect the children's identities.

between SIDS and brain stem abnormalities). Rather, these parents have acted like any good parent: loving and caring for their child, and making sure their child has enough food to eat and a roof over his or her head.

American jurisprudence recognizes that parental "natural bonds of affection lead [them] to act in the best interests of their children." *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (O' Connor, J., plurality opinion) (quoting *Parham v. J.R.*, 443 U.S. 584, 602 (1979). Consequently, "there is a presumption that a fit parent will act in the best interests of their children." *Id.* (citing *J.R.*, 442 U.S. at 602). Yet today the majority contravenes that presumption, potentially creating the possibility that whenever a parent loses a child to SIDS, the parent is also at risk for losing the other children in the home. This is contrary to our law and manifestly unjust. Accordingly, I dissent.

Glenda was born on 23 September 2018. When Glenda was approximately one and a half years old, DSS filed a petition on 13 March 2020 to adjudicate her as neglected. On 19 October 2021, the trial court adjudicated her as such under N.C.G.S. § 7B-101(15) because she "did not receive proper care, supervision, or discipline from [her] parent[s], guardian, custodian, or caretaker, and [she] lived in an environment injurious to [her] welfare."

Gary and Glenda's mother has two older children who were previously placed in DSS custody on 28 December 2017 following their adjudication as abused, neglected, and dependent.[2] After Glenda was born, mother and respondent-father received DSS case management support from December 2018 through August 2019. During the nine months DSS was involved in Glenda's life, the parents properly cared for Glenda and abided by all safety plans.

Gary was born on 16 December 2019. On 12 March 2020, respondent-father was at work, and mother was home caring for Gary. Although the cause of Gary's death remains unclear, the trial court found that mother fed Gary, burped him, and placed him on his side in a "Pack n Play" with several blankets. Approximately three hours later, mother returned to check on Gary and found him unresponsive. Mother picked the baby up and ran to the home of Gary's grandmother, who is a nurse, for help and called 911. Gary was later pronounced dead at the scene. The next day, DSS filed the petition seeking to have Glenda declared a neglected juvenile.

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2. Respondent father is not the father of those children.

In addition to the above findings of fact, the trial court found that the parents "have been instructed about proper sleeping arrangements for children"; that upon arriving at the scene, EMS saw Gary foaming from the nose and mouth, which is indicative of asphyxiation; that the Fayetteville Police Department incident report from that day indicated there were several blankets and bottles in the Pack n Play; and that the medical examiner's autopsy report noted that a child under one year of age sleeping with blankets is at risk for "an accidental asphyxial event." Based on the trial court's findings regarding Gary's death and mother's prior DSS involvement with her older children, the trial court determined that Glenda was a neglected juvenile pursuant to N.C.G.S. § 7B-101(15) because she lived in an environment injurious to her welfare and did not receive proper care, supervision, or discipline from her parent, guardian, or custodian. Following this adjudication, Glenda was ordered to stay in DSS custody.

Under our law, "[a] 'neglected juvenile' is defined in part as one 'who does not receive proper care, supervision, or discipline from the juvenile's parent . . . or who lives in an environment injurious to the juvenile's welfare.' " *In re Stumbo*, 357 N.C. 279, 283 (2003) (quoting N.C.G.S. § 7B-101(15) (2001)). In order to adjudicate a child neglected, "our courts have additionally required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline. " *Id.* (cleaned up). Here the trial court did not make such a finding. Accordingly, under North Carolina law, Glenda cannot be adjudicated neglected. Thus, the Court of Appeals correctly concluded that the trial court did not make the necessary findings to support Glenda's adjudication as neglected. *In re G.C.*, 284 N.C. App. 313, 319 (2022).

The appellants in this case, petitioner DSS and the guardian ad litem, make two principal arguments. First, DSS argues that N.C.G.S. § 7B-101(15) does not require a showing of "substantial risk" to adjudicate a child neglected. Petitioner states this omission is in contrast to N.C.G.S. § 7B-101(1)(b) which does require "substantial risk" to adjudicate a child abused. While the majority agrees with this argument, this distinction ignores our precedent on this point, *In re Stumbo*, 357 N.C. 279, and the overarching principles the United States Supreme Court holds as central to a parent's fundamental right to custody, care, and control of their child. *See Troxel*, 530 U.S. at 68-69; *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *J.R.*, 442 U.S. at 602; *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

A parent's right to "establish a home and bring up children" was acknowledged by the United States Supreme Court as early as 1923. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Since then, the United States Supreme Court has affirmed that there is a "constitutional dimension to the right of parents to direct the upbringing of their children," *Troxel*, 530 U.S. at 65, and that parents have a "fundamental right to make decisions concerning the care, custody, and control of [their children.]," *id.* at 72; *accord Stanley*, 405 U.S. at 651; *Quilloin*, 434 U.S. at 255 (1978); *J.R.* 442 U.S. at 602; *Santosky*, 455 U.S. at 753.

Under this framework, "so long as a parent adequately cares for his or her children (*i.e.*, is [a] fit [parent]), there will normally be no reason for the State to inject itself into the private realm of the family." *Troxel*, 530 U.S. at 68. Thus, it follows that, when a parent's right to custody, control, and care of their children is at issue, the reviewing court must determine whether the parent has the best interests of the child in mind. *Id.* at 69. In doing so, the court must apply the traditional presumption that a fit parent will act in the best interest of his or her child. *Id.*

This Court's requirement that the State make the showing reflected in N.C.G.S. § 7B-101(15), and that there "be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline," *In re Stumbo*, 357 N.C. at 283 (2003) (cleaned up), contemplates the framework above and ensures that only children who are neglected are adjudicated as such, *see id.* Perhaps most importantly, in *In re Stumbo*, this Court cautioned that "not every act of negligence . . . constitutes 'neglect' under the law and results in a 'neglected juvenile.' " *Id.* For "[s]uch a holding would subject every misstep by a care giver to . . . the potential for petitions for removal of the child." *Id.* Rather than heed this advice, the majority's holding brushes it aside by effectively abolishing this Court's "impairment" or "substantial risk of impairment" requirement. *See id.*

While the majority acknowledges *In re Stumbo* and its teachings, and admits that decision "remains the law," the majority's analysis reduces *In re Stumbo*'s holding to "useful" but "no[t] required" to show neglect under N.C.G.S. § 7B-101(15). Specifically, the majority states that "there is no requirement of a specific written finding of substantial risk of impairment." This holding contravenes North Carolina law as stated in *In re Stumbo* and United States Supreme Court precedent requiring that a reviewing court be certain a parent is unfit before terminating parental rights, *see Troxel*, 530 U.S. at 68–69; *see also In re Safriet*, 112 N.C. App. 747, 752–53 (1993) (stating that a mandatory finding of

impairment or substantial risk of impairment properly limits the authority of the State to regulate the parent's constitutional right to rear their children only to when "it appears that parental decisions will jeopardize the health or safety of the child" (first citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); and then quoting *Wisconsin v. Yoder*, 406 U.S. 205, 233–34 (1972))).

Next, DSS and the guardian ad litem argue that under *In re Safriet*, 112 N.C. App. at 753, if findings of fact, viewed in totality, would support a finding of impairment or substantial risk of impairment, then remanding a case to the trial court to make those findings of fact is not necessary. They argue that substantial risk of impairment is supported here by the adjudication of mother's older children as abused and neglected, and by the prior training and instruction the parents received on proper sleeping arrangements and caring for children; however, not only is *In re Safriet* not binding on this Court, but it is also not applicable because the record in this case does not support a finding of impairment or substantial risk of impairment.

In re Safriet does not stand for the proposition that a petitioner need not demonstrate impairment or substantial risk of impairment. Instead, while the Court of Appeals in that case acknowledged that the statute is silent as to whether this factor is required, that court also stated that the requirement "is consistent with the authority of the State to regulate the parent[s'] constitutional right to rear their children only when "it appears that parental decisions will jeopardize the health or safety of the child," *In re Safriet*, 112 N.C. App. at 752–53 (1993) (first citing *Meyer*, 262 U.S. at 390; and then quoting *Yoder*, 406 U.S. at 233–34 (1972)). Importantly, in reaching its conclusion that evidence in Ms. Safriet's case supported a finding of physical, mental, or emotional impairment of the child, the Court of Appeals reviewed evidence that is not present in this case. There Ms. Safriet's child was reported to have noticeably poor hygiene, such that "other children made fun of him." *Id.* at 753. Ms. Safriet also lacked a permanent residence, and the child's school and grandparents did not know how to contact her in case of an emergency. *Id.* In contrast, it is clear in this case that during the nine months DSS was involved in Glenda's life, the parents properly cared for Glenda and abided by all safety plans.

This Court has also previously found that a child cannot be adjudicated neglected based solely on previous DSS involvement with other children. *In re J.A.M.*, 372 N.C. 1, 9 (2019) (quoting *In re A.K.*, 360 N.C. 449, 456 (2006)). "Rather, in concluding that a juvenile 'lives in an environment injurious to the juvenile's welfare,' N.C.G.S. § 7B-101(15), the

clear and convincing evidence in the record must show current circumstances that present a risk to the juvenile." *In re J.A.M.*, 372 N.C. at 9. *In re J.A.M.* also reiterates that to adjudicate a child neglected "our courts have additionally required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision or discipline." *Id.* (cleaned up). Thus, while the circumstances surrounding mother's older children may be relevant these circumstances cannot on their own, without a showing of impairment or substantial risk of impairment to Glenda, support Glenda's removal from her parents' care and adjudication of neglect. *See id.* It is also important to note that this case is based on respondent father's appeal and not mother's. Thus, what is at stake are his parental rights.

The majority relies on *In re J.A.M.* to conclude that the facts in Glenda's case reflect "current circumstances that present a risk," and that thus she can be adjudicated neglected. Nonetheless, in reaching its conclusion that evidence in J.A.M.'s case supported that J.A.M. "presently faced substantial risk in her living environment," *id.* at 10, this Court reviewed evidence there that is not present in this case. In *In re J.A.M.*, the trial court found that respondent-mother

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

Id. But these facts are not present in Glenda's case. Instead, here the trial court found that Glenda's mother had completed services ordered by the court in her older children's cases, and there is no evidence of domestic violence in her relationship with Glenda's father. Thus, the evidence in this case does not support Glenda's adjudication as a neglected juvenile.

Petitioner DSS and the guardian ad litem argue that Gary's death and the parents' prior knowledge about proper sleeping arrangements for an infant are sufficient to show impairment or substantial risk of impairment for Glenda. Similarly, the majority contends these facts are sufficient to show "current circumstances that present a risk." Yet neither assertion can be true given the undetermined nature of Gary's death.

Sudden Infant Death Syndrome "is the most common cause of death for children between 1 and 6 months of age." *Distinguishing SIDS from Child Abuse*, 421. This condition is defined as the "sudden death of an infant younger than 1 year that remains unexplained after thorough case investigation, including performance of a complete autopsy, examination of the death scene, and review of the clinical history." *Id.* Sudden Infant Death Syndrome is suspected in cases, such as Gary's, in which a healthy child under six months of age "apparently dies during sleep." *Id.* at 422. When a child is diagnosed with SIDS, this finding "reflects the clear admission by medical professionals that an infant's death remains unexplained." *Id.*

In many cases a parent is blamed for a SIDS death.[3] And while it is true that many SIDS risk factors are preventable,[4] research also suggests some causes of SIDS are outside the parent's control. For example, brain stem abnormalities involving the "delayed development of arousal, cardiorespiratory control, or cardiovascular control" may contribute to SIDS. *Id.* In this case Gary was born on 16 December 2019 and died on 12 March 2020, at just under three months old. The police officer who arrived on the scene made observations indicating that Gary was not malnourished, and had no signs of physical abuse, such as bruising or burn marks on his body. Gary's home was also reported to be "in order" and there were no signs of alcohol or drug abuse by the parents. An autopsy was performed on Gary's body, and no internal or external injuries were found. There was also no evidence of injury to Gary's scalp, including no sign of skull fractures. Radiography of Gary's body indicated no acute or chronic fractures.

According to the Medical Examiner who conducted Gary's autopsy, "[t]he lack of significant traumatic injuries, toxicologic findings, congenital abnormalities, infectious disease processes or other natural disease that would account for death" meant that Gary's death "could be consistent with a diagnosis of sudden infant death syndrome." While it is true the Medical Examiner could not rule out "an accidental asphyxial

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3. *See Distinguishing SIDS from Child Abuse*, p. 423 (explaining that "the appropriate medical response to every [SIDS] death must be compassionate, empathic, supportive and nonaccusatory", and that "[i]t is important for those in contact with parents during this time to remain nonaccusatory even while conducting a thorough death and/or incident-scene investigation").

4. For example, "SIDS has been linked epidemiologically in research studies to prone sleep position, sleeping on a soft surface, bed sharing, maternal smoking during or after pregnancy, overheating, [and] late or no prenatal care. " *Id.* at 422.

event," there is no evidence in the report to indicate Gary's death was intentional in nature. Ultimately, Gary's cause of death was classified as "undetermined."

Our precedent in *In re Stumbo*, teaches that "not every act of negligence . . . constitutes 'neglect' under the law and results in a 'neglected juvenile.' " 357 N.C. at 283. This is one such case. Losing a child to an unexplained or accidental death would be a painful experience for any parent. To have another child removed from the home on top of that would be devastating. Because the record does not show, and the trial court did not find that Glenda suffered impairment, or that she was at a substantial risk for such impairment, the Court of Appeals was correct to vacate Glenda's neglect adjudication. In my view, this Court should do the same. Thus, I dissent.

Justice MORGAN joins in this dissenting opinion.

MICHAEL MOLE'
v.
CITY OF DURHAM, NORTH CAROLINA, A MUNICIPALITY

No. 394PA21

Filed 6 April 2023

Appeal and Error—discretionary review improvidently allowed—no precedential value of lower appellate decision

The Supreme Court concluded that discretionary review had been improvidently allowed; therefore, the decision of the Court of Appeals was left undisturbed but without precedential value.

Justice DIETZ concurring.

Justice BERGER joins in this concurring opinion.

Justice MORGAN dissenting.

Justice EARLS joins in this dissenting opinion.

Justice EARLS dissenting.

Justice MORGAN joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 279 N.C. App. 583, 866 S.E.2d 773 (2021), affirming the trial court's dismissal of plaintiff's Article I, Section 19 claims and reversing the trial court's dismissal of plaintiff's Article I, Section 1 claim. Heard in the Supreme Court on 9 February 2023.

J. Michael McGuinness and M. Travis Payne for plaintiff-appellant.

Kennon Craver, PLLC, by Henry W. Sappenfield and Michele L. Livingstone, for defendant-appellee.

Norris A. Adams, II, Caitlin H. Walton, and Larry H. James for the National Fraternal Order of Police and the State of North Carolina Fraternal Order of Police, amici curiae.

John W. Gresham for North Carolina Association of Educators and National Association of Police Organizations, amici curiae.

Patterson Harkavy, LLP, by Narendra K. Ghosh and Trisha Pande, for Professional Fire Fighters and Paramedics Association of North Carolina and North Carolina Advocates for Justice, amici curiae.

PER CURIAM.

Discretionary review improvidently allowed. The decision of the Court of Appeals is left undisturbed but stands without precedential value. *See Costner v. A.A. Ramsey & Sons Inc.*, 318 N.C. 687, 351 S.E.2d 299 (1987) (stating that a published opinion of the Court of Appeals was without precedential value where the Court was "divided three to two as to the result and thus there being no majority of the Court[.]").

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justice DIETZ concurring.

It might seem odd to write a separate opinion concurring in a boilerplate, two-sentence order from this Court. But my dissenting colleagues have managed to write a combined thirty-two pages in response to this order, so adding a few extra paragraphs feels quite reasonable by comparison. And I write separately solely because a reader trekking through these two lengthy dissents is owed some context about what is really going on here.

First, with respect to "unpublishing" a Court of Appeals opinion, this is nothing new. This Court has done so just shy of 100 times in the last fifty years, most recently this past November. *Townes v. Portfolio Recovery Assocs., LLC*, 382 N.C. 681, 682 (2022) (holding that "the decision of the Court of Appeals is left undisturbed and stands without precedential value").

Now, to be sure, many of these orders were because there was a recusal and this Court's remaining members were equally divided, which is not the case here. But the point is that "unpublishing" a Court of Appeals opinion is far from unprecedented. Indeed, this practice is so noteworthy that one legal scholar wrote an entire law review article about it, explaining that the effect of these rulings is to render the Court of Appeals opinions "of no more precedential value than the decision

of a trial court." John V. Orth, "*Without Precedential Value*"*—When the Justices of the Supreme Court of North Carolina Are Equally Divided*, 93 N.C. L. Rev. 1719, 1735 (2015).

And, more importantly, this practice is *not* limited solely to cases where the voting members of this Court were equally divided. We also have unpublished Court of Appeals opinions when the Court was not equally divided but, nevertheless, there was "no majority of the Court" voting for any given outcome. *Costner v. A.A. Ramsey & Sons Inc.*, 318 N.C. 687 (1987); *Nw. Bank v. Roseman*, 319 N.C. 394, 395 (1987).

Of course, by using the phrase "majority of the Court" in these cases, we meant a majority of the *full court*. When this Court is divided three to two with two recusals, as happened in *Costner* and *Roseman*, the Court always has the power to enter a precedential decision by the three justices in the voting majority. Indeed, we have done so in several recent cases. *E.g.*, *Connette for Gullatte v. Charlotte-Mecklenburg Hosp. Auth.*, 382 N.C. 57, 58 (2022) (overturning 100-year-old medical malpractice precedent by 3-2 vote with two recusals). But when there is no majority of the full court voting for a particular disposition, this Court has long had the *option*—one we used in *Costner* and *Roseman*—to take no action on the merits and to render the Court of Appeals decision non-precedential, so that the issue could continue to percolate in the lower courts. *Costner*, 318 N.C. at 687; *Roseman*, 319 N.C. at 395.

Cases like *Costner* and *Roseman*—where there was no majority vote for how to resolve the case—bring me to my second point. As anyone watching the oral argument in this case could observe, the justices' questions revealed several alternative ways to decide the case, none of which could be reconciled with the others.

When this happens in appellate cases, if there is no majority for any one approach in the voting conference, the result is often a series of plurality and minority opinions that are a complete mess to decipher. Moreover, those competing opinions can make the law less settled and make the surrounding confusion about the law even worse.

How do courts of last resort, exercising discretionary review, avoid creating these sorts of messy rulings with no majority holding? They can dismiss a case by announcing that their discretionary decision to review it was improvident. Again, this practice is hardly unprecedented. This Court has done so well over 100 times, including several times last year. *E.g.*, *State v. Boyd*, 381 N.C. 169 (2022). And again, scholars have acknowledged that a court's "jurisprudence would be better served" by this practice when "the justices are at loggerheads and see that an

opinion is going to go eight ways." H.W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* 39, 111 (1991).

One final point: I am not fond of unpublishing a Court of Appeals decision. I served on the Court of Appeals twice as long as all the other members of this Court combined. The Court of Appeals' ability to create its own body of binding precedent is essential to our State's jurisprudence. Similarly, I am not fond of dismissing a case for review improvidently allowed. If we took a case based on the statutory criteria for review, that is a strong indication that the case deserves resolution on the merits.

Having said that, there is precedent for taking both of these steps. And there will be rare cases where it is appropriate for this Court to do so because doing otherwise would only make things worse. I concur in the Court's order because this is one of those rare cases.

Justice BERGER joins in this concurring opinion.

Justice MORGAN dissenting.

I respectfully dissent from both the majority's determination that discretionary review was improvidently allowed in the present case as well as this Court's unprecedented unpublication of the Court of Appeals opinion rendered in this case, *Mole' v. City of Durham*, 279 N.C. App. 583 (2021). In my view, the issues raised by the parties regarding the applicability of the Fruits of Labor Clause of Article I, Section 1 of the Constitution of North Carolina as previously interpreted by this Court in *Tully v. City of Wilmington*, 370 N.C. 527 (2018), as well as the viability of class-of-one equal protection claims for public employees under Article I, Section 19 of the Constitution of North Carolina, easily met this Court's requirements for discretionary review as described by the General Assembly. This Court's review of this challenging case which invokes two momentous state constitutional provisions would have provided crucial direction into uncharted constitutional terrain, while appropriately allowing North Carolina's highest court to determine a resolution of plaintiff's constitutionally significant claims. I therefore respectfully disclaim the majority's refusal to clarify the reach of *Tully* or the viability of class-of-one claims in the employment context, along with the majority's simultaneous decision to strip the Court of Appeals opinion here of its own precedential effect, thereby calculatedly eliminating any North Carolina appellate court examination of the pivotal constitutional principles illuminated by this case.

On 28 June 2016, the Durham Police Department dispatched officers to an apartment complex in Durham in order to serve an arrest warrant on Julius Smoot. Upon their arrival, the officers discovered that Smoot had barricaded himself in an upstairs bedroom and claimed to be armed with a firearm. Smoot represented that he would kill himself unless he was allowed to see his wife and son within ten minutes. As a result, the law enforcement officers contacted their supervising officers for the purpose of requesting that a hostage negotiator be sent to the scene.

Plaintiff, who had begun working for the Durham Police Department in May 2007 and held the rank of sergeant on 28 June 2016, was the only hostage negotiator on duty when the request for a hostage negotiator was made. Although plaintiff had received hostage negotiation training in May 2014, he had not ever participated in a barricaded subject or hostage situation until this event occurred. Upon arriving at the apartment approximately five minutes after the police department had received the request for negotiation assistance with Smoot, plaintiff began talking with Smoot in an effort primarily to keep Smoot alive and to extend Smoot's stated deadlines to meet Smoot's demands. In the course of his interactions with Smoot, plaintiff heard the sound of a gunshot come from the interior of Smoot's apartment, at which point Smoot assured plaintiff that the gunshot was accidental.

After the negotiations had proceeded for about two hours, during which time Smoot became "highly agitated," Smoot told plaintiff that Smoot had a "blunt"[1] and intended to smoke it. In light of plaintiff's concerns that the effects of marijuana consumption might exacerbate Smoot's precarious emotional state and could result in even more danger to himself and the law enforcement officers, plaintiff asked Smoot to refrain from smoking the marijuana cigarette and, in return, plaintiff would allow Smoot to smoke the "blunt" if Smoot would peacefully surrender himself and the firearm. After agreeing to plaintiff's proposal, Smoot handcuffed himself, left the gun in the bedroom of the apartment, and surrendered to plaintiff while still in the apartment. As Smoot waited in the living room of the apartment to meet with his son, Smoot asked for Smoot's lighter and pack of cigarettes, which plaintiff placed on the table in front of Smoot. Smoot then removed the marijuana cigarette from behind his ear, lit it with his lighter, and smoked about half of it prior to his son's arrival.

In the aftermath of these events, the Durham Police Department initiated an internal investigation into plaintiff's actions. On 24 October

1. A marijuana cigarette.

2016, plaintiff received written notice that a predisciplinary hearing would take place on the following day despite the fact that municipal policy provided that City of Durham employees were entitled to notice of at least three business days before such a hearing could be held. After the hearing was conducted on 25 October 2016, plaintiff's immediate supervisors recommended that plaintiff be demoted. However, defendant City of Durham terminated plaintiff's employment on 14 November 2016 for "conduct unbecoming" a municipal employee based upon the manner in which he secured Smoot's surrender.

On 13 November 2018, plaintiff filed a complaint against the City of Durham which alleged that the City had violated his constitutional rights to due process, equal protection, and the fruits of his labor. On 17 January 2019, the City filed an answer to plaintiff's complaint in which the City denied the material allegations of plaintiff's complaint and moved to dismiss the action for failure to state a claim upon which relief could be granted pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). On 24 May 2019, the trial court entered an order granting the City's dismissal motion. Plaintiff appealed this outcome to the Court of Appeals.

In recognizing that plaintiff asserted in his complaint that his rights to due process, equal protection, and the fruits of his labor under the Constitution of North Carolina were violated, the Court of Appeals interpreted this Court's decision in *Tully* to acknowledge that plaintiff had adequately pleaded a claim for relief under the state constitution with regard to the City's failure to abide by their established disciplinary procedures. *Mole'*, 279 N.C. App. at 586. The majority of the Court has decided to utilize this case to inaugurate the extraordinary measure of unpublishing this Court of Appeals opinion, thus leaving the opinion bereft of any precedential value upon the majority's conclusion that discretionary review of this case was improvidently allowed.

Section 7A-31 of the North Carolina General Statutes governs the subject of discretionary review by this Court. In relevant part, section 7A-31 provides that:

> (c) In causes subject to certification under subsection (a) of this section, certification may be made by the Supreme Court after determination of the cause by the Court of Appeals when in the opinion of the Supreme Court any of the following apply:
>
> (1) The subject matter of the appeal has significant public interest.

(2) The cause involves legal principles of major significance to the jurisprudence of the State.

(3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

N.C.G.S. § 7A-31(c) (2021). Plaintiff petitioned this Court for discretionary review pursuant to section 7A-31(c)(2) and (3), arguing both that the Court of Appeals opinion involved legal principles of major significance to the jurisprudence of the state and that the lower court's decision appeared to be in conflict with decisions of this Court; primarily, the momentously precedential case of *Tully*. Even the Court of Appeals itself, in its now-erased decision which it issued in this case, urged this Court to provide guidance with regard to the application of the Equal Protection Clause of the Constitution of North Carolina as compared to the federal counterpart of the fundamental rights protections established in the Equal Protection Clause of the United States Constitution. *Mole'*, 279 N.C. App. at 598 ("Because our constitution is to be liberally construed, we urge the Supreme Court to address this issue.").

Upon this Court's determination to accord discretionary review to this compelling case, the legal briefs subsequently submitted by the parties, along with three separate clusters of amici curiae composed of organizations with varying orientations and corresponding varying perspectives, underscored both the jurisprudential and policy implications of the complex constitutional issues presented by plaintiff's case. On one side, plaintiff and supportive amici curiae argued that the internal logic of this Court's previous decision in *Tully* and the interpretation of the Fruits of Labor Clause established by *Tully* were not necessarily constrained to the case's specific fact pattern. They also reminded us that this Court is not bound to construe provisions of the Constitution of North Carolina identically to their federal analogues, even where the language is exactly mirrored. *Evans v. Cowan*, 122 N.C. App. 181, 183–84, *aff'd per curiam*, 345 N.C. 177 (1996). Indeed, our state courts have in many instances found it proper to give the Constitution of North Carolina a more "liberal interpretation in favor of [North Carolina's] citizens," *Corum v. Univ. of N.C.*, 330 N.C. 761, 783 (1992), and to grant relief in circumstances where no relief would be afforded under the federal constitution. *Evans*, 122 N.C. App. at 184. Amici curiae which supported plaintiff's legal stances here also emphasized the increasingly challenging and often dangerous working conditions of public

employees—especially first responders like Mole'[2], whose lives *and* livelihoods can be endangered by government employers' refusal to abide by their own internal policies.

On the other side, defendant asked this Court to reconsider the Court of Appeals decision pronounced here, but also to reduce *Tully* expressly to the case's explicit holding concerning arbitrary refusals by government employers to follow their own personnel policies in promotional processes. Defendant contended that plaintiff's arguments possessed no meaningful limiting principle and therefore could be expanded well beyond the facts of his particular case. Defendant argued that any expansion of either the Fruits of Labor Clause or the Equal Protection Clause of the Constitution of North Carolina which would recognize plaintiff's claims as cognizable under state law would effectively nullify existing case law recognizing public employees as being employed at-will and would have the additional effect of exposing any municipal or operational policy enacted by a government employer to potential constitutional claims from public employees. For these reasons, defendant asked this Court to reject plaintiff's "novel claims" in order to preserve the at-will posture of public employment and managerial discretion of government employers.

Although the legal briefs submitted by the named parties and other interested parties highlighted the delicacy of resolving such intricate constitutional questions concerning the government's role as employer, there was nothing about the parties' submissions or their positions that suggested that this case did not legitimately harbor significant public interest, involve legal principles of major significance to the jurisprudence of the State, or present the question of a likely conflict between the Court of Appeals decision issued here and a decision of this Court, to wit: *Tully*. Likewise, there was nothing about the parties' respective presentations of their oral arguments to the Court that indicated that this case did not satisfy *any* of the above-referenced criteria established in N.C.G.S. § 7A-31(c) to warrant this Court's allowance of discretionary review.

It is therefore puzzling for me to identify a reasonable set of circumstances to reconcile this Court's institutionalized propensity to address complex constitutional issues with the majority's intentional dual avoidance here of the existence of any appellate court direction in this matter

2. The record before us contains two variations of plaintiff's surname—Molé and Mole'. In conformity with the majority of the legal documents before us, we have chosen to spell plaintiff's name as Mole'.

by virtue of the majority's unusual passiveness to review constitutional subjects, coupled with the majority's sensational aggressiveness to unpublish a major Court of Appeals opinion. The complexity of the issues and interests involved in this case, the intrinsic nature of which creates discomfort for the majority to render a binding opinion here, provides a detectable reticence of the majority to proverbially bury its head in the sand and to neglect this Court's obligation to answer necessary constitutional questions through the interpretation of state law. *See Union Carbide Corp. v. Davis*, 253 N.C. 324, 327 (1960) ("Courts must pass on constitutional questions when, but only when, they are squarely presented and necessary to the disposition of a matter then pending and at issue."); *see also Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 610 (1983) ("Only this Court may authoritatively construe the Constitution and laws of North Carolina with finality.").

I embrace the concurrence's invitation to explore "what is really going on here" regarding the unpublication of the Court of Appeals opinion in the present case and the majority's determination that discretionary review of this matter was improvidently allowed.

Between the Court majority's per curiam opinion and the supportive concurring opinion, the two opinions utilize the terms "unpublishing" / "unpublished" and "without precedential value" interchangeably with regard to the Court's own eradication of the Court of Appeals opinion, in an effort to diminish the true irregular, unprecedented nature of this action. This Court's per curiam opinion in *Costner v. A.A. Ramsey and Sons, Inc.*, 318 N.C. 687 (1987) is cited by the majority as legal precedent for its "Discretionary Review Improvidently Allowed" opinion. In *Costner*, this Court expressly observed that two Justices of the seven-member forum—Justices Webb and Whichard—did not participate in the outcome of the case, and that with

> [t]he remaining members of this Court being divided three to two as to the result and thus there being no majority of the Court voting to either affirm or reverse, the decision of the Court of Appeals is left undisturbed and stands without precedential value.
>
> AFFIRMED.

Id. at 687.

This Court has similarly issued per curiam opinions in other cases in which there was not a majority of the Justices to vote for the same outcome in the resolution of a case, thus prompting the Court to declare

that the Court of Appeals decision would be left undisturbed and stand without precedential value. For example, in *Northwestern Bank v. Roseman*, 319 N.C. 394 (1987), we stated in a per curiam opinion:

> Justices Martin and Webb took no part in the consideration or decision of this case. The remaining members of the Court being divided three to two as to all issues presented and thus there being no majority of the Court voting to either affirm or reverse, the decision of the Court of Appeals is left undisturbed and stands without precedential value.
>
> AFFIRMED.

Id. at 395.

In *Couch v. Private Diagnostic Clinic*, 351 N.C. 92 (1999), we stated in a per curiam opinion:

> Justice Freeman did not participate in the consideration or decision of this case. . . . All members of the Court are of the opinion that the trial court erred by not sustaining defendant's objection and by not intervening *ex mero motu*. Justices Lake, Martin, and Wainwright believe that the error was prejudicial to the appealing defendant and would vote to grant a new trial. Chief Justice Frye and Justices Parker and Orr are of the opinion that the error was not prejudicial to the appealing defendant and would vote to affirm the result reached by the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.
>
> The decision of the Court of Appeals is affirmed without precedential value.
>
> AFFIRMED.

Id. at 93.

We also issued a per curiam opinion in the determination of *Townes v. Portfolio Recovery Assocs., LLC*, 382 N.C. 681 (2022), opining:

> Justice Ervin took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting

> to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. . . .
>
> AFFIRMED.

Id. at 682 (citation omitted).

While both the majority's per curiam opinion and the concurring opinion which have been issued here rely on this Court's cited opinions, which were decided in the same vein as numerous other per curiam opinions in which this Court has directed that the Court of Appeals opinion under review was without precedential value because there was not a majority of the Court which voted to affirm or reverse the lower appellate court's determination, there are two stark omissions from the majority's current per curiam opinion that appear in the similar line of cases upon which the majority relies: (1) a transparent divulgence of the numerical breakdown of the Justices favoring affirmance or reversal of the Court of Appeals decision, and (2) the Court's clear declaration of the outcome of the case—"AFFIRMED" or "REVERSED"—based upon the lack of precedential value of the Court of Appeals opinion. In examining this Court's per curiam opinions cited here as authority by the majority and buttressed by the concurrence, along with additional harmonious per curiam opinions issued by us, all of the Court's previous cases cited here—*Costner*, *Northwestern Bank*, *Couch*, and *Townes*—revealed the identities of any Justices who did not participate in the outcome of the case, and disclosed the numerical vote of the remaining participating Justices which did not constitute a majority of votes on the Court to either affirm or reverse (i.e., 3-2 votes in *Costner* and *Northwestern Bank*) or which created a tie vote (i.e., 3-3 votes in *Couch* and *Townes*). Curiously, the majority, though painstakingly duplicating the Court's standard language that "the decision of the Court of Appeals is left undisturbed and stands without precedential value," somehow fails to replicate the disclosure of the specific votes of Chief Justice Newby, Justice Berger, Justice Barringer, Justice Dietz, and Justice Allen[3] as the Court did with each Justice's identified vote in *Couch*, or even to indicate the number of Justices who voted in one fashion or another in a manner which caused the Court of Appeals opinion to be without precedential value.

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3. Justices Morgan and Earls have recorded their respective dissenting votes in this case.

Furthermore, while all of the cases cited among the majority, the concurrence, and this dissent in the present case illustrate this Court's established practice of concluding a per curiam opinion with a definitive declaration of the case's outcome such as "affirmed" or "reversed" with regard to this Court's pronouncement that a Court of Appeals opinion theretofore will be "without precedential value," the majority interestingly neglected such clarity on this occasion. If the majority had employed this Court's well-established practice in cases which are resolved in the manner in which the majority has selected here, this Court would have made it plain that the Court of Appeals opinion was still effective in that discretionary review was improvidently allowed and that the Court of Appeals opinion would afford plaintiff the opportunity to pursue his claim against defendant municipality based on plaintiff's constitutional claim lodged under Article I, Section I of the North Carolina Constitution. This Court has traditionally even employed this direct and transparent approach in its per curiam opinions which result in a determination of discretionary review improvidently allowed, as shown in our per curiam opinion issued in *John Conner Constr., Inc. v. Grandfather Holding Co., LLC*, 366 N.C. 547 (2013):

> Justice Beasley took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals stands without precedential value. As to the issue allowed in plaintiffs' petition for discretionary review, we hold that discretionary review was improvidently allowed.
>
> AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Id. at 547.

Here, in the majority's per curiam opinion that discretionary review was improvidently allowed, the decision ends with the sole declaration of "DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED." The majority glaringly fails to adhere to this Court's tradition, with the issuance of a per curiam opinion, to unequivocally announce the ultimate outcome of the case in the last line of the opinion, such as the opinion of the Court of Appeals being affirmed or reversed. On its face, it appears that the majority has seen fit to initiate a new practice of refraining from

such a plain announcement of the final result of a case in order to be consistent with this Court's new practice of unpublishing a Court of Appeals opinion on this Court's own volition. With this approach, there would be no requirement for this Court to declare the conclusive result of a per curiam opinion—including one in which discretionary review was improvidently allowed—because this Court would no longer recognize the lower appellate court's opinion to exist, due to this Court's unilateral unpublication of the Court of Appeals opinion.

I do not agree with this majority's departures from well-established and time-honored practices, traditions, and customs of this Court merely because these deviations conveniently serve the majority's interests. The concurrence here engages in a tutorial discussion of the myriad of circumstances which a court can confront during its deliberations in a case which may ultimately end with an outcome that discretionary review was improvidently allowed. The concurrence even endeavors to intimate the existent circumstances in the present case which led to the majority's determination that discretionary review was improvidently allowed. The learned concurring Justice should not be placed in a position to attempt to explain the awkward aspects of this case's situation which he and the Court's other distinguished colleagues in the majority have implemented with their decision. In the first instance, this Court should definitively decide the critical constitutional issues which have been presented to us, especially those which are impacted by the North Carolina Constitution, since discretionary review by this Court is essential here to resolve substantial questions of law. And in the second instance, since the majority has deemed discretionary review to be improvidently allowed in the instant case, then it should follow the institutionalized precedent set by our per curiam opinions of *Costner*, *Northwestern Bank*, *Couch*, *Townes*, and *John Conner Constr., Inc.* and others to disclose, at the least, the numerical breakdown of the Justices here who favored affirmance, reversal, or some other reviewing disposition of the Court of Appeals, instead of adeptly utilizing the concepts of discretionary review improvidently allowed and unpublication of the Court of Appeals opinion to craftily shield their votes.

It is always within this Court's discretion to deny review where no appeal may be had as a matter of right. Likewise, it is within this Court's discretion to determine that it would be improvident to exercise our discretionary review over a matter previously evaluated as being appropriate for such review. However, I believe that a greater improvidence is flaunted when this Court leaves constitutional questions of such jurisprudential import as those presented here without any guiding appellate authority, either from this Court or in the form of a published opinion

of the Court of Appeals, due to clear and convenient unwillingness to engage with the issues at hand.

I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

Justice EARLS dissenting.

I join Justice Morgan's dissent in this matter. I write separately to address two procedural issues. The majority concludes that discretionary review was improvidently allowed (DRIA) and therefore in theory, no review on the merits has occurred in this Court. Simultaneously, the Court for the first time in its history, when sitting as a seven-member court, is, without coherent explanation, ruling that the opinion issued by the Court of Appeals in this case has no "precedential value."As the opinion was published by the Court of Appeals, under our Rules of Appellate Procedure, it should be binding precedent unless reversed by this Court. *In re Civil Penalty*, 324 N.C. 373, 384 (1989). Because this Court's unspoken assertion of its authority to decide which Court of Appeals opinions have precedential value is the most destructive to the administration of justice, I begin with that aspect of today's two-line majority opinion.

I. "Unpublishing" a Court of Appeals Decision

The majority's decision to effectively "unpublish" the Court of Appeals decision in this case by denoting it as "without precedential value" does not have the doctrinal support the majority would wish it to have. None of the cases relied upon in the concurring opinion involved the full court, without explanation, deciding that discretionary review was improvidently granted while simultaneously holding that the Court of Appeals opinion will have no precedential effect. Not a single one. There is no precedent for what the Court does in this case. Vague references to oral argument with insinuations that this was a complicated case that divided the court do not distinguish it from the many complicated issues the court faces that often involve multiple possible outcomes.

The majority's effort to hide the ball through sleight of hand is all the more appalling because having moved the cups around, they can't remember where it is. While the per curiam opinion implies through its citation to *Costner v. A.A. Ramsey & Sons, Inc.*, 318 N.C. 687 (1987) that this Court chose to unpublish the Court of Appeals opinion in this case because "the Court was 'divided three to two as to the result and thus

there . . . [was] no majority of the Court,' "[1] *See Mole' v. City of Durham*, No. 394PA21, 384 N.C. 78, (April 6, 2023) (per curiam), the concurrence essentially states the opposite, *see id.* (Dietz, J., concurring). The concurrence points out that while in many cases a Court of Appeals opinion will be designated as having no precedential value "because there was a recusal and this Court's remaining members were equally divided, [that] is not the case here." *Id.* (Dietz, J., concurring). This inconsistency alone is sufficient to alert readers as to "what is really going on here." *See id.* Furthermore, because there are only two dissenting opinions in this case it is clear this case's per curiam opinion constitutes the majority, thus leaving no room for a "three to two" split, *see id.* (per curiam), or an "equally divided court," *see id.* (Dietz, J., concurring). The parties in this case and the citizens of this state deserve better than a shell game.

It is unwise for the Court to hand itself this new power without even publishing an amendment to the Rules of Appellate Procedure to establish clear and fair guidelines for taking such action. The Court is making a hasty and unexamined, yet fundamental and radically destabilizing shift in the authority to determine legal precedent. It has far-reaching implications for the jurisprudence of this state. "[T]he rules governing publication of and citation to judicial opinions are not only central to the judiciary's self-identity—they are also critical to lawyers and the public, shaping how litigants' cases are treated by the courts and how litigants communicate with courts through their counsel." Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. Rev. 705, 734 (2006) [hereinafter Gant, *Missing the Forest for a Tree*].

Rule 30(e) of the North Carolina Rules of Appellate Procedure has careful guidelines for how the precedential value of Court of Appeals opinions should be determined. It states that:

> (1) In order to minimize the cost of publication and of providing storage space for the published reports, the Court of Appeals is not required to publish an opinion in every decided case. If the panel that hears the

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1. Ironically, and completely contrary to *Costner*, the Court is simultaneously issuing an opinion of the Court in *State v. Hobbs*, No. 263PA18-2, in which two Justices are recused and the remaining five members of the Court are divided three to two, without in any way suggesting that there was no majority of the Court or that the Court of Appeals opinion in that case therefore is without precedential value. Such an arbitrary and disparate application of procedural rules is the antithesis of due process and equal justice under the law. Compare *Costner*, 318 N.C. at 687 with *State v. Hobbs*, No. 263PA18-2, 384 N.C. 144, (April 6, 2023).

case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as a precedent, it may direct that no opinion be published.

(2) The text of a decision without published opinion shall be posted on the opinions web page of the Court of Appeals at https://appellate.nccourts.org/opinion-filings/coa and reported only by listing the case and the decision in the advance sheets and the bound volumes of the North Carolina Court of Appeals Reports.

(3) An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing claim preclusion, issue preclusion, or the law of the case. If a party believes, nevertheless, that an unpublished opinion has precedential value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion if that party serves a copy thereof on all other parties in the case and on the court to which the citation is offered. This service may be accomplished by including the copy of the unpublished opinion in an addendum to a brief or memorandum. A party who cites an unpublished opinion for the first time at a hearing or oral argument must attach a copy of the unpublished opinion relied upon pursuant to the requirements of Rule 28(g). When citing an unpublished opinion, a party must indicate the opinion's unpublished status.

(4) Counsel of record and pro se parties of record may move for publication of an unpublished opinion, citing reasons based on Rule 30(e)(1) and serving a copy of the motion upon all other counsel and pro se parties of record. The motion shall be filed and served within ten days of the filing of the opinion. Any objection to the requested publication by counsel or pro se parties of record must be filed within five days after service of the motion requesting publication. The

> panel that heard the case shall determine whether to allow or deny such motion.

N.C. R. App. P. 30(e). Nothing in this detailed set of procedures would give any party notice that the North Carolina Supreme Court might take it upon itself to "overrule" a Court of Appeals determination that an opinion of that Court has precedential value while leaving the opinion otherwise undisturbed.

In terms of how appellate procedure rules should be adopted, while Article IV, Section 13(2) of the Constitution of North Carolina vests in the Supreme Court "exclusive authority to make rules of procedure and practice for the Appellate Division," N.C. Const. art. IV, § 13(2), this Court has previously enjoyed a strong working relationship with the Appellate Rules Committee of the North Carolina Bar Association. Indeed, that Committee has been advising the Court concerning the Rules of Appellate Procedure at least since 1974 when the North Carolina Bar Association Foundation's Appellate Rules Study Committee proposed the form of appellate rules that we use today, creating a unitary set of rules that combined three prior rule sets: The Supreme Court Rules, the Court of Appeals Rules, and the "Supplemental Rules" that defined the practice and procedure in appeals within the appellate division. *See* App. Rules Study Comm., N.C. Bar Ass'n Found., *Proposed Draft of the North Carolina Rules of Appellate Procedure with General Commentary* 1 (1974). The 1974 Committee included forty-three distinguished attorneys and jurists from across the state, some of whom later served on this Court and other appellate courts. The current committee likewise is composed of lawyers and judges from across the state who are dedicated to improving the quality of appellate practice in North Carolina. They previously have had an instrumental role in proposing, examining, and refining numerous revisions and clarifications of the rules. *See App. Rules*, N.C. Bar Ass'n, https://www.ncbar.org/members/communities/committees/appellate-rules/ (last visited Jan. 29, 2023).

While there is no constitutional or other mandate requiring this Court to consult with interested stakeholders prior to revising the Rules of Appellate Procedure, it is universally understood throughout the legal profession to be good practice to engage the most esteemed and experienced legal experts before modifying the rules that govern our legal system. The North Carolina Bar Association's Appellate Rules Committee can identify possible unintended consequences or implications for practitioners that this Court may overlook. In general, consultation and input from affected parties are important elements of improving the administration of justice.

Therefore, I object in the first instance because this Court is summarily making a fundamental change in how legal precedent is determined in this state without any opportunity for notice and comment from knowledgeable and experienced members of the bar and the judiciary, whether they are on a committee devoted to this issue or otherwise interested individuals with valuable expertise.

On the merits of unpublishing a lower court opinion without explanation, it is notable that very few states allow their supreme courts to unilaterally determine when an opinion of an intermediate appellate court will be published and therefore have precedential value. California and Kentucky are two examples that comprise this minority. *See* Melissa M. Serfass & Jessie W. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. App. Prac. & Process 251, 258–85 tbl.2 (2001); *see also* Cal. Rules of Court, rule 8.1105(e)(2). This Court should be both informed about the experiences of the few states that allow this practice and wary of adopting a rule that is seldom used without closer examination.

To illustrate the consequences this new rule may trigger, one scholar at the University of Louisville School of Law observed that Kentucky's rule not allowing the citation of unpublished opinions as legal authority creates the perception that "non-publication is a rug under which judges sweep whatever they wish never to see the light of day." Edwin R. Render, *On Unpublished Opinions*, 73 Ky. L. J. 145, 164 (1984) [hereinafter Render, *On Unpublished Opinions*]; *see also* David S. Tatel, *Some Thoughts on Unpublished Decisions*, 64 Geo. Wash. L. Rev. 815, 818 (1996) (allowing citation of all court opinions increases public confidence in the courts, "eliminating any basis for believing that the court is dispensing second-class justice to some parties").

California's widely denounced depublication rule has been similarly criticized on the basis "that the public's expectation of justice fairly and consistently dispensed will be undermined by 'hidden' decisions, and that judicial accountability will be rendered impossible by the suppression of the tangible evidence of judges' work." Philip L. Dubois, *The Negative Side of Judicial Decision Making: Depublication as a Tool of Judicial Power and Administration on State Courts of Last Resort*, 33 Vill. L. Rev. 469, 476 (1988). Moreover, "depublication has become part of 'a process of covert substantive review which allows [a] supreme court to dispose of an objectionable interpretation of law without having to risk the exposure involved in hearing a case and reversing it on reasoned basis." *Id.* at 478 (cleaned up). For this Court to take it upon itself to decide an already published opinion of the Court of Appeals

will have no precedential value actually illustrates the problem of covert substantive review.

Further indication that the procedure used in this case is unwise is found in the fact that the question of when an appellate court opinion should become precedential has been the subject of extensive scholarly examination for many years. In 1973, the Advisory Council on Appellate Justice of the Federal Judicial Center, in collaboration with the National Center for State Courts, assembled a group of lawyers, law professors, and judges to study state and federal appellate systems in the United States. *See* Advisory Couns. on App. Just., Comm. on Use of App. Ct. Energies, *Standards for Publication of Judicial Opinions* (1973). In its model rule developed after extensive study of the practices of state and federal appellate courts across the country, the judges who decide the case are to consider the question of whether to publish the opinion and thereby make it binding precedent, based on clear and well-established criteria applied equally to every case. According to those model rules, the highest court in the state may order any unpublished opinion of the intermediate court to be published, but the reverse is not contemplated. *Id.* app. 1 at 22. No one recommends this as a good idea, only a handful of other states do it, and it has the effect of taking away from the intermediate court that heard the case the power to set precedent.

The Court's action in this case gave the parties no opportunity to be heard on the question of whether the opinion should have precedential effect, even though as currently drafted the Rules of Appellate Procedure do give litigants the opportunity to make a motion in the Court of Appeals and thereby be heard if they believe an opinion designed by the panel as "unpublished" should be published. *See* N.C. R. App. P. 30(e)(4). The Court's order is inconsistent with the spirit and purpose of the current rules in this regard.

Legal scholars and judges have questioned the constitutionality of issuing appellate opinions that are unpublished and therefore of no precedential value, particularly on legal issues otherwise not the subject of controlling authority. *See*, *e.g.*, Elizabeth Earle Beske, *Rethinking the Nonprecedential Opinion*, 65 UCLA L. Rev. 808 (2018) (arguing that the U.S. Supreme Court's retroactivity jurisprudence of *Harper v. Virginia Board of Taxation* and *Griffith v. Kentucky* "require[s] that any case's new rule apply not only to future litigants but also to those whose cases are pending"); Johanna S. Schiavoni, *Who's Afraid of Precedent?: The Debate Over the Precedential Value of Unpublished Opinions*, 49 UCLA L. Rev. 1859 (2002) (explaining the argument that the U.S. Constitution requires that decisions of appellate courts have

precedential effect).[2] An Eighth Circuit opinion concluding that it was unconstitutional for a court to fail to apply a prior decision was rooted in an examination of the intent of the Framers of the U.S. Constitution and what they understood to be the nature of judicial power. *See Anastasoff v. United States*, 223 F.3d 898, 901 (8th Cir.) (rule that states unpublished opinions are not precedent is unconstitutional under Article III), *vacated as moot*, 235 F.3d 1054 (2000); *see also United States v. Goldman*, 228 F.3d 942 (8th Cir. 2000).

In 2006, the Federal Rules of Appellate Procedure were amended to provide that a court of appeals may not prohibit a party from citing an unpublished opinion of a federal court for its persuasive value or for any other reason. *See* Fed. R. App. P. 32.1(a). The Committee Notes to the Rule further explain that "under Rule 32.1(a), a court may not place any restriction on the citation of such opinions. For example, a court may not instruct parties that the citation of unpublished opinions is discouraged, nor may a court forbid parties to cite unpublished opinions when a published opinion addresses the same issue." Fed. R. App. P. 32.1(a), notes of advisory committee on rules (2006). In part, this is a recognition of the fact that general principles of equal justice under law and the widespread availability of court documents electronically make the artificial limitation on the precedential value of appellate court decisions potentially an illegitimate exercise of judicial power. *See generally* Gant, *Missing the Forest for a Tree*, 47 B.C. L. Rev. 705 (reviewing history of deliberations over the federal rule change to allow citation of all court opinions as precedent).

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2. *See also* Jessie Allen, *Just Words? The Effects of No-Citation Rules in Federal Courts of Appeals*, 29 Vt. L. Rev. 555, 574–91 (2005) (no-citation rules violate litigants' due process rights); David Greenwald & Frederick A. O. Schwarz, Jr., *The Censorial Judiciary*, 35 U.C. Davis L. Rev. 1133, 1161–66 (2002) (no-citation rules violate the First Amendment guarantees of free speech and the right to petition); Daniel N. Hoffman, *Publicity and the Judicial Power*, 3 J. App. Prac. & Process 343, 347–52 (2001) (no-citation rules violate Article III); Salem M. Katsh & Alex V. Chachkes, *Constitutionality of "No-Citation" Rules*, 3 J. App. Prac. & Process 287, 315–23 (2001) (no-citation rules violate separation of powers because they are not within courts' Article III powers); Jon A. Strongman, Comment, *Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value Is Unconstitutional*, 50 U. Kan. L. Rev. 195, 211–22 (2001) (no-citation rules violate procedural due process and equal protection under the Fifth Amendment); Marla Brooke Tusk, Note, *No-Citations Rules as a Prior Restraint on Attorney Speech*, 103 Colum. L. Rev. 1202, 1221–34 (2003) (no-citation rules violate the First Amendment's rule against prior restraints). The scholarly literature on unpublished opinions, non-precedential opinions, and no-citation rules is extensive. *See, e.g.*, Gant, *Missing the Forest for a Tree* at 706 n.5 (collecting citations); Coleen M. Barer, *Preface: Anastasoff, Unpublished Opinions, and "No-Citation Rules"*, 3 J. App. Prac. & Process 169 (2001) (surveying cases).

Similarly, in 2007, in amending its Rules of the Supreme Court and Court of Appeals upon recommendation of the Arkansas Supreme Court's Committee on Civil Practice and after general public notice and comment, the Arkansas Supreme Court concluded that published and unpublished opinions alike constitutionally should have precedential effect. *See In re Ark. Rules of Civ. Proc.*, 2007 Ark. LEXIS 332 (2007); Ark. R. Sup. Ct. R. 5-2(c).

I believe that we should not suddenly decide that a Court of Appeals opinion designed as one that has precedential value by that court cannot be binding precedent without careful consideration and input from stakeholders concerning the implications of this action for our system of justice. We should continue our institutional deference to the Court of Appeals' expertise in determining which of its own opinions should have precedential effect, should the practice of non-precedential opinions continue.

II. Discretionary Review Improvidently Allowed

The majority has chosen to simultaneously rule on the merits by leaving the Court of Appeals decision in place, yet usurp the role of the Court of Appeals to determine the precedential value of its own opinions by ruling that the Court of Appeals opinion in this case has no precedential value. Our use of the DRIA disposition should be rare. As Justice Harlan wrote over sixty years ago, once a case "ha[s] been taken" it should be "consider[ed] . . . on their merits." *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 521, 559 (1957) (Harlan, J., concurring in part and dissenting in part). In part this is because once a court votes on a petition and meets the threshold of votes required to take the case, allowing the objecting Justices to subsequently vote to dismiss the petition would render a court's procedures meaningless. Joan Maisel Leiman, *The Rule of Four*, 57 Colum. L. Rev. 975, 976 (1957). The use of DRIA also amounts to a waste of money, energy, and time. *Id.* In normal circumstances, litigants must assume their case could be dismissed based on newly revealed factors between the time the petition for discretionary review was allowed and the case was decided. But no such intervening events occurred here. In this case, Mr. Molé was given an "empty hearing" and forced to put forth "futile effort" to prove the merits of his case despite this Court never actually reaching them. *See id.* at 989. This raises questions of fundamental fairness.

Traditionally, DRIA's limited use as a disposition has been tied to issues regarding (1) a court's lack of jurisdiction when it first agrees to hear a case, *Forsyth v. City of Hammond*, 166 U.S. 506, 511 (1897)

(stating the question of jurisdiction is always open); (2) cases where after agreeing to hear the case the question presented becomes moot, *Texas Consol. Theatres Inc. v. Pittman*, 305 U.S. 3, 4 (1938); (3) cases where no relief is sought by or against the petitioner, *Penfield Co. of Cal. v. Sec. and Exch. Comm'n*, 330 U.S. 585, 589 (1947); or (4) when the petition raises a question that was not actually raised or determined below, *McCullough v. Kammerer Corp.*, 323 U.S. 327, 328–29 (1945). More recently, the United States Supreme Court has also used DRIA when a party " 'cho[o]se[s] to rely on a different argument' in their merits briefing" than the one provided in their petition for writ of certiorari. *Visa, Inc. v. Osborn*, 137 S. Ct. 289–90, 289 (2016) (mem.) ("After having persuaded us to grant certiorari on this issue, however, petitioners chose to rely on a different argument in their merits briefing. The Court, therefore, orders that the writs in these cases be dismissed as improvidently granted." (cleaned up)).

To be sure, none of these reasons apply to Mr. Molé's case. This Court allowed Mr. Molé's petition for discretionary review because it met our criteria under N.C.G.S. § 7A-31, which gives the Court authority to allow a case if "[t]he subject matter of the appeal has significant public interest," the case "involves legal principles of major significance to the jurisprudence of the State," or the Court of Appeals decision "appears likely to be in conflict with a decision of [our Court]." N.C.G.S. § 7A-31(c) (2021). This case is also not moot, and the petitioner, Mr. Molé, is seeking relief. *See In re A.K.*, 360 N.C. 449, 452 (2006) ("When a legal controversy between opposing parties ceases to exist, the case is generally rendered moot and is no longer justiciable."). There is also no "bait and switch" present, as Mr. Molé provided the same arguments in his brief as he presented in his petition for discretionary review. The only thing that has changed since having allowed Mr. Molé's petition in March of last year is the political composition of this Court.

Choosing to use DRIA as a mechanism to avoid ruling on a case, in conjunction with designating the Court of Appeals' published decision in that same case as without precedential value can be detrimental whenever it is used. However, in cases where the Court of Appeals explores issues of "significant public interest," issues that are "significan[t] to the jurisprudence of the State," or issues opinions "likely to be in conflict" with our precedent, use of these procedures are exceedingly harmful. *See* N.C.G.S. § 7A-31. Because this Court chose to allow Mr. Molé's petition for discretionary review, this Court believed one or more of these principles existed. Mr. Molé's case did not involve a strict application of our precedent. Instead, the Court of Appeals explained that a "strict

reading" of *Tully v. City of Wilmington*, 370 N.C. 527 (2018), would have foreclosed Mr. Molé's claim and limited claims arising under *Tully* to the "employment promotional process." *Molé v. City of Durham*, 279 N.C. App. 583, 588 (2021). Furthermore, on Mr. Molé's equal protection claim, the Court of Appeals noted it was bound by precedent and "urged" this Court to provide guidance on the resolution of Mr. Molé's class-of-one Equal Protection Clause claim. *Id.* at 598.

Accordingly, providing a ruling in this case would have allowed this Court to, *inter alia*, affirm or reverse the Court of Appeals on these issues. Under Mr. Molé's Fruit of One's Labor Clause claim, choosing to affirm would have granted workers in North Carolina greater protections by confirming that claims like Mr. Molé's could be brought under that section of our Constitution. *See id.* at 590. Under Mr. Molé's class-of-one Equal Protection Clause claim, this Court could have confirmed again that our Equal Protection Clause grants North Carolinians greater protection than the U.S. Constitution. *See State v. Carter*, 322 N.C. 709, 713 (1988) ("Even were the two provisions identical, we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the U.S. Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision."); *see also Stephenson v. Bartlett*, 355 N.C. 354, 381 n.6 (2002); *Holmes v. Moore*, 383 N.C. 171, 179 (2022) ("North Carolina's guarantee of equal protection has also been held to be more expansive than the federal right.").

On any issue, this Court could have also chosen to reject Mr. Molé's claims on the merits. By reaching the merits of Mr. Molé's claims and issuing an opinion, the parties would receive an explanation of why their claim was successful or failed, and future litigants would have a foundation from which to bring or defend any subsequent claims. More generally, this Court's opinions also provide the citizens of this state with guidance on the types of relief available to them, and in this case could alert workers to applicable protections.

Rather than carry out its duty to the citizens of this state, the majority in this instance has shirked its responsibility to be the final arbiter of the North Carolina Constitution, *Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 610 (1983), and to determine whether a lower court has committed an error of law. *See State v. Brooks*, 337 N.C. 132, 149 (1994) ("After there has been a determination by the Court of Appeals, review by this Court, whether by appeal of right or discretionary review, is to determine whether there is any error of law in the decision of the Court of Appeals[.]"). In more ways than one, this Court has chosen to "sweep"

this case under the rug never to be seen again without so much as an explanation. *See* Render, *On Unpublished Opinions* at 164.

The rule of law exists to curb the arbitrary exercise of power. *See The Federalist No. 15* (Alexander Hamilton) (explaining that laws are instituted "[b]ecause the passions of men will not conform to the dictates of reason and justice, without constraint"). Our justice system is protected by "rules that are known today and can be enforced tomorrow." *See* Thomas M. Reavley, *The Rule of Law for Judges*, 30 Pepp. L. Rev. 79 (2002). If rules are uncertain, our justice system will be affected. *Id.* The majority's use of DRIA and its designation of the Court of Appeals opinion as without precedential value both subvert the rule of law by creating uncertainty. This is precisely the type of exercise of arbitrary power the rule of law should guard against. In this instance, the use of the DRIA disposition deprives the parties, the attorneys who represented them, those who filed amicus briefs in support of one party's position, and the people of North Carolina collectively of these protections. Furthermore, taking from the Court of Appeals the ability to decide which of its opinions have precedential value without otherwise disturbing anything in the opinion is a disingenuous sleight of hand and a dangerous threat to the fair application of the laws to all citizens. Therefore, I dissent.

Justice MORGAN joins in this dissenting opinion.

DAVID SCHAEFFER
v.
SINGLECARE HOLDINGS, LLC, SINGLECARE SERVICES, LLC,
RXSENSE HOLDINGS, LLC, RICHARD A. BATES, AND DARCEY SCHOENEBECK

No. 321PA21

Filed 6 April 2023

1. Jurisdiction—personal—specific—nonresident corporation—resident employee terminated—entire relationship considered

In a suit brought by a former employee after he was terminated, nonresident corporate defendants were subject to personal jurisdiction in North Carolina because they purposefully availed themselves of the privileges of conducting business-related activities in this State and those activities arose from or were related to plaintiff's claims. Although defendants initiated the employment relationship with plaintiff in California where plaintiff was then living, defendants established minimum contacts with North Carolina to survive constitutional analysis through multiple voluntary and intentional acts, including subsequently approving of and assisting in plaintiff's move to North Carolina, communicating with and supporting plaintiff as he expanded defendants' business in North Carolina, employing at least three other individuals in this state, serving North Carolina consumers by offering discounts for pharmacy benefits at retail locations throughout the state and, ultimately, terminating plaintiff's employment when he was a North Carolina resident.

2. Jurisdiction—personal—specific—nonresident corporate officers—resident employee terminated—insufficient contacts

In a suit brought by a former employee after he was terminated, in which he sued both his corporate employer and two individual defendants who worked for the corporation (neither of whom lived in North Carolina), plaintiff did not establish sufficient minimum contacts between the individual defendants and the state of North Carolina to subject them to personal jurisdiction in this state, and his complaint lacked specific allegations that the individual defendants were the primary participants in the alleged wrongdoing that gave rise to the suit.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, No. COA20-427, 2021 WL 2426202 (N.C. Ct. App. June 15, 2021), reversing an order

entered on 22 November 2019 by Judge Susan Bray in Superior Court, Orange County. Heard in the Supreme Court on 7 February 2023.

Kornbluth Ginsberg Law Group, P.A., by Joseph E. Hjelt and Michael A. Kornbluth, for plaintiff-appellant.

Julia C. Ambrose, Charles B. Leuin, pro hac vice, and Mark S. Eisen for defendant-appellee.

Sam McGhee, Lauren O. Newton, Jennifer D. Spyker, and David G. Schiller for North Carolina Advocates for Justice, amicus curiae.

EARLS, Justice.

It is axiomatic that "where individuals 'purposefully derive benefit' from their interstate activities . . . it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473–74 (1985) (quoting *Kulko v. Cal. Super. Ct.*, 436 U.S. 84, 96 (1978)). But when a defendant's conduct in a forum is not so robust as to give rise to general jurisdiction, to conclude that the defendant has "purposefully derive[d] benefit from their interstate activities," the defendant must have "purposefully directed his activities at residents of the forum . . . and the litigation [must] result[ ] from alleged injuries that arise out of or relate to those activities." *Id.* at 472–73 (cleaned up).

At its heart, this case presents the question of which of a defendant's activities matter. Defendants here—both corporate entities and individuals—take the position that, in evaluating which forums' courts may exercise specific jurisdiction with respect to claims arising from an alleged breach of an employment agreement, only activities that occurred prior to or at the time of the execution of the relevant agreements bear on the analysis. However, such a position would require a court to turn a blind eye to activities a defendant conducts in a new forum after agreements are negotiated and executed. Because this position would "allow [defendants] to escape having to account in other States for consequences" that arise from their own intentional conduct, we decline to adopt this unduly narrow approach to specific jurisdiction. *Id.* at 474. Determining whether specific jurisdiction exists does not—and has never—required a court to treat a discrete, temporally-limited set of events as dispositive to the exclusion of all other activities that occur throughout the evolution of a relationship. Instead, we consider *all* of Defendants' activities,

including those that occurred after the employment agreements were executed, and hold that Corporate Defendants intentionally reached out to North Carolina to conduct business activities in the state, and the claims at issue in this litigation arise from or are related to those activities. *See Beem USA Ltd.-Liab. Ltd. P'ship v. Grax Consulting LLC*, 373 N.C. 297, 307 (2020) (rejecting Business Court's specific jurisdiction analysis as "requir[ing] too strict a temporal connection between" the defendant's forum-directed contacts and the plaintiffs' claims).

I. Factual Background

Plaintiff David Schaeffer, a North Carolina resident, brought this action against defendants SingleCare Holdings, LLC; SingleCare Services, LLC; RxSense Holdings, LLC, Darcey Schoenebeck, and Richard A. Bates (collectively, Defendants). SingleCare Holdings, SingleCare Services, and RxSense (Corporate Defendants) are Delaware limited liability companies with their principal offices in Massachusetts. Schoenebeck and Bates (Individual Defendants) are citizens and residents of Minnesota and Massachusetts, respectively. Corporate Defendants provide pharmacy benefit management and medical benefit management services. Bates is the Chief Executive Officer of each of the Corporate Defendants and Schoenebeck is the Executive Vice President of Business Development for SingleCare services.

Schaeffer was jointly employed by SingleCare and RxSense as the Senior Vice President of Business Development for SingleCare from 1 May 2017 until his termination on 22 October 2018. On 13 June 2019, Schaeffer brought this action against Defendants, alleging various tort and contract claims arising from his termination. Specifically, Schaeffer alleged that Defendants revoked fully vested shares that they promised Schaeffer during employment negotiations to incentivize him to accept his position. Schaeffer argues that he accepted the business development position based on Defendants' promises that he would be granted equity in SingleCare, a promise that Defendants reiterated throughout employment negotiations and during Schaeffer's employment.

Schaeffer lived in California during contract negotiations with Defendants and for the first several months of his employment. In 2018, he sought approval from Defendants to move to North Carolina, where he would continue to carry out his duties remotely.[1] According to Schaeffer, Defendants not only approved his request to move to North Carolina but helped facilitate his move. For example, Defendant

1. Schaeffer also worked remotely during the period of his employment when he was living in California.

Schoenebeck sent a letter to Schaeffer's North Carolina-based mortgage lender to confirm his authorization to work remotely.

After Schaeffer's move, he alleges that he "substantially performed [his work duties] in North Carolina." In his brief to this Court, he explains that he "made efforts to expand and further the Corporate Defendants' business in North Carolina," received reimbursements for work-related travel to and from North Carolina and for other expenses associated with his work in the state, and engaged in regular communications from North Carolina to carry out his sales duties. As a result of these activities, he argues that "Corporate Defendants derived revenue from services rendered . . . in his capacity as Senior Vice President on their behalf in North Carolina."

While Schaeffer was employed by Corporate Defendants and living in North Carolina, Corporate Defendants maintained other connections to the state. For example, they employed at least three other individuals in North Carolina, solicited applicants for business development positions in various cities within the state through LinkedIn posts that highlighted SingleCare's goal of hiring sales representatives in "all major U.S. cities," and provided North Carolina consumers with pharmacy discounts. Corporate Defendants also paid Schaeffer in North Carolina, paid state taxes based on his employment, and mailed tax documents to his North Carolina address.

Schaeffer was officially terminated from his position on 22 October 2018. On 13 June 2019, he brought an action against Defendants, alleging fraud, misrepresentation, and breach of contract, among other claims. On 19 August 2020, Defendants filed Rule 12(b)(6) and Rule 12(b)(2) motions to dismiss. *See* N.C.G.S. § 1A-1, Rule 12(b)(2) and Rule 12(b)(6) (2021). Relevant here, the Rule 12(b)(2) motion argued that the trial court lacked personal jurisdiction over Defendants for nine of Schaeffer's ten claims.[2] The trial court denied the motions, and Defendants timely appealed the denial of the Rule 12(b)(2) motion.

The Court of Appeals unanimously reversed the trial court's denial of Defendants' Rule 12(b)(2) motion in an unpublished opinion issued on 15 June 2021 and denied Schaeffer's subsequent Petition for Rehearing. The Court of Appeals concluded that Schaeffer's contacts with North Carolina that were relevant to the suit were the result of his own unilateral actions and explained that "Defendants' acquiescence

2. The Rule 12(b)(2) motion challenged jurisdiction only as to the first nine counts of the complaint.

with Plaintiff's move to North Carolina, and subsequent communications with Defendant in North Carolina, do not create personal jurisdiction." *Schaeffer v. SingleCare Holdings LLC*, No. COA20-427, 2021 WL 2426202, at *4 (N.C. Ct. App. June 15, 2021). The court recognized that some of Corporate Defendants' contacts with North Carolina weighed in favor of finding specific jurisdiction, including Corporate Defendants' solicitation of business and services, recruitment of employees, and operation of a third-party administrator in the state. *Schaeffer*, 2021 WL 2426202, at *4. Nonetheless, the Court of Appeals concluded that these activities "alone [were] not sufficient to establish specific jurisdiction" and held that Schaeffer's claims "[did] not arise out of, or even relate to, the alleged contacts between Defendants and North Carolina." *Schaeffer*, 2021 WL 2426202, at *5.

II. Analysis

A. Standard of Review

"When the parties have submitted affidavits and other documentary evidence, a trial court reviewing a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2) must determine whether the plaintiff has established that jurisdiction exists by a preponderance of the evidence." *State ex rel. Stein v. E. I. du Pont de Nemours & Co.*, 382 N.C. 549, 555 (2022). "As an appellate court, we consider whether the trial court's determination regarding personal jurisdiction is supported by competent evidence in the record." *Id.* at 556.

B. Legal Standard

It is well established that "whether a nonresident defendant is subject to personal jurisdiction in this State's courts involves a two-step analysis." *Id.* at 556. First, North Carolina's long-arm statute, N.C.G.S. § 1-75.4, must authorize a court to exercise jurisdiction. *See Beem USA Ltd.-Liab. Ltd. P'ship*, 373 N.C. at 302; N.C.G.S. § 1-75.4 (2021). This statute "make[s] available to the North Carolina courts the full jurisdictional powers permissible under federal due process." *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 676 (1977). Thus, the second step in the inquiry addresses the determinative issue: whether the Fourteenth Amendment's Due Process Clause permits a state court to exercise jurisdiction over a defendant. *See Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021).

Due process permits a state's courts to exercise jurisdiction over an out-of-state defendant when the defendant has "certain minimum contacts with [the forum state] such that the maintenance of the suit

does not offend traditional notions of fair play and substantial justice." *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (cleaned up). Minimum contacts are established through "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Beem USA Ltd.-Liab. Ltd. P'ship*, 373 N.C. at 303 (quoting *Skinner v. Preferred Credit*, 361 N.C. 114, 133 (2006)). "In giving content to that formulation, the [U.S. Supreme] Court has long focused on the nature and extent of 'the defendant's relationship to the forum State.' " *Ford Motor Co.*, 141 S. Ct. at 1024 (quoting *Bristol-Myers Squibb Co. v. Super. Ct. of Cal., San Francisco Cty.*, 582 U.S. 255, 262 (2017)). To demonstrate this relationship, "the plaintiff has the burden of proving that the defendant deliberately 'reached out beyond' its home—by, for example, 'exploit[ing] a market' in the forum State or entering a contractual relationship centered there." *Mucha v. Wagner*, 378 N.C. 167, 171 (2021) (alteration in original) (quoting *Ford Motor Co.*, 141 S. Ct. at 1025).

Minimum contacts may give rise to one of two forms of jurisdiction: general or specific jurisdiction. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). General jurisdiction requires that a defendant's "affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Id.* (quoting *Int'l Shoe*, 326 U.S. at 317). When a defendant's conduct in a state is not so extensive, however, jurisdiction may still be proper if "the litigation results from the alleged injuries that arise out of or relate to the defendant's activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (cleaned up). Jurisdiction that is based on this relationship is known as specific jurisdiction. Because Schaeffer asserts only that the trial court has specific jurisdiction over Defendants, our analysis is limited to this kind of personal jurisdiction.

"Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice." *Id.* at 476 (cleaned up). These factors are:

> 'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.'

Id. at 477 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

The purpose of the Due Process Clause's limitations on personal jurisdiction is to "treat[ ] defendants fairly," *Ford Motor Co.*, 141 S. Ct. at 1025, by providing them with "fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign," allowing them to "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King Corp.*, 471 U.S. at 472 (cleaned up) (first quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977); then quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 297).

C. Discussion

Applying this framework to the facts of this case, we conclude that specific jurisdiction exists over Corporate Defendants because they purposefully availed themselves of the privileges of conducting various business-related activities in North Carolina, and Schaeffer's claims arise out of or are related to those activities.[3] We further conclude that exercising jurisdiction in this case is constitutionally reasonable.

The same cannot be said for Individual Defendants, however, because Schaeffer's evidence fails to demonstrate that their conduct directed at North Carolina was sufficient to permit the trial court to exercise specific jurisdiction over them in this litigation.

1. Corporate Defendants

[1] Schaeffer urges that Defendants' suit-related activities in North Carolina are sufficient to enable the trial court to exercise specific jurisdiction in this litigation. But in Defendants' view, which was adopted by the Court of Appeals, Schaeffer's decision to move was his own unilateral choice, and "Defendants' acquiescence with Plaintiff's move to North Carolina, and subsequent communications with Defendant in North Carolina, do not create personal jurisdiction." *Schaeffer*, 2021 WL 2426202, at *4.

Defendants contend that the only relevant activities that give rise to Plaintiff's claims, such as the contract negotiations that took place between Schaeffer and Defendants and the execution of Schaeffer's employment-related agreements, occurred in another forum, and

3. Note that we do not address the separate question of whether any Defendants have consented to jurisdiction in this case or whether registering to do business in North Carolina is a valid basis for personal jurisdiction under the Fourteenth Amendment.

"SingleCare's contacts with Schaeffer *after* he moved to North Carolina have no bearing on the analysis." In short, Defendants argue that they did not voluntarily reach out to North Carolina to conduct suit-related activities here. Further, Defendants argue that their "contacts with North Carolina are limited and entirely unrelated to the claims at hand," meaning the activities "do not support jurisdiction . . . in North Carolina for *all employment-related suits*." But Defendants' position on both points ignores the import of Corporate Defendants' voluntary conduct in North Carolina in response to and following Schaeffer's move and misstates the character of Corporate Defendants' other North Carolina-directed activities.

First, we address whether Corporate Defendants purposefully availed themselves of the privileges of conducting business-related activities in North Carolina. It is true that the "unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984). Defendants assert that "SingleCare *did not* reach out to a citizen of North Carolina" because Defendants recruited Schaeffer and initiated his employment when he was a resident of California and "Schaeffer unilaterally moved to North Carolina" prior to his termination. But there is no legal basis for hinging the whole of the analysis on the forum in which the relationship was established (*i.e.* California) to the exclusion of the forum in which Corporate Defendants perpetuated the relationship.

Corporate Defendants emphasize the idea that "SingleCare created a . . . relationship with Schaeffer well *before* he moved to North Carolina" or "before SingleCare even knew Schaeffer would move to North Carolina." In Defendants' view then, there seems to be only *one* forum in which specific jurisdiction might exist—the forum in which the relationship was established. Under this approach, so long as Schaeffer's move was his own decision, there are very few subsequent activities Corporate Defendants could conduct in a new forum that would allow the new forum's courts to exercise jurisdiction over the claims at issue here. For example, Defendants could continue to employ Schaeffer in North Carolina for the next twenty years. Shaeffer could continue to grow Defendants' business in the state, and representatives of the company could visit him regularly to oversee his work. But because Defendants initially "reach[ed] out" to Schaeffer when he was a resident of California, none of those details would matter, even if Schaeffer's presence and work in North Carolina far exceeded any of his

activities in California. Though the forum in which a contractual relationship began is certainly relevant in determining where jurisdiction is proper, it is not the only event that is pertinent to this analysis.

Indeed, the U.S. Supreme Court "long ago rejected the notion that personal jurisdiction might turn on 'mechanical' tests or on 'conceptualistic theories of the place of contracting or of performance.' " *Burger King Corp.*, 471 U.S. at 478–79 (cleaned up) (first quoting *Int'l Shoe Co.*, 326 U.S. at 319; then quoting *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 316 (1943)). And though "prior negotiations" and "contemplated future consequences" are relevant "in determining whether the defendant purposefully established minimum contacts with the forum," so too is "the parties' actual course of dealing." *Id.* at 479.

Burger King demonstrates that the purposeful availment inquiry is a "flexible" one. *Universal Leather, LLC v. Koro AR, S.A.*, 773 F.3d 553, 560 (4th Cir. 2014). As the Fourth Circuit has recognized, it "depends on a number of factors" that should be considered "on a case-by-case basis." *Id.* Relevant here,

> [i]n the business context, those factors include, *but are not limited to*, an evaluation of: (1) whether the defendant maintains offices or agents in the forum state; (2) whether the defendant owns property in the forum state; (3) whether the defendant reached into the forum state to solicit or initiate business; (4) whether the defendant deliberately engaged in significant or long-term business activities in the forum state; (5) whether the parties contractually agreed that the law of the forum state would govern disputes; (6) whether the defendant made in-person contact with the resident of the forum in the forum state regarding the business relationship; (7) the nature, quality and extent of the parties' communications about the business being transacted; and (8) whether the performance of contractual duties was to occur within the forum.

Id. (emphasis added) (cleaned up). Defendants would have us forgo this flexible analysis and establish a rigid, per se rule that touches on few of these factors. Such an approach ignores decades of case law from both this Court and the U.S. Supreme Court that evaluates a range of activities to determine whether a defendant intentionally reached out to the forum state, and it would subvert the purpose of the protections

afforded by personal jurisdiction doctrine. *See, e.g.*, *Burger King Corp.*, 471 U.S. at 479–82; *World-Wide Volkswagen Corp.*, 444 U.S. at 295–98; *Int'l Shoe Co.*, 326 U.S. at 319–20; *Mucha*, 378 N.C. at 172–73; *Beem USA Ltd-Liab. Ltd. P'shp*, 373 N.C. at 306; *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 367 (1986).

Rather, as described above, to determine whether personal jurisdiction exists, we examine the totality of the circumstances that this case presents. In response to Schaeffer's decision to move, Corporate Defendants purposefully availed themselves of the privilege of conducting business in North Carolina, voluntarily engaging in a wide range of activities within the state.

The crux of the purposeful availment analysis is whether a defendant " 'reached out beyond' its home—by, for example, 'exploit[ing] a market' in the forum State or entering a contractual relationship centered there." *Ford Motor Co.*, 141 S. Ct. at 1025 (quoting *Walden v. Fiore*, 571 U.S. 277, 285 (2014)). The contacts cannot simply be "random, isolated, or fortuitous[,]" *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 774 (1984), and they must be such that the defendant has "fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign." *Burger King Corp.*, 471 U.S. at 472 (cleaned up). In short, the defendant's contacts with the forum state must be voluntary, and it must be foreseeable that the defendant could be hailed to court in that particular forum as a consequence.

Here, Defendants first approved Schaeffer's request to move to North Carolina where he would continue to carry out his work remotely. After approving Schaeffer's request to move, Schaeffer explains in his brief that Defendants "helped him purchase a house in North Carolina" by sending a letter to his "North Carolina mortgage lender in order to facilitate [his] move to the state." These activities are not, without more, enough to conclude that Corporate Defendants purposefully availed themselves of the North Carolina market. But they demonstrate that Corporate Defendants supported the transition, which becomes more significant in light of their subsequent North Carolina-targeted activities.

Once Schaeffer moved to North Carolina, Corporate Defendants paid state taxes based upon his work here, mailed tax documents to his North Carolina address, and paid him in the state. Defendants communicated frequently with Schaeffer through phone calls and emails as part of his employment and reimbursed him for expenses he incurred as a result of working in North Carolina, including for travel to and from the state and office maintenance costs. Based on business directives

Defendants issued, Schaeffer argues that "[he] furthered Defendants' pharmacy benefit management business and pharmaceutical benefit card services in North Carolina, which were targeted at North Carolina businesses and residents." For example, as part of his North Carolina-focused work and operating under the instructions of Defendants, Schaeffer sold services related to a third-party administrator—Towers Administrators LLC—that is both licensed in North Carolina and wholly owned by Corporate Defendants.[4] Due to his efforts, "Corporate Defendants derived revenue from services rendered by Schaeffer in his capacity as Senior Vice President on their behalf in North Carolina." Finally, Corporate Defendants terminated Schaeffer with the knowledge that he was a North Carolina-based employee.

These actions demonstrate that Corporate Defendants voluntarily and knowingly engaged with a North Carolina-based employee to support and expand his work in the state. Due to their own directives, Corporate Defendants reaped the business benefits of work that Schaeffer conducted in North Carolina. This work was, at least in part, targeted at the North Carolina market. Based on the extent of the communications and the various forms of support Corporate Defendants voluntarily provided Schaeffer to enable his work in North Carolina coupled with the profits and other benefits Corporate Defendants expected to gain as a result of that support, Corporate Defendants' activities in North Carolina were also sufficient to provide them with ample notice that they may be subject to suit in the state.[5]

On top of its activities in North Carolina as a result of employing Schaeffer, Corporate Defendants voluntarily conduct many other activities in the state that would fairly put them on notice of the possibility that litigation might arise in the forum. Corporate Defendants employed at least three other individuals in North Carolina, one of whom was a sales representative, and solicited candidates from around the state for business development roles. Schaeffer argues that the positions Corporate Defendants advertised in North Carolina "shared the same underlying goal and responsibility held by Schaeffer: to 'help drive growth' in

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4. Towers Administrators LLC holds itself out as "SingleCare Administrators" and is described on SingleCare's website as its "licensed discount medical plan organization."

5. *See*, *e.g.*, *Burger King Corp.*, 471 U.S. at 473–74 ("[W]here individuals 'purposefully derive benefit' from their interstate activities . . . it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." (quoting *Kulko v. Cal. Super. Ct.*, 436 U.S. 84, 96 (1978))).

SingleCare." Further, SingleCare intentionally serves North Carolina consumers by providing them "with access to pharmacy discounts at retail locations across the state, including major grocery stores such as Harris Teeter, CVS, Walgreens, and Walmart."[6]

Schaeffer's claims further arise out of and are related to Corporate Defendants' activities in North Carolina. *See Ford Motor Co.*, 141 S. Ct. at 1026. Schaeffer's claims stem from an employment relationship that was partially carried out and allegedly breached in North Carolina. Though the alleged promises that are the basis for the claims were originally made in California, Schaeffer continued to act on Corporate Defendants' behalf in North Carolina based on those promises. The promises were then broken in North Carolina when Corporate Defendants reclaimed the shares they had allegedly granted Schaeffer, which is the event that gave rise to Schaeffer's claims. To be precise, the claims *arise from*, or were caused by, Corporate Defendants' revocation of the shares. *See id.* at 1026 (explaining that the "arise from" language in this standard "asks about causation").

Additionally, other activities conducted by Corporate Defendants are related to Schaeffer's claims. Corporate Defendants supported Schaeffer's employment-related needs and business efforts in North Carolina, directed Schaeffer to carry out certain activities directed at the North Carolina market on their behalf, and they terminated him when he was a North Carolina resident. It is one thing for Defendants to argue that these activities are not sufficient to conclude that Corporate Defendants *purposefully availed* themselves of the benefits of doing business in North Carolina so as to establish minimum contacts—an argument that we have already rejected—but there is simply no basis in law or logic to conclude that Schaeffer's claims are not *related* to these activities.

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6. In framing the California-directed activities as the only relevant events in the purposeful availment analysis, Defendants ignore their North Carolina-directed activities, brushing them off as irrelevant because they occurred after the employment relationship initially formed. As part of this error, Defendants muddle the distinction between the purposeful availment inquiry and the relatedness inquiry. For example, as part of their purposeful availment analysis, they assert that "[w]ithout soliciting a relationship with a North Carolina resident and the forum itself, there is no connection between the contracts at issue and this forum." At this point in the analysis, however, the task is to evaluate "the nature and extent of 'the defendant's relationship to the forum State.' " *Ford Motor Co.*, 141 S. Ct. at 1024 (quoting *Bristol-Myers Squibb Co.*, 582 U.S. at 262). Whether there is a connection between the at-issue contacts and North Carolina is a separate question that does not bear on whether the "quality and nature" of Corporate Defendants' contacts are sufficient to trigger specific jurisdiction. *Int'l Shoe Co.*, 326 U.S. at 319.

The U.S. Supreme Court's decision in *Ford Motor Co.* supports this result. *Ford Motor Co.* consolidated two product liability cases that arose after Ford-manufactured cars malfunctioned, injuring individuals in the cars when the vehicles crashed. 141 S. Ct. at 1023. The accidents occurred in the states where the suits were brought, the victims were residents of those states, and "Ford did substantial business in" both states. *Id.* at 1022. Ford sought to dismiss the suits for lack of personal jurisdiction, arguing that the state courts "had jurisdiction only if the company's conduct in the State had given rise to the plaintiff's claims. And that causal link existed . . . only if the company had designed, manufactured, or—most likely—sold in the State the particular vehicle involved in the accident." *Id.* at 1023. The U.S. Supreme Court rejected this argument, highlighting that jurisdiction can be established when a plaintiff's claims arise from or are related to a defendant's activities in the relevant forum. *Id.* at 1026. Applying this distinction, the Court held that the plaintiffs' claims were related to Ford's activities in their states, meaning the " 'relationship among the defendant, the forum[s], and the litigation'—[was] close enough to support specific jurisdiction." *Id.* at 1032 (first alteration in original) (quoting *Walden*, 571 U.S. at 284).

Applying *Ford Motor Co.* to the facts of this case, just as jurisdiction there was not limited "to where the car was designed, manufactured, or first sold," 141 S. Ct. at 1028, jurisdiction here is not limited to where Schaeffer was first recruited or where his contract was negotiated and executed. In *Ford Motor Co.*, the Court recognized that "Ford sold the specific products [that malfunctioned] in other states," but it explained that the plaintiffs' claims were related to Ford's activities anyway because "the plaintiffs [were] residents of the forum States. They used the allegedly defective products in the forum States. And they suffered injuries when those products malfunctioned in the forum States." *Id.* at 1031. Here, Schaeffer was a resident of North Carolina, he carried out his employment obligations in North Carolina based on both directives from Corporate Defendants and promises Corporate Defendants allegedly made to him, and he claims he suffered an injury in North Carolina when Corporate Defendants allegedly broke those promises. There is a clear connection between Corporate Defendants' activities in North Carolina—some of which were conducted by Corporate Defendants themselves to accommodate and support Shaeffer's remote work in North Carolina while others were conducted by Schaeffer at Corporate Defendants' behest for their own benefit—and Schaeffer's claims in this litigation. This conclusion "is faithful to the United States Supreme Court's characterization of specific jurisdiction as being based on 'case-linked' contacts." *Beem USA Ltd.-Liab. Ltd. P'ship*, 373 N.C. at 307.

To distort this straightforward analysis, Defendants again frame their recruitment of Schaeffer and execution of his employment-related agreements—activities that were completed in California—as their only relevant activities with respect to Schaeffer's claims. Through this narrow lens, Defendants assert that "Schaeffer seeks to relitigate alleged representations made to him, and agreements entered into, in California, and that have nothing whatsoever to do with North Carolina or [Defendants'] alleged North Carolina contacts. The only connection between the claims at issue and this forum is Schaeffer's unilateral decision to relocate to North Carolina." This contention mischaracterizes Corporate Defendants' activities in North Carolina as described above, and incorrectly focuses on a limited set of events during the parties' relationship to the exclusion of other relevant considerations. As discussed, conduct that occurred in North Carolina following the formation of the relationship between Schaeffer and Corporate Defendants is pertinent to this analysis as well.

Not only have Defendants purposefully established minimum contacts in North Carolina that arise out of and are related to Schaeffer's claims, but personal jurisdiction is also constitutionally reasonable in that "the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' " *Burger King Corp.*, 471 U.S. at 476 (quoting *Int'l Shoe Co.*, 326 U.S. at 320). Most significantly, Corporate Defendants already independently conduct extensive activities in North Carolina apart from any activities they conducted in the state that were related to Schaeffer. What is more, Defendants have not challenged the trial court's jurisdiction as to one of Schaeffer's claims, so they are already subject to litigation in North Carolina in this very matter. As a result, there is virtually no burden on Corporate Defendants in litigating the additional claims in this state. Further, litigating all of the claims against Corporate Defendants in North Carolina preserves judicial resources, thereby promoting the interstate judicial system's interest in obtaining an efficient resolution of the case by consolidating the claims within a single court. Finally, contrary to the Court of Appeals' conclusion that "North Carolina has minimal interest in a contract negotiated outside of this State, formed between non-resident parties, and substantially performed outside of this State," *Schaeffer*, 2021 WL 2426202, at *5, North Carolina has a " 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 367 (citing *Burger King Corp.*, 471 U.S. at 473). All told, Corporate Defendants have established "minimum contacts with [North Carolina] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co.*, 326 U.S. at 316 (cleaned up).

2. Individual Defendants

[2] Importantly, foreign corporate officers, directors, or representatives are not subjected to jurisdiction simply because their employer-corporation is subject to suit in a particular forum. *See Calder v. Jones*, 465 U.S. 783, 790 (1984) ("Petitioners['] . . . contacts with California are not to be judged according to their employer's activities there."); *see also Robbins v. Ingham*, 179 N.C. App. 764, 771 (2006) (" '[P]laintiffs may not assert jurisdiction over a corporate agent without some affirmative act committed in his individual *official* capacity.' ") (emphasis added) (quoting *Godwin v. Walls*, 118 N.C. App. 341, 348, *disc. review allowed*, 341 N.C. 419 (1995)). Imputing a corporation's contacts to individuals employed by the corporation would ignore that specific jurisdiction turns on "the relationship between the *defendant*, the forum, and the litigation." *Mucha v. Wagner*, 378 N.C. 167, 174 (2021) (emphasis added) (cleaned up). Nevertheless, we do not conclude that any foreign corporate representative acting solely within their official capacity is shielded from jurisdiction, as such a blanket rule would itself risk ignoring the forum-directed activities of the individual defendant. But "more than mere participation in the affairs of the corporation is required." *King v. Prodea Sys., Inc.*, 433 F. Supp. 3d 7, 16 (D. Mass. 2019) (cleaned up). We instead conduct the same minimum contacts test for Individual Defendants as we have for Corporate Defendants. With respect to the relatedness inquiry, one particularly relevant consideration is whether Individual Defendants were "primary participants in the alleged wrongdoing intentionally directed at a [North Carolina] resident." *Calder*, 465 at 790.

Schaeffer's pleadings and affidavit do not provide a factual basis to conclude that Individual Defendants themselves engaged in sufficient activities giving rise to or related to the subject matter of the claims to be subjected to jurisdiction in North Carolina courts. Though Schaeffer's affidavit alleges, among other minor activities, that Defendant Schoenebeck "participated in [his] termination" and "[he] believes that" he was terminated "at the direction of Defendant Bates," Schaeffer does not make sufficiently specific allegations regarding the North Carolina-directed activities Individual Defendants themselves engaged in or the connection between those activities and his claims, such as by alleging their individual roles in bringing about the injuries he suffered. For example, while it might be the case that Defendant Schoenebeck *participated* in his termination, she may have had nothing to do with the decision to terminate him and did not necessarily know that his shares were being revoked. Without more, these general allegations

are insufficient to conclude that the exercise of personal jurisdiction is appropriate as to Individual Defendants.

III. Conclusion

Personal jurisdiction doctrine has necessarily evolved over time to account for "the fundamental transformation of our national economy." *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 704 (1974). "Today[,] many commercial transactions touch two or more States and may involve parties separated by the full continent." *Id.* In the same vein, as technological innovation flourishes, remote work has become increasingly common. In the face of these advances, courts must balance the importance of a foreign defendant's "liberty interest in not being subject to the binding judgments of a forum in which he has established no meaningful contacts, ties, or relations," with the reality that such contacts are more easily and more widely cultivated today. *See Burger King Corp.*, 471 U.S. at 471–72 (cleaned up). Indeed, "because modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity, it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity." *Id.* at 473–74 (cleaned up).

Though our rapidly changing world has perhaps made it easier to hold foreign defendants to account for alleged wrongdoings in a variety of forums, our decision today breaks no new ground. It simply analyzes the whole of Schaeffer's relationship with Defendants, rather than focusing only on a narrow and discrete set of events. Because Corporate Defendants purposefully availed themselves of the privileges of conducting various business-related activities in North Carolina and those activities arise from or relate to Schaeffer's claims in this litigation, we hold that the trial court may exercise personal jurisdiction over Corporate Defendants pursuant to the Due Process Clause. Accordingly, we reverse the Court of Appeals decision in this case as to Corporate Defendants, affirm its decision with respect to Individual Defendants, and remand to the trial court for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART.

STATE OF NORTH CAROLINA
v.
RAYQUAN JAMAL BORUM

No. 505PA20

Filed 6 April 2023

Homicide—second-degree murder—malice—jury verdict—sentencing

In defendant's trial for second-degree murder, where the jury indicated on the verdict sheet its finding that all three forms of malice supported defendant's conviction—actual malice (a B1 felony), "condition of mind" malice (a B1 felony), and "depraved-heart" malice (a B2 felony)—the trial court properly imposed a B1 felony sentence (which is more severe than a B2 felony sentence). There was no ambiguity in the jury's verdict, which the trial court reviewed and confirmed with the jury, and the relevant statute, N.C.G.S. § 14-17(b), was unambiguous that a Class B2 sentence is required only when a second-degree murder conviction hinges on a finding of depraved-heart malice.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, No. COA19-1022, 2020 WL 6437413 (N.C. Ct. App. Nov. 3, 2020), vacating a judgment entered on 8 March 2019 by Judge Gregory R. Hayes in Superior Court, Mecklenburg County, and remanding for resentencing. This matter was calendared for argument in the Supreme Court on 7 February 2023 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Joshua H. Stein, Attorney General, by Caden William Hayes, Assistant Attorney General, for the State-appellant.

Meghan Adelle Jones for defendant-appellee.

EARLS, Justice.

This case requires us to determine whether, under all of the circumstances, the jury's verdict at trial was ambiguous as to what kind of malice supported the second-degree murder charge.

"Before 2012[,] all second-degree murders were classified at the same level [of severity] for sentencing purposes." *State v. Arrington*,

371 U.S. 518, 522 (2018). In 2012, however, the legislature amended North Carolina's murder statute to classify second-degree murders according to varying degrees of severity based on the level of culpability with which an offender acted. *See* Act of June 28, 2012, S.L. 2012-165, § 1, 2011 N.C. Sess. Laws (Reg. Sess. 2012) 781. Consequently, under the amended statute, most kinds of second-degree murder are classified at the Class B1 felony level. N.C.G.S. § 14-17(b) (2021). But when it is determined that a criminal defendant acted with depraved-heart malice, meaning the individual engaged in "an inherently dangerous act or omission, done in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief," second-degree murder is classified as a Class B2 felony. N.C.G.S. § 14-17(b)(1).

Defendant Rayquan Jamal Borum was convicted of second-degree murder in March 2019. The jury indicated on the verdict sheet that Mr. Borum acted with depraved-heart malice in addition to the two other forms of malice recognized in North Carolina, and the trial court sentenced him for a Class B1 felony. This appeal concerns whether Mr. Borum should have been sentenced at the lower B2 felony level, given the jury's conclusion that he acted, in part, with depraved-heart malice. Based on our precedents which establish that whether a verdict is unambiguous depends on all of the circumstances present in a case, including the indictment, the evidence, and the instructions of the trial court, *see State v. Abraham*, 338 N.C. 315, 356 (1994), we hold that under the circumstances of this particular case, the jury's completed verdict form was not ambiguous and the trial court properly sentenced Mr. Borum at the Class B1 level.

I. Background

On 21 September 2016, Mr. Borum shot and killed Justin Carr during a protest of the shooting of Keith Lamont Scott. At the time of the incident, witnesses heard a gunshot and subsequently saw Mr. Borum holding a gun before he ran away from the crowd. Witnesses then observed Mr. Carr lying on the ground in a pool of blood. Mr. Carr died the next day. Mr. Borum was indicted for Mr. Carr's murder on 3 October 2016. He was charged with first-degree murder and possession of a firearm by a felon.

Mr. Borum was tried before a jury beginning on 11 February 2019 in the Superior Court, Mecklenburg County, before the Honorable Gregory R. Hayes. During the jury charge conference, the court explained the three theories of malice that could support a murder conviction: actual malice, "condition of mind" malice, and "depraved-heart" malice. The

trial court provided the jury with a special verdict form to identify which theories of malice it found, if any. The verdict form again defined each form of malice and instructed the jury, "IF YOU FIND THE DEFENDANT GUILTY OF SECOND DEGREE MURDER YOU MUST UNANIMOUSLY FIND ONE OR MORE [FORMS OF MALICE] BELOW."

The jury found Mr. Borum guilty of possession of a firearm by a felon and second-degree murder. On the verdict sheet, the jury found that all three forms of malice supported the conviction. Upon reading the verdict in open court, the trial court confirmed with the jury that it was a unanimous verdict.

At sentencing, the State asserted that Mr. Borum should be sentenced for a Class B1 felony, given that the jury found that he acted with actual malice and condition of mind malice. In response, defense counsel argued that Mr. Borum should instead be sentenced in the lower Class B2 range. According to the defense, there was a possibility "that the verdict sheet [was] inconsistent with the actual sentence" because the jury found Mr. Borum acted with not just actual and condition of mind malice but also depraved-heart malice. When a verdict sheet indicates the latter form of malice, the defense argued, second-degree murder should be treated as a Class B2 felony to avoid a verdict that is inconsistent with the verdict sheet.

The trial court rejected the defense's argument and sentenced Mr. Borum to 276 to 344 months in prison for the Class B1 second-degree murder conviction and 14 to 26 months for the possession of a firearm by a felon conviction. The sentences were to be served consecutively, and he was credited with just over two years of time served during pretrial confinement. The defense entered notice of appeal.

Mr. Borum raised several arguments in the Court of Appeals. Relevant here, he argued that the trial court erred by sentencing him for a Class B1 felony rather than a Class B2 felony based on ambiguity in the jury's verdict. *State v. Borum*, No. COA19-1022, 2020 WL 6437413, at *7–9 (N.C. Ct. App. Nov. 3, 2020). The Court of Appeals agreed and remanded the case for resentencing at the Class B2 level, reasoning that "[t]he State presented evidence tending to show multiple malice theories. As in *Mosley*, evidence presented could support a Class B1 or Class B2 level felony. Also, as in *Mosley*, the jury's verdict was ambiguous because the theories supported different levels of felonies." *Borum*, 2020 WL 6437413, at *8; *see State v. Mosley*, 256 N.C. App. 148 (2017). The Court of Appeals concluded that because the jury's verdict was ambiguous and that "[c]onsistent with [the court's] holding in *Mosley*,

ambiguities in the verdict should be construed in favor of Defendant." *Borum*, 2020 WL 6437413, at *9. The State petitioned this case for discretionary review, arguing that the Court of Appeals erred in remanding Mr. Borum's case for resentencing on the second-degree murder conviction as a Class B2 felony. This Court allowed the State's petition for discretionary review on 9 February 2022.

II. Analysis

In order to prove that a criminal defendant committed second-degree murder, one of the essential elements the State must prove is malice. *See Arrington*, 371 N.C. at 518 ("Second-degree murder is defined as (1) the unlawful killing, (2) of another human being, (3) *with malice*, but (4) without premeditation and deliberation." (cleaned up) (emphasis added)). In North Carolina, there are three forms of malice: (1) "actual malice, meaning hatred, ill-will or spite;" (2) "that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification," or condition of mind malice; and (3) "an inherently dangerous act done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief," or depraved-heart malice. *Id.* (cleaned up).

Mr. Borum's position that he should have been sentenced for a Class B2 felony is based on N.C.G.S. § 14-17(b)(1). Under subsection 14-17(b), second-degree murder is generally a Class B1 felony. However, where "[t]he malice necessary to prove second degree murder [was] based on an inherently dangerous act or omission, done in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief," second-degree murder is considered a Class B2 felony. N.C.G.S. § 14-17(b) (2021).[1] In practice, this means that "the crime of second-degree murder has two potential classifications, B1 and B2, depending on the facts of the murder," *Arrington*, 371 N.C. at 522, and a defendant who is convicted of second-degree murder and is found to have acted with depraved-heart malice has committed an offense in a lower felony class than a defendant who is found to have acted with one of the other two types of malice.

Relying on subsection 14-17(b)(1), Mr. Borum argues that because the jury found that he acted with all three kinds of malice, including depraved-heart malice, "[u]nder the plain language of Section 14-17(b),

1. Subsection 14-17(b)(2) provides another exception to the Class B1 sentencing requirement when "[t]he murder is one that was proximately caused by the unlawful distribution of [certain illegal substances]." N.C.G.S. § 14-17(b)(2) (2021).

the trial court should have sentenced Mr. Borum for second-degree murder as a Class B2 felony." According to Mr. Borum's interpretation of subsection 14-17(b), "a Class B1 sentence is appropriate only where there are *no facts* . . . that give rise to a Class B2 sentence." Mr. Borum also argues that the jury's verdict was ambiguous. We disagree and hold that when, as here, the jury's verdict unambiguously supports a second-degree murder conviction based on actual malice or condition of mind malice, a Class B1 sentence is required, even when depraved-heart malice is also found.

Given all of the circumstances of this case, the jury's verdict convicting Mr. Borum of second-degree murder was not ambiguous. "A verdict may be given significance and a proper interpretation by reference to the indictment, the evidence, and the instructions of the court." *State v. Hampton*, 294 N.C. 242, 248 (1978); *see also State v. Tilley*, 272 N.C. 408, 416 (1968) ("A verdict, apparently ambiguous, may be given significance and correctly interpreted by reference to the allegations, the facts in evidence, and the instructions of the court." (cleaned up)). While any ambiguity in the verdict is to be construed in favor of the defendant, *Mosley*, 256 N.C. App. at 153, there can be circumstances "[w]hen the indictment, the evidence and the charge are reasonably considered in connection with the verdict returned, it is clear that the jury intended to find, and did find, defendant guilty," *Hampton*, 294 N.C. at 248.

Here, the trial court instructed the jury on the different forms of malice and provided a verdict form that both required the jury to specifically select which forms of malice supported a second-degree murder conviction and explicitly stated that the jury must unanimously find that Mr. Borum acted with the type(s) of malice indicated on the form. After the jury returned a verdict form finding that Mr. Borum acted with all three kinds of malice, the trial court reviewed the verdict with the jury, confirming that it was the jurors' unanimous verdict. These facts demonstrate that the jury understood its responsibility to unanimously determine each form of malice that supported the second-degree murder conviction, and the trial court took steps to ensure that this task was completed properly.

In support of his contention that the jury's verdict was ambiguous, Mr. Borum relies on the Court of Appeals' decision in *State v. Mosley*, 256 N.C. App. 148 (2017). In *Mosley*, the State charged the defendant with murder and during his trial, introduced evidence supporting that the defendant acted with all three forms of malice. *Id.* at 149–50. Prior to jury deliberations, the trial court provided the jury with a general verdict form, meaning the jury did not have a way to specifically indicate which

type of malice supported a second-degree murder conviction. *Id.* at 149, 152–53. The jury ultimately found the defendant guilty of second-degree murder, and the trial court subsequently sentenced him for a Class B1 felony. *Id.* at 149–50.

The Court of Appeals vacated the judgment and remanded for sentencing as a Class B2 felony based largely on the trial court's provision of a general verdict form to the jury.[2] *Id.* at 153. The general verdict form raised the possibility that the jury only found that the defendant acted with depraved-heart malice, which would require that he be sentenced at the B2 level. As the Court of Appeals explained, "[b]ecause there was evidence presented which would have supported a verdict on second degree murder on more than one theory of malice, and because those theories support different levels of punishment under . . . [N.C.G.S.] § 14-17(b), the verdict rendered in [*Mosley*] was ambiguous." *Id.* Based on the principle that "neither the [Court of Appeals] nor the trial court [wa]s free to speculate as to the basis of [the] jury's verdict," the court concluded that "the verdict should be construed in favor of the defendant." *Id.*; *see also State v. Goodman*, 298 N.C. 1, 16 (1979) ("If the jury's verdict were general, not specifying the theory upon which guilt was found, the court would have no way of knowing what theory the jury used and would not have proper basis for passing judgment."). Mr. Borum argues that *Mosley* is persuasive here because the special verdict sheet the jury received in this case did not differentiate between the Class B1 and Class B2 offenses by including the term "OR" between the different levels of second-degree murder like "it did between first and second-degree murder."

Mosley was correctly decided based on the circumstances presented in that case. However, the trial court in this case submitted a different verdict form that did allow the jury to indicate specifically which form of malice it was finding to have been proven beyond a reasonable doubt. Here, the jury was repeatedly instructed on the different forms of malice, and through a special verdict form, the jury explicitly found that all three forms of malice were present, including the types of malice that require a Class B1 felony sentence. There is no uncertainty regarding whether the jury's verdict was based only on a single form of malice that requires a lower level of punishment (*i.e.*, depraved-heart malice) or the two other forms that require a higher level of punishment.

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2. Additionally, the Court of Appeals' decision was based on the fact that the trial court only described the different forms of malice when instructing on first-degree murder, rather than explaining the distinction while instructing on second-degree murder as well. *See Mosley*, 256 N.C. App. at 149, 153.

Thus, the concerns in *Mosley* that led the Court of Appeals to conclude that the jury's verdict was ambiguous are not implicated here.

Next, we must decide whether N.C.G.S. § 14-17(b) requires a Class B2 felony sentence for any second-degree murder conviction in which a jury finds that a criminal defendant acted with depraved-heart malice. According to Mr. Borum, "[N.C.G.S. §] 14-17(b) does not say that a Class B2 sentence shall be imposed when 'the malice to prove second-degree murder is *necessarily* based on depraved-heart malice.' " In his view, under N.C.G.S. § 14-17(b), "a Class B1 sentence is appropriate only where there are *no facts* . . . that give rise to a Class B2 sentence." This reading of the statute is untenably broad.

"The goal of statutory interpretation is to determine the meaning that the legislature intended upon the statute's enactment." *State v. Rankin*, 371 N.C. 885, 889 (2018). "The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *State v. Langley*, 371 N.C. 389, 395 (2018) (cleaned up). "The legislative purpose of a statute is first ascertained by examining the statute's plain language." *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144 (1992). "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209 (1990).

Subsection 14-17(b) states:

> Any person who commits second degree murder shall be punished as a Class B1 felon, except that a person who commits second degree murder shall be punished as a Class B2 felon in either of the following circumstances:
>
> (1) The malice necessary to prove second degree murder is based on an inherently dangerous act or omission, done in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.
>
> (2) The murder is one that was proximately caused by the unlawful distribution of any opium, opiate, or opioid; any synthetic or natural salt, compound, derivative, or preparation of opium, or opiate, or opioid; cocaine or other substance

> described in G.S. 90-90(1)d.; methamphetamine; or a depressant described in G.S. 90-92(a)(1), and the ingestion of such substance caused the death of the user.

N.C.G.S. § 14-17(b). Thus, the statute plainly expresses that a person convicted of second-degree murder is only sentenced as a Class B2 felon where the malice *necessary* to prove the murder conviction is depraved-heart malice. The term "necessary" is commonly understood as a condition "[t]hat is needed for some purpose or reason; essential." *Necessary*, Black's Law Dictionary (11th ed. 2019).

Contrary to Mr. Borum's interpretation, this means that a Class B2 sentence is only appropriate where a second-degree murder conviction hinges on the jury's finding of depraved-heart malice. Here, however, depraved-heart malice is not necessary—or essential—to prove Mr. Borum's conviction because the jury also found that Mr. Borum acted with the two other forms of malice. Put another way, in this case, the verdict does not stand or fall based on the jury's finding of depraved-heart malice. This interpretation is consistent with this Court's decision in *Arrington*, which explained that N.C.G.S. § 14-17(b) "distinguishes between second-degree murders that involve an intent to harm (actual malice or the intent to take a life without justification) versus the less culpable ones that involve recklessness[,]" namely depraved-heart malice. 371 N.C. at 524. As explained, the jury here found that the murder involved "an intent to harm," so the murder necessarily was not "less culpable." *See id.* The plain language of the statute is determinative and forecloses reference to other interpretive tools.

III. Conclusion

It is true that "[w]hen a verdict is ambiguous, neither we nor the [lower courts are] free to speculate as to the basis of a jury's verdict, and the verdict should be construed in favor of the defendant." *See Mosley*, 256 N.C. App. at 153; *see also State v. Whittington*, 318 N.C. 114, 123 (1986). But not only was the verdict against Mr. Borum unambiguous, the text of N.C.G.S. § 14-17(b)(1) is plain as well. We therefore reverse the Court of Appeals' decision below and hold that the trial court correctly sentenced Mr. Borum at the Class B1 felony level.

REVERSED.

STATE OF NORTH CAROLINA
v.
ANTIWUAN TYREZ CAMPBELL

No. 97A20-2

Filed 6 April 2023

Jury—selection—Batson challenge—prima facie case—limited record—ratio of excused jurors

In defendant's prosecution for first-degree murder, the trial court did not err by determining that defendant had failed to establish a prima facie case of racial discrimination during jury selection pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), where the State used three out of four peremptory strikes to excuse black potential jurors and defendant was unable on appeal to produce any additional facts or circumstances for consideration—due largely to defendant's specific request at trial that jury selection not be recorded. The single mathematical ratio, standing alone, was insufficient to show clear error in the trial court's determination. Finally, the Supreme Court did not consider the State's race-neutral explanation for its peremptory strikes—which the trial court had ordered the State to provide—because the trial court's *Batson* inquiry should have concluded with the court's determination that defendant had failed to make a prima facie showing and should not have moved to the second step.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 272 N.C. App. 554, 846 S.E.2d 804 (2020), finding no error in the trial court's determination that defendant failed to establish a prima facie case of purposeful discrimination during jury selection. On 15 December 2020, the Supreme Court allowed defendant's petition for discretionary review of additional issues. Heard in the Supreme Court on 8 February 2023.

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

Olivia Warren for defendant-appellant.

University of North Carolina School of Law, Clinical Programs Civil Rights Clinic, by Erika K. Wilson; and Tiffany R. Wright for North Carolina Black Lives Matter Activists, amici curiae.

Cassandra Stubbs, Elizabeth R. Cruikshank, Sarah H. Sloan, Daniel Rubens, and Easha Anand for the Roderick and Solange Macarthur Justice Center and the American Civil Liberties Union, amici curiae.

BERGER, Justice.

Defendant appeals from a decision of the Court of Appeals concluding that there was no error in the trial court's determination that defendant failed to establish a prima facie case of racial discrimination during jury selection pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986). We affirm.

I. Factual and Procedural Background

On April 15, 2015, defendant was indicted for first-degree murder and second-degree kidnapping. Defendant's matter came on for trial in the Superior Court, Columbus County, on July 24, 2017.

Defendant's counsel filed a series of motions at the outset of trial, including a motion for complete recordation. Notably, although defendant's counsel stated that this motion was "[j]ust for appeal purposes," defendant's counsel specified she was "not requesting that [recordation] include jury selection." The trial court granted defendant's motion; thus, no transcript of voir dire is available. The record in this matter, as it relates to voir dire, contains only the deputy clerk's jury panel sheet and a transcript of the proceedings after defendant made his *Batson* objection.[1]

In seating twelve jurors for defendant's trial, the jury panel sheet shows that two prospective jurors were excused for cause. In addition, defendant exercised three peremptory challenges to excuse prospective jurors Pamela Moore, Richard Fowler, and Brentwood Parker, while the State excused prospective jurors Timothy Coe and Sylvia Vereen with peremptory challenges. The record contains no evidence of objections by defendant at the time the State used these peremptory challenges.

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1. The record in this case is sufficient for appellate review due to the trial court's care in ensuring that exchanges between counsel and the trial court relevant to *Batson* were put on the record.

However, while selecting alternate jurors, the State exercised two peremptory challenges to excuse Justin Staton and Andria Holden. Defendant raised a *Batson* objection to the State's excusal of Ms. Holden, arguing that the State had used three of its four peremptory challenges to strike black prospective jurors and "ha[d] tried extremely hard for every African-American, to excuse them for cause." Defendant further contended that "the last two alternate jurors that were excused showed no leaning one way or the other or indicated that they would not be able to hear the evidence, apply the law, and render a verdict."

After hearing from defendant, the trial court allowed the State to respond. The State noted that although it had race-neutral reasons justifying each peremptory challenge, the trial court was first required to determine that defendant had made a prima facie showing under *Batson*. Defendant agreed that "it's a decision for the [c]ourt at this point." The trial court denied defendant's *Batson* challenge, concluding that defendant had failed to establish a prima facie case even though such a showing "is a very low hurdle."

After determining that defendant had failed to establish a prima facie case, the trial court again asked the State if it would like "to offer a racially-neutral basis" for its peremptory strikes. Because the State noted that offering race-neutral reasons "could be viewed as a stipulation that there was a prima facie showing," the State declined to offer its reasons for the strikes. The trial court again reiterated that "the [c]ourt has found at this point there's not a prima facie showing, and the [c]ourt will deny the *Batson* challenge."

After a short recess, the trial court repeated that it "d[id] not find that a prima facie case has been established," but nevertheless "order[ed] the State to proceed as to stating a racially-neutral basis for the exercise of the peremptory challenges."

As to the first prospective juror, Ms. Vereen, the State explained:

> [S]he had indicated that she was familiar with Clifton Davis and actually dated his brother, who is a potential witness, and a potential witness who was . . . alleged to have been in the vehicle with . . . defendant on the night of this encounter in those early morning hours.
>
> . . . .
>
> . . . [W]e used our peremptory strike based upon blood relation to the people in the area of that

> community, . . . defendant's blood relation to the people in the area of the Bennett Loop community, and Mr. Davis, his blood brother being the person she dated around the time period or within a few years of this happening, and her being familiar with Mr. Clifton Davis, who is a witness.

Regarding the challenge to Mr. Staton, the State explained:

> [He] made several conflicting statements during the State's questioning to try and ensure if he could be fair and impartial or not.
>
> . . . [H]e was familiar with [a primary witness to the murder and alleged kidnapping] . . . any concern he may have preconceived notions about who she was and these events, was one of the State's concerns.
>
> In addition, he stated he needed to hear from both sides . . . [h]e had flip-flopped back and forth or had stated he needed to hear from both sides, he could only hear from the State, he needed to hear from both sides.
>
> . . . [S]ince he had gone from having to hear both sides to only hearing one side, being the State, back and forth on multiple occasions, that was a concern.
>
> Also, he indicated that he had two friends, one who was transgender who was killed in Cumberland County, that friend, he indicated, those events, and the one in California for the girlfriend or female friend he had who had been killed. When the State asked whether that would substantially impair his ability to be fair and impartial as a juror in this case and a trier of fact being presented here for this particular case-in-chief, he indicated it would.

The State provided the following race-neutral reasons for the challenge to Ms. Holden:

> [S]he was familiar with . . . [people] that are on the potential witness list, they are blood relatives to [a primary witness to the murder and alleged kidnapping] . . . .

> And based upon her familiarity with those three names, which are related to the facts in this case and potential witnesses, we did not—from our viewpoint, we wanted to ensure that a potential juror did not bring in outside knowledge or facts into this case about those people they were familiar with and saw socially . . . .
>
> . . .
>
> [A]n additional reason for the peremptory strike . . . was the fact [that] when she was describing her political science background and nature as a student, she was also indicating that she was a participant, if not an organizer, for Black Lives Matter at her current college with her professor, and whether or not that would have any implied unstated issues that may arise due to either law enforcement, the State, or other concerns we may have.

Thereafter, the trial court stated that "the [c]ourt continues to find, as I've already indicated, that there has not been a prima facie showing as to purposeful discrimination." The trial court subsequently entered a written order denying defendant's *Batson* claim for failure to establish a prima facie showing:

> The [c]ourt, pursuant to the *Batson v. Kentucky* objection made by the [d]efense during jury selection, finds that there was not a prima facie showing made to establish any violations by the State for its exercise of [per]emptory challenges to prospective jurors. The [c]ourt noted that the State excused two jurors by using [its per]emptory challenges before sitting the initial twelve jurors. When the State sought to use a [per]emptory challenge on the second prospective alternate juror, after excusing the previous alternate juror, the [d]efense made a *Batson v. Kentucky* based objection. During the subsequent hearing the [c]ourt found that the [d]efense did not make a prima facie showing.
>
> NOW THEREFORE, IT IS ORDERED, that the [c]ourt finds that the State's use of [per]emptory challenges during jury selection did not constitute a violation of *Batson v. Kentucky*.

At the conclusion of trial, the jury found defendant guilty of first-degree murder and not guilty of second-degree kidnapping. Defendant was sentenced to life imprisonment without parole and timely appealed.

In the Court of Appeals, defendant argued that the trial court erred in concluding that he failed to establish a prima facie case of impermissible racial discrimination during jury selection. *State v. Campbell* (*Campbell I*), 269 N.C. App. 427, 838 S.E.2d 660 (2020). A majority of the Court of Appeals found no error. *Id.* at 435, 838 S.E.2d at 666. One judge dissented, contending that the case should be remanded to the trial court "for specific findings of fact in order to permit appellate review of the trial court's decision." *Id.* at 439, 838 S.E.2d at 668 (Hampson, J., concurring in part and dissenting in part).

Defendant subsequently petitioned this Court for a writ of certiorari, which we allowed to remand the case to the Court of Appeals for reconsideration in light of our decisions in *State v. Hobbs*, 374 N.C. 345, 841 S.E.2d 492 (2020) and *State v. Bennett*, 374 N.C. 579, 843 S.E.2d 222 (2020). On remand, a majority of the Court of Appeals once again found no error, and, once again, there was a dissent urging remand to the trial court for additional findings of fact. *State v. Campbell* (*Campbell II*), 272 N.C. App. 554, 846 S.E.2d 804 (2020). Defendant appealed from this decision based upon the dissent.

In addition, defendant filed a petition for discretionary review as to additional issues, which was allowed by this Court. Defendant argues that the Court of Appeals erred in holding that there was no error in the trial court's conclusion that he failed to establish a prima facie case of purposeful discrimination during jury selection.

II. Standard of Review

"[T]he job of enforcing *Batson* rests first and foremost with trial judges." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019). "[T]rial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." *Batson v. Kentucky*, 476 U.S. 79, 97, 106 S. Ct. 1712, 1723 (1986) (emphasis omitted); *see also United States v. Moore*, 895 F.2d 484, 486 (8th Cir. 1990) ("The trial judge, with his experience in voir dire, is in by far the best position to make the *Batson* prima facie case determination.").

Thus, when a trial court rules that a defendant has failed to demonstrate a prima facie case of discrimination, "[t]he trial court's ruling is accorded deference on review and will not be disturbed unless it is

clearly erroneous." *State v. Augustine*, 359 N.C. 709, 715, 616 S.E.2d 515, 522 (2005) (citing *State v. Nicholson*, 355 N.C. 1, 21–22, 558 S.E.2d 109, 125 (2002)); *see also Hernandez v. New York*, 500 U.S. 352, 366, 111 S. Ct. 1859, 1870 (1991) (plurality opinion) ("[I]n the absence of exceptional circumstances, we [sh]ould defer to [the trial] court['s] factual findings . . . ."); *Flowers*, 139 S. Ct. at 2244 (describing the "appellate standard of review of the trial court's factual determinations in a *Batson* hearing as highly deferential." (cleaned up)); *United States v. Stewart*, 65 F.3d 918, 923 (11th Cir. 1995) ("When we review the resolution of a *Batson* challenge, we give great deference to the [trial] court's finding as to the existence of a prima facie case.").

III. Analysis

A. *Batson* Claims

In selecting a jury, an attorney may exercise two different types of challenges against potential jurors. First, "attorneys may challenge prospective jurors for cause, which usually stems from a potential juror's conflicts of interest or inability to be impartial." *Flowers*, 139 S. Ct. at 2238. In criminal cases, the grounds supporting a challenge for cause are that the prospective juror:

> (1) Does not have the qualifications required by G.S. 9-3.
>
> (2) Is incapable by reason of mental or physical infirmity of rendering jury service.
>
> (3) Has been or is a party, a witness, a grand juror, a trial juror, or otherwise has participated in civil or criminal proceedings involving a transaction which relates to the charge against the defendant.
>
> (4) Has been or is a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution.
>
> (5) Is related by blood or marriage within the sixth degree to the defendant or the victim of the crime.
>
> (6) Has formed or expressed an opinion as to the guilt or innocence of the defendant. It is improper for a party to elicit whether the opinion formed is favorable or adverse to the defendant.

(7) Is presently charged with a felony.

(8) As a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina.

(9) For any other cause is unable to render a fair and impartial verdict.

N.C.G.S. § 15A-1212 (2021).

In addition, attorneys are afforded peremptory challenges which "may be used to remove any potential juror for any reason—no questions asked." *Flowers*, 139 S. Ct. at 2238. In noncapital cases, each party is permitted to use six peremptory challenges, and "[e]ach . . . is entitled to one peremptory challenge for each alternate juror in addition to any unused challenges." N.C.G.S. § 15A-1217(b)–(c) (2021).

However, the "Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder v. Louisiana*, 552 U.S. 472, 478, 128 S. Ct. 1203, 1208 (2008) (quoting *United States v. Vasquez–Lopez*, 22 F.3d 900, 902 (9th Cir. 1994)). An attorney's "privilege to strike individual jurors through peremptory challenges [ ] is subject to the commands of the Equal Protection Clause," *Batson*, 476 U.S. at 89, 106 S. Ct. at 1719, which forbids the striking of prospective jurors if "race was significant in determining who was challenged and who was not," *Miller-El v. Dretke*, 545 U.S. 231, 252, 125 S. Ct. 2317, 2332 (2005). Moreover, "Article I, Section 26 of the North Carolina Constitution likewise bars race-based peremptory challenges" and "[o]ur courts have adopted the *Batson* test for reviewing the validity of peremptory challenges under the North Carolina Constitution." *Nicholson*, 355 N.C. at 21, 558 S.E.2d at 124–25.

When a defendant raises a *Batson* objection, the trial court must engage in a three-step inquiry to evaluate the merits of the objection. First, the trial court must determine whether the defendant has met his or her burden of "establish[ing] a prima facie case that the peremptory challenge was exercised on the basis of race." *State v. Cummings*, 346 N.C. 291, 307–08, 488 S.E.2d 550, 560 (1997) (emphasis omitted) (citing *Hernandez*, 500 U.S. at 359, 111 S. Ct. at 1866). While "the first step [is not] to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts," *Johnson v. California*, 545 U.S. 162, 170, 125 S. Ct. 2410, 2417 (2005), "[t]he prima facie inquiry is a hurdle that preserves the traditional confidentiality of a lawyer's reason for

peremptory strikes unless good reason is adduced to invade it." *Sorto v. Herbert*, 497 F.3d 163, 170 (2d Cir. 2007) (emphasis omitted).

"[A] defendant c[an] make out a prima facie case of discriminatory jury selection by the totality of the relevant facts about a prosecutor's conduct during the defendant's own trial." *Miller-El*, 545 U.S. at 239, 125 S. Ct. at 2324 (cleaned up); *see also Higgins v. Cain*, 720 F.3d 255, 266 (5th Cir. 2013) (emphasis omitted) ("[P]roof of a prima facie case is fact-intensive, and '[i]n deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances.' " (second alteration in original) (quoting *Batson*, 476 U.S. at 96, 106 S. Ct. at 1723)). A defendant meets his or her burden at step one "by showing that the totality of the relevant facts gives rise to inference of discriminatory purpose." *Batson*, 476 U.S. at 94, 106 S. Ct. at 1721.

"In response to this initial challenge, the prosecutor may argue that the defendant has failed to establish [a] prima facie showing of discrimination." *State v. Clegg*, 380 N.C. 127, 146, 867 S.E.2d 885, 901 (2022). A "prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose." *Batson* at 97, 106 S. Ct. at 1723 (emphasis omitted).

In addition, "[o]ur prior cases have identified a number of factors" for a trial court to consider at the initial stage of a *Batson* inquiry, including, but not limited to, the race of the defendant, the race of the victim, the race of the key witnesses, repeated use of peremptory challenges demonstrating a pattern of strikes against black prospective jurors in the venire, disproportionate strikes against black prospective jurors in a single case, and the State's acceptance rate of black potential jurors. *State v. Hobbs*, 374 N.C. 345, 350, 841 S.E.2d 492, 497–98 (2020).

If the trial court finds that a defendant has met his or her burden at step one, then the trial court moves to the second step of the *Batson* inquiry where "the burden shifts to the prosecutor to offer a racially neutral explanation to rebut [the] defendant's prima facie case."[2] *Cummings*, 346 N.C. at 308, 488 S.E.2d at 560 (emphasis omitted) (citing *Hernandez*, 500 U.S. at 359, 111 S. Ct. at 1866). "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will

2. Courts may conclude that step one in a *Batson* inquiry is moot if race-neutral reasons are offered "before the trial court rules whether the defendant has made a prima facie showing," *State v. Hoffman*, 348 N.C. 548, 551, 500 S.E.2d 718, 721 (1998) (emphasis omitted). Although defendant argues that the Court of Appeals erred in concluding step one was not moot in this case, defendant abandoned this argument. *See* N.C. R. App. P. 16(b), 28(a).

be deemed race neutral." *Hernandez*, 500 U.S. at 360, 111 S. Ct. at 1866. Put another way, "*Batson*'s requirement of a race-neutral explanation means an explanation other than race." *Id.* at 374, 111 S. Ct. at 1874 (O'Connor, J., concurring). "[E]ven if the State produces only a frivolous or utterly nonsensical justification for its strike, the case does not end—it merely proceeds to step three." *Johnson*, 545 U.S. at 170–71, 125 S. Ct. at 2417.

Finally, at step three, the trial court must "determine the persuasiveness of the defendant's constitutional claim." *Hobbs*, 374 N.C. at 371, 841 S.E.2d at 498 (quoting *Johnson*, 545 U.S. 171, 125 S. Ct. at 2417–18). The "burden is, of course, on the defendant who alleges discriminatory selection of the venire to prove the existence of purposeful discrimination." *Batson*, 476 U.S. at 93, 106 S. Ct. at 1721 (cleaned up). "The ultimate inquiry is whether the State was motivated in substantial part by discriminatory intent." *Flowers*, 139 S. Ct. at 2244 (cleaned up). Thus, "[n]o matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race." *Hernandez*, 500 U.S. at 375, 111 S. Ct. at 1874 (O'Connor, J., concurring).

B. Discussion

Defendant argues that the Court of Appeals erred in affirming the trial court's determination that defendant failed to make a prima facie showing of purposeful discrimination.[3] Specifically, defendant contends that the State's use of three out of four of its peremptory strikes against black jurors was sufficient to establish a prima facie case.

Jury selection is typically not recorded by the court reporter in noncapital trials. N.C.G.S. § 15A-1241(a) (2021). However, voir dire must be recorded if requested by a party or the trial judge. N.C.G.S. § 15A-1241(b). Defendant here did not move for recordation of jury selection and specifically requested that jury selection not be recorded. Thus, the record before us does not contain the intimate details of the interaction between counsel and prospective jurors.[4]

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3. In this appeal, we do not address whether defendant established all of the elements of a successful *Batson* claim because, as defendant's counsel conceded at oral argument, this case "is a step one case." Oral Argument at 13:24, *State v. Campbell* (No. 97A20-2) (Feb. 8, 2023), https://www.youtube.com/watch?v=gxGNuMocyT0 (last visited Mar. 17, 2023).

4. This, perhaps, is another reason that great deference is given to our trial courts on *Batson* inquiries.

However, "[w]hen a party makes an objection to unrecorded statements or other conduct in the presence of the jury, upon motion of either party the judge must reconstruct for the record, as accurately as possible, the matter to which objection was made." N.C.G.S. § 15A-1241(c). One could argue that the trial court's order for the State to offer race-neutral reasons may have been an attempt to comply with this statute or to facilitate appellate review. Whatever the reason, the *Batson* inquiry should have concluded when the trial court first determined that defendant failed to make a prima facie showing.

The State appropriately objected to the trial court's attempt to move beyond step one. Where "the trial court clearly ruled there had been no prima facie showing . . . before the State articulated its reasons," this Court does "not consider whether the State offered proper, race-neutral reasons for its peremptory challenge." *State v. Hoffman*, 348 N.C. 548, 552, 500 S.E.2d 718, 721 (1998) (emphasis omitted). Accordingly, we do not consider at step one the State's *post facto* reply to the trial court's request for a step two response.

Thus, we review only the trial court's initial determination that defendant failed to make a prima facie showing of purposeful discrimination. *Id.* We do so by looking at the totality of the information in the record relevant to step one of a *Batson* inquiry, giving appropriate deference to the trial court's determination.

Here, the record shows that both defendant and the victim, as well as at least one key witness, were black; the State exercised two peremptory strikes during selection of the initial twelve jurors, one on a white prospective juror and one on a black prospective juror; and the State exercised two peremptory strikes during alternate juror selection, both on black prospective jurors.[5] Defendant has failed to produce any additional facts or circumstances for consideration.

Defendant argues that the State's exercise of three out of four peremptory strikes against black prospective jurors is sufficient to establish a prima facie case of purposeful discrimination. Specifically, defendant asserts that our opinion in *State v. Barden*, 356 N.C. 316, 572 S.E.2d 108 (2002) can be read to mean that a 71.4% strike rate—the corollary to a 28.6% acceptance rate—establishes a prima facie case,

5. We note that, when reviewing the totality of the relevant evidence, a trial court is not required to ignore statements made by prospective jurors which may provide a readily apparent and legitimate basis for the exercise of the peremptory strike. Here, however, no such information is available because voir dire was not recorded.

and that the 75% strike ratio in this case therefore compels reversal. Defendant's argument is without merit.

In *Barden*, this Court calculated the State's acceptance rate of black prospective jurors to be 28.6% and compared that rate to cases where this Court "held that a defendant had failed to establish a prima facie case of discrimination." *Barden*, 356 N.C. at 344, 572 S.E.2d at 128 (emphasis omitted). This Court recounted that defendants had previously failed to establish prima facie cases "where the minority acceptance rate was 66%, 50%, 40%, and 37.5%," but nevertheless held that although "the issue [wa]s a close one," the trial court erred in concluding the defendant failed to establish a prima facie case where the acceptance rate was 28.6%. *Id.* at 344–45, 572 S.E.2d at 128 (citations omitted).

While it is correct that this Court has stated that "a numerical analysis . . . can be useful in helping us and the trial court determine whether a prima facie case of discrimination has been established," such an analysis is not dispositive when reviewing the totality of the relevant facts available to a trial court. *Id.* at 344, 572 S.E.2d at 127 (emphasis omitted).

Reliance on a single mathematical ratio, standing alone in a cold record, is insufficient here. Not only would such an approach result in this Court "splitting hairs," *id.* at 344, 572 S.E.2d at 128, but it would also demand that we abandon all pretense of deference to the trial judge, who, "with his experience in voir dire, is in by far the best position to make the *Batson* prima facie case determination," *Moore*, 895 F.2d at 486.

Our decision in *Barden* was not an invitation for defendants to manufacture minimal records on appeal and force appellate courts to engage in a purely mathematical analysis.[6] We expressly reject defendant's suggested interpretation, as it would "remove[ ] the defendant's burden and eliminate[ ] the first step of *Batson*." *Bennett*, 374 N.C. at 616, 843 S.E.2d at 246 (Newby, J., dissenting).[7]

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6. It is also worth noting that defendant's reliance in *Barden* is further misplaced because defendant's argument conflates strike rates, acceptance rates, and strike ratios. The State's exercise of three of its four peremptory challenges on black prospective jurors yields a strike ratio of 75%. However, because the record that defendant presents to us does not disclose the total number of black prospective jurors in the pool of prospective jurors or the racial make-up of the jurors who were seated, this metric reveals nothing about the State's strike rate or acceptance rate.

7. As stated, we review a trial court's finding at step one to determine whether it was "clearly erroneous." *State v. Augustine*, 359 N.C. 709, 715, 616 S.E.2d 515, 522 (2005). Because *Batson* inquiries involve analysis of the totality of relevant circumstances, it is extremely unlikely that a single mathematical calculation will be sufficient for a defendant to demonstrate such clear error or compel an appellate court to abandon all deference to the trial court.

Finally, defendant argues the dissent below concluded that "this case requires more explanation and context for the trial court's determination [that] no prima facie showing had been made." *Campbell II*, 272 N.C. App. at 568, 846 S.E.2d at 813–14 (Hampson, J., concurring in part and dissenting in part). Specifically, defendant contends that the trial court failed to sufficiently explain its reasoning as required by our decision in *Hobbs* and that this Court should therefore "grant the limited remedy of remanding this case to the trial court for specific findings of fact in order to permit appellate review of the trial court's decision." *Id.* at 568, 846 S.E.2d at 814.

As the dissent below noted, in *Hobbs* this Court "was not addressing the prima facie inquiry," and it is therefore both factually and legally distinguishable from the present case. *Id.* at 567, 846 S.E.2d at 813 (citing *Hobbs*, 374 N.C. at 357–59, 841 S.E.2d at 502). In *Hobbs*, this Court reviewed the trial court's *Batson* ruling, but did not engage in a step one analysis because that portion of the inquiry was moot. *Hobbs*, 374 N.C. at 355, 841 S.E.2d at 500–01. The *Batson* review in *Hobbs* instead focused on steps two and three and the trial court's ultimate determination that the State's peremptory challenges were not based on race. *Id.* at 356, 841 S.E.2d at 501. Notably, the record in *Hobbs* included evidence regarding the racial composition of the venire and the acceptance and rejection rates of both white and black prospective jurors. *Id.* at 348, 841 S.E.2d at 496.

Here, unlike in *Hobbs*, we are concerned only with step one of the *Batson* inquiry. Defendant has provided no case law from this state or any other jurisdiction establishing that a trial court is required to enter extensive written factual findings in support of its determination that a defendant has failed to establish a prima facie case, and we decline to impose such a requirement.

IV. Conclusion

"An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court." *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 645 (1983) (quoting *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968)). Following this principle, the Court of Appeals concluded that "defendant has not shown us that the trial court erred in its finding that no prima facie showing had been made." *Campbell II*, 272 N.C. App. at 563–64, 846 S.E.2d at 811 (majority opinion) (emphasis omitted).

Based on a review of the record in this case and the arguments of the parties, we agree that defendant has failed to demonstrate that the

trial court's determination that defendant failed to prove a prima facie showing of racial discrimination was "clearly erroneous." *Augustine*, 359 N.C. at 715, 616 S.E.2d at 522. The decision of the Court of Appeals is affirmed.

AFFIRMED.

Justice EARLS dissenting.

Justice Marshall observed that "[m]isuse of the peremptory challenge to exclude black jurors has become both common and flagrant. Black defendants rarely have been able to compile statistics showing the extent of that practice, but the few cases setting out such figures are instructive." *Batson v. Kentucky*, 476 U.S. 79, 103 (1986) (Marshall, J., concurring). He went on to highlight cases from a variety of state and federal courts that shed some light on what was known at the time about the use of peremptory challenges to exclude potential Black jurors from being empaneled as a juror for a trial. Today, this Court returns to the practice of refusing to acknowledge what is in plain sight and turns a blind eye to evidence of racial discrimination in jury selection in this case by contorting the doctrine and turning the *Batson* test into an impossible hurdle. *Cf. State v. Clegg*, 380 N.C. 127, 170 (2022) (Earls, J., concurring) (demonstrating that from 1986 until 2022, this Court never reversed a conviction based on a *Batson* challenge to a prosecutor's use of a peremptory challenge).

As the majority explains, at the time that Mr. Campbell's defense counsel raised a *Batson* challenge during the second day of jury selection, the State had used three of its four total peremptory strikes to exclude African American jurors. The trial court denied the *Batson* objection, concluding that Mr. Campbell had failed to make a prima facie showing of discrimination under *Batson*'s Step 1, but it inquired whether, "out of an abundance of precaution," the State nevertheless "wish[ed] to offer a racially-neutral" reason for its peremptory challenges. The State declined, explaining it had "reasons [it] could attribute, but . . . if [it were to] give the race-neutral reasons[,]" that "could be viewed as a stipulation there was a *prima facie* showing." The trial court accepted this explanation and noted, "again, the [c]ourt has found at this point there's not a *prima facie* showing, and the [c]ourt will deny the *Batson* challenge."

Later that day, however, the trial court explained that "upon further reflection, although I do not find that a prima facie case has been

established for discrimination pursuant to *Batson*, in my discretion, I am still going to order the State to . . . stat[e] a racially-neutral basis for the exercise of the peremptory challenges in regards to" the challenged jurors. The State then offered its reasons for the peremptory strikes, including that one of the jurors was "a participant, if not an organizer, for Black Lives Matter at her current college."

The majority admonishes that "the *Batson* inquiry should have concluded when the trial court first determined that defendant failed to make a prima facie showing." But the inquiry did not stop there. Instead, the trial court ordered the State to share its race-neutral justifications for its peremptory challenges, which is exactly what would have been required under Step 2 of *Batson*. But because the trial court already rejected Mr. Campbell's *Batson* challenge, concluding that he did not make a prima facie showing of discrimination under Step 1, the majority "do[es] not consider at step one the State's *post facto* reply to the trial court's request for a step two response."

This Court has addressed similar circumstances before. For example, in *State v. Smith*, 351 N.C. 251 (2000), the trial court rejected the defendant's *Batson* challenge, but the court permitted the State to explain its race-neutral reasons for the record. *Id.* at 262. This Court held that "[w]here the trial court rules that a defendant has failed to make a *prima facie* showing, . . . [appellate] review is limited to whether the trial court erred in finding that defendant failed to make a *prima facie* showing, even if the State offers reasons for its exercise of the peremptory challenges." *Id.*

Similarly, in *State v. Williams*, 343 N.C. 345 (1996), after the trial court denied the defendant's *Batson* challenge, it granted the defendant's request that the State provide its reasons for its peremptory challenges for the record. *Id.* at 357. This Court explained that when the State provides its reasons for juror challenges prior to the trial court's ruling on whether a prima facie case has been established "or if the trial court requires the prosecutor to give his reasons without ruling on the question of a *prima facie* showing, the question of whether the defendant has made a *prima facie* showing becomes moot," and the trial court must proceed to Step 3 of the *Batson* analysis. *Id.* at 359. But the Court explained that this "rule d[id] not apply in [*Williams*] because the trial court made a ruling that defendant failed to make a *prima facie* showing before the prosecutor articulated his reasons for the peremptory challenges." *Id.* As such, the Court held that "review [was] limited to whether the trial court erred in finding that defendant failed to make a *prima facie* showing." *Id.*

Thus, in similar circumstances where a trial court rules that a prima facie showing has not been made and subsequently orders the State to provide its race-neutral reasons for the strikes or the State proffers these reasons voluntarily, this Court has held that the prima facie showing is not moot and appellate review is limited to whether the trial court's conclusion on Step 1 of the *Batson* analysis is correct. However, the facts of this case demonstrate the fundamental flaw in the reasoning of *Smith*, *Williams*, and the majority's decision here.

Imagine, for example, that when ordered to provide his race-neutral reasons for his peremptory challenges, the prosecutor in Mr. Campbell's case stated, among other reasons, that he struck one of the jurors because of her race. Once this plainly unconstitutional sentiment has been expressed, it could hardly be argued that the trial court is not obligated under *Batson* to consider the prosecutor's statements under Step 3 of the *Batson* analysis, regardless of whether the defendant initially failed to make a prima facie showing of racial discrimination. Such a result would be absurd in light of a blatant admission of racial discrimination. This means that when a prosecutor provides supposedly race-neutral reasons for peremptory challenges, the trial court has some obligation to consider the substance of those statements.

Indeed, when the prosecutor's "race-neutral" reasons are actually indicative of racial bias in jury selection, the prosecutor has himself stated precisely that which was the defendant's burden to demonstrate at *Batson* Step 1. The prosecutor's proffered reasons obviate the initial requirement that the defendant make a prima facie showing of discrimination. This is particularly true where, as here, the trial court *orders* the prosecutor to provide its race-neutral reasons. A court cannot on the one hand insist that the prima facie showing requirement from *Batson* Step 1 has not been met while, on the other hand, compel the State to provide race-neutral reasons for its jury strikes, precisely as a trial court would be required to do under *Batson* when the prima facie burden in Step 1 has been met. Feigning that the trial court's conduct in this case is materially different from a scenario in which the trial court actually proceeds to *Batson* Step 2, *or* prior to making a finding with respect to the defendant's prima facie showing, requires the State to provide its race-neutral reasons for its challenges, meaning that the defendant's prima facie burden has become moot, defies logic, and this Court should recognize as much.

"America's trial judges operate at the front lines of American justice. In criminal trials, trial judges possess the primary responsibility to enforce *Batson* and prevent racial discrimination from seeping into

the jury selection process." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019). Trial courts cannot be permitted to spurn this responsibility through hyper-technical constructions of *Batson* that lack common sense and are at odds with *Batson*'s central purpose of preventing racial discrimination in jury selection. *See Batson*, 476 U.S. at 85–87 (majority opinion).

This case also demonstrates Justice Marshall's prescient concern, expressed in his concurring opinion in *Batson*, that "[m]erely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge." *Batson*, 476 U.S. at 105 (Marshall, J., concurring).

In this case, the prosecutor's explanation for excluding an African American juror in part based on her involvement with Black Lives Matter, which was revealed only after the trial court ruled that Mr. Campbell failed to make a prima facie showing, could not have been known to Mr. Campbell when attempting to meet his burden during *Batson* Step 1. This excuse for excluding a juror is "just another [way of expressing] racial prejudice." *Batson*, 476 U.S. at 106.

It is a troubling and illogical proposition to assert that it is race-neutral for a prosecutor to excuse a Black woman as a prospective juror on the grounds that she cannot be unbiased due to her association with a predominately Black organization that brings to light "what it means to be [B]lack in this country" and "[p]rovide[s] hope and inspiration for collective action to build collective power to achieve collective transformation." Garrett Chase, *The Early History of the Black Lives Matter Movement, and the Implications Thereof*, 18 Nev. L.J. 1091, 1096 (2018) (quoting Jennings Brown, *One Year After Michael Brown: How a Hashtag Changed Social Protest*, Vocativ (Aug. 7, 2015, 5:41 PM), http://www.vocativ.com/218365/michael-brown-and-black-lives-matter). The majority's only way to overcome the natural force of this race-conscious rationale is to pretend it did not happen.

In contrast, in *Cooper v. State*, 432 P.3d 202 (Nev. 2018), the Supreme Court of Nevada held that a prosecutor's questions to potential jurors about whether they had strong opinions about Black Lives Matter were race-based. *Id.* at 206. The court expressed the "concern[ ] that by questioning a venire[ ]member's support for social justice movements with indisputable racial undertones, the person asking the question believes that a 'certain, cognizable racial group of jurors would be unable to be impartial, an assumption forbidden by the Equal Protection Clause.' " *Id.*

(quoting *Valdez v. People*, 966 P.2d 587, 595 (Colo. 1998)). As in *Cooper*, the prosecutor's reliance on the juror's Black Lives Matter involvement appears to have had "minimal relevance to the circumstances of this case." *Id.* But the trial court made no findings regarding the relevance of this stated reason to the State's case.

I would hold that the Step 1 requirement that Mr. Campbell demonstrate a prima facie case of discrimination was rendered moot when the trial court required the prosecution to explain its reasons for excluding the three Black jurors. At that point, the trial court needed to examine all of the evidence and the circumstances to assess whether the prosecutor's strikes were motivated in part by impermissible race-based considerations. I would accordingly vacate the decision of the Court of Appeals and remand to the trial court to make proper findings regarding whether the prosecutor's use of three of four peremptory challenges to excuse Black prospective jurors was in violation of *Batson* based on all of the evidence, including the prosecutor's proffered justifications. Therefore, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
CEDRIC THEODIS HOBBS, JR.

No. 263PA18-2

Filed 6 April 2023

Jury—selection—Batson challenge—third step of inquiry—juror comparison

The trial court did not clearly err in determining that defendant failed to prove, pursuant to the third step of the analysis set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986), that the State engaged in purposeful discrimination in peremptorily striking three black prospective jurors in defendant's trial for first-degree murder. The trial court properly considered numerous factors and its findings were supported by the evidence, including, among other things, that the case was not susceptible to racial discrimination; that a study relied upon by defendant regarding the history of prosecutors' use of peremptory strikes in the jurisdiction was misleading and potentially flawed; that a side-by-side comparison of the three excused black prospective jurors—whom the State had explained were excused based on their reservations about the death penalty, connections with mental health issues, connections with substance abuse issues, or criminal record—with similarly situated non-excused white jurors did not support a finding of purposeful discrimination; and that even if the juror comparisons supported a finding of discrimination, the totality of the remaining circumstances outweighed the probative value of the comparisons.

Justice EARLS dissenting.

Justice MORGAN joins in this dissenting opinion.

On appeal pursuant to the Supreme Court's decision in *State v. Hobbs*, 374 N.C. 345, 841 S.E.2d 492 (2020), after remand to the Superior Court, Cumberland County, for further proceedings. Heard in the Supreme Court on 8 February 2023.

Joshua H. Stein, Attorney General, by Jonathan P. Babb Sr., Special Deputy Attorney General, and Zachary K. Dunn, Assistant Attorney General, for the State-appellee.

Glenn Gerding, Appellate Defender, by Sterling Rozear, Assistant Appellate Defender, for defendant-appellant.

Elizabeth Simpson and Joseph Blocher for Social Scientists, amicus curiae.

NEWBY, Chief Justice.

In this case, applying the well-established standard of review, we must determine whether the trial court clearly erred in concluding there was no violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986). This case is before us for the second time after this Court remanded it to the trial court to conduct further proceedings under *Batson*. Specifically, this Court ordered the trial court to conduct a hearing under the third step of *Batson* and instructed it to consider specific factors in making its decision. *See State v. Hobbs* (*Hobbs I*), 374 N.C. 345, 360, 841 S.E.2d 492, 503–04 (2020). Thus, only the third step of *Batson* is at issue here. In reviewing the trial court's order, we apply the well-established standard of review which affords "great deference" to the trial court's determination unless it is clearly erroneous. *Id.* at 349, 841 S.E.2d at 497 (quoting *State v. Golphin*, 352 N.C. 364, 427, 533 S.E.2d 168, 211 (2000)). After reviewing the trial court's findings of fact and conducting our own independent review of the entire evidence, we hold that the trial court's conclusion that there was no *Batson* violation is not clearly erroneous. We affirm.

I. Procedural History

In *Hobbs I*, this Court remanded this case to the trial court to conduct a hearing and make findings of fact under the third *Batson* step, namely whether defendant proved the State engaged in purposeful discrimination in peremptorily striking three black prospective jurors.[1] *Id.* at 347, 841 S.E.2d at 496. Specifically, this Court instructed the trial court to consider the following:

> On remand, considering the evidence in its totality, the trial court must consider whether the primary reason given by the State for challenging juror McNeill was pretextual. This determination must be made in light of all the circumstances, including how McNeill's responses during voir dire compare to any

1. The three prospective jurors at issue are Brian Humphrey, Robert Layden, and William McNeill.

> similarly situated white juror, the history of the use of peremptory challenges in jury selection in that county, and the fact that, at the time that the State challenged juror McNeill, the State had used eight of its eleven peremptory challenges against black potential jurors. At the same point in time, the State had used two of its peremptory challenges against white potential jurors. Similarly, the State had passed twenty out of twenty-two white potential jurors while passing only eight out of sixteen black potential jurors.

Id. at 360, 841 S.E.2d at 503.[2] In accordance with this Court's instructions, the trial court on remand conducted a hearing and made extensive findings of fact under step three of *Batson* and concluded there was no *Batson* violation. We must now determine whether the trial court's conclusions are clearly erroneous.

II. Analysis

The ability to serve on a jury is one of "the most substantial opportunit[ies] that most citizens have to participate in the democratic process." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019) (citing *Powers v. Ohio*, 499 U.S. 400, 407, 111 S. Ct. 1364, 1369 (1991)). The right to jury service is protected by the Equal Protection Clause of the Federal Constitution and Article I, Section 26 of the North Carolina Constitution. In jury trials, however, attorneys are given the right to excuse a certain number of prospective jurors through discretionary strikes known as peremptory strikes. "Peremptory strikes have very old credentials and can be traced back to the common law." *Id.* Notably, "peremptory strikes traditionally may be used to remove any potential juror for any reason—no questions asked." *Id.*

The Equal Protection Clause prevents purposeful discrimination against a protected class, however, and thus it can limit an attorney's

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2. While the Court specifically referenced juror McNeill in its remand instructions, it appears the trial court was required to conduct the same analysis for all three excused prospective jurors. *See id.* at 347, 841 S.E.2d at 496 (holding "[a]s to all three jurors, we remand for reconsideration of the third stage of the *Batson* analysis, namely whether [defendant] proved purposeful discrimination in each case.").

The dissent in *Hobbs I* would not even have reached steps two or three of *Batson* because the trial court's findings were not clearly erroneous. *Id.* at 361, 841 S.E.2d at 504 (Newby, J., dissenting). Moreover, the dissent emphasized the majority's failure to apply the correct deferential standard of review. *Id.* at 368, 841 S.E.2d at 509. In failing to apply the correct deferential standard of review, the dissent argued that the majority made "arguments not presented to the trial court or the Court of Appeals and then fault[ed] both courts for not specifically addressing them." *Id.* at 361, 841 S.E.2d at 504.

ability to exercise peremptory strikes. *See id.* Accordingly, the Supreme Court of the United States has recognized limitations on peremptory strikes to ensure that strikes are not used for a discriminatory purpose against a protected class. *See Batson*, 476 U.S. 79, 106 S. Ct. 1712. In *Batson*, the Supreme Court of the United States set forth a three-prong test to determine whether a prosecutor improperly excused a prospective juror based on the juror's race. *See id.* This Court expressly "adopted the *Batson* test for review of peremptory challenges under the North Carolina Constitution." *State v. Fair*, 354 N.C. 131, 140, 557 S.E.2d 500, 509 (2001) (citing *State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000), *cert. denied*, 531 U.S. 1083, 121 S. Ct. 789 (2001)). Under the *Batson* framework, the defendant must first present a prima facie showing of purposeful discrimination. *Batson*, 476 U.S. at 93–94, 106 S. Ct. at 1721. Second, if the trial court finds that the defendant has presented a prima facie showing of purposeful discrimination, the burden then shifts to the State to provide race-neutral reasons for its peremptory strike. *Id.* at 97, 106 S. Ct. at 1723. Third, the trial court then determines whether the defendant, who has the burden of proof, established that the prosecutor acted with purposeful discrimination. *Id.* at 98, 106 S. Ct. at 1724.

On appeal, "[t]he trial court's ruling will be sustained 'unless it is clearly erroneous.' " *State v. Waring*, 364 N.C. 443, 475, 701 S.E.2d 615, 636 (2010) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S. Ct. 1203, 1207 (2008)). In other words, this Court conducts an "independent examination of the record," *Foster v. Chapman*, 578 U.S. 488, 502, 136 S. Ct. 1737, 1749 (2016), and will uphold the trial court's conclusions unless this Court, upon reviewing "the entire evidence," is "left with the definite and firm conviction that a mistake ha[d] been committed," *Hernandez v. New York*, 500 U.S. 352, 369, 111 S. Ct. 1859, 1871 (1991) (alteration in original) (quoting *United States v. U. S. Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542 (1948)). Moreover, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *State v. Thomas*, 329 N.C. 423, 433, 407 S.E.2d 141, 148 (1991) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S. Ct. 1504, 1511 (1985)).

Because this Court's decision in *Hobbs I* ordered the trial court to conduct further proceedings solely under the third step of *Batson*, we address only the third step here.

A. Step Three of *Batson*

In reviewing the trial court's decision as to the third step of *Batson*, this Court has previously stated factors to consider in determining whether the trial court's conclusions of law are clearly erroneous.

See Golphin, 352 N.C. at 427, 533 S.E.2d at 211. These factors include the race of the witnesses, the prosecutor's questions during voir dire, whether the State exhausted all of its peremptory strikes, whether the State accepted any black jurors, and whether the case is susceptible to racial discrimination. *Id.* The ultimate determination under step three, however, is whether the prosecutor's peremptory strike was "motivated in substantial part by discriminatory intent." *Snyder*, 552 U.S. at 485, 128 S. Ct. at 1212. This determination "involves an evaluation of the prosecutor's credibility." *Id.* at 477, 128 S. Ct. at 1208. In assessing the prosecutor's credibility, "the best evidence [of discriminatory intent] often will be the [prosecutor's] demeanor." *Hernandez*, 500 U.S. at 365, 111 S. Ct. at 1869. Notably, the trial court is in the best position to assess prosecutor credibility and demeanor.

Thus, because "[t]he trial court has the ultimate responsibility of determining 'whether the defendant has satisfied his burden of proving purposeful discrimination[,]' " this Court will "give [the trial court's] determination 'great deference,' overturning it only if it is clearly erroneous." *Hobbs I*, 374 N.C. at 349, 841 S.E.2d at 497 (quoting *Golphin*, 352 N.C. at 427, 533 S.E.2d at 211).

In *Hobbs I*, this Court remanded to the trial court and instructed it to conduct a hearing and make findings of fact based on "the evidence in its totality." *Id.* at 360, 841 S.E.2d at 503. Specifically, this Court ordered the trial court to consider whether the State's reasons for its strikes were pretextual, the history of peremptory strikes in that county, the comparison between the three excused jurors and any similarly situated white prospective jurors, and the statistical comparison between the State's number of peremptory strikes used on white jurors versus black jurors. *Id.* On remand, the trial court conducted a hearing and made extensive findings of fact in accordance with this Court's directive in *Hobbs I*. Based on those findings, the trial court concluded there was no *Batson* violation as to any of the three prospective jurors. After reviewing the trial court's findings of fact and conducting our own independent review of the record, we determine that the trial court's conclusions are not clearly erroneous.

B. Trial Court's Findings of Fact

As instructed by this Court, the trial court considered numerous factors under the third step of *Batson* as to all three prospective jurors at issue, including: the races of defendant, the victim, and the key witnesses; whether the case was susceptible to racial discrimination; whether the State asked questions or made statements tending to support an inference of discrimination; whether the State disparately questioned jurors;

a comparison of questions and juror answers; whether the State had a pattern of using peremptory strikes against black jurors; whether the State accepted any black jurors; and whether the State's reasons for striking the prospective jurors were pretextual.

The trial court first found that defendant is black and the victim in this case is white, while some of the key witnesses are black. Additionally, the trial court found the race of the victim in the Rule 404(b) evidence that was presented at trial was black. Next, the trial court found this case was not susceptible to racial discrimination because there was no evidence that defendant's race, the victim's race, or the witnesses' races were "in any way significant before or during the trial." Additionally, the trial court found the State did not ask questions or make statements that support a finding of discrimination. Instead, the trial court found "that as to each of the three excused jurors, the State asked questions [and made statements] in an even-handed manner," which mitigated against a finding of purposeful discrimination. In a similar context, the trial court found that the State did not disparately question the black jurors as compared to the white jurors. Instead, the trial court found "that the only significant differences in the questioning was a function of the different styles of three prosecutors engaged in the jury selection process."

Moreover, the trial court considered the history of prosecutors' use of peremptory strikes in the jurisdiction and found this history did not support a finding of purposeful discrimination. In particular, the trial court found defendant's reliance on a study conducted by researchers at Michigan State University (MSU) regarding North Carolina prosecutors' use of peremptory strikes to be misleading. First, while the study showed a higher percentage of strikes against black jurors, all of the *Batson* claims in each of the cases mentioned in the study had been rejected by our state's appellate courts. Second, the trial court found that the MSU study was potentially flawed in three ways: (1) the study identified juror characteristics without input from prosecutors, thus failing to reflect how prosecutors evaluate various characteristics; (2) recent law school graduates with little to no experience in jury selection evaluated the juror characteristics; and (3) the recent law school graduates conducted their study solely based on trial transcripts rather than assessing juror demeanor and credibility in person. Notably, however, the trial court found that even assuming the relevant history supports a finding of discrimination, "the probative value of the inference is significantly reduced by the fact that the prosecutors in this case were not the prosecutors in any of the cases identified by the historical evidence."

Additionally, the trial court conducted side-by-side juror comparisons of the three excused prospective jurors at issue with similarly situated prospective white jurors whom the State did not strike. The trial court declined to adopt defendant's suggested "single factor approach" to compare the prospective jurors because that approach fails to consider each juror's characteristics "as a totality." Instead, the trial court adopted the State's "whole juror" approach in its comparisons. *See Flowers*, 139 S. Ct. at 2246 (stating that the Court looks at the "overall record" of a *Batson* case and makes a determination "[i]n light of all of the circumstances"). It found that this approach "provided the State with the complete image or picture of the juror[,] thereby informing its decision as to whether the juror was either appropriate or inappropriate for this specific case." Importantly, however, the trial court found that even if the juror comparisons supported a finding of discrimination, the totality of the remaining circumstances outweighed the probative value of these comparisons. After reviewing the entire evidence, we agree that the evidence supports the trial court's findings of fact.

1. Brian Humphrey

The trial court first considered whether defendant proved purposeful discrimination in the State's strike of prospective juror Brian Humphrey. To reach its conclusion, the trial court made extensive findings of fact based on the totality of the evidence in the record. Specifically, the trial court compared Humphrey's responses to the State's questions with the responses of prospective jurors James Stephens and Sharon Hardin. In each comparison, the trial court found the differences between the two prospective jurors' responses outweighed the similarities. After considering the relevant factors and conducting a thorough comparative juror analysis, the trial court concluded that defendant failed to prove the State acted with purposeful discrimination in peremptorily striking Humphrey. Accordingly, the trial court ruled there was no *Batson* violation. After conducting our own independent review of the record, we agree with the trial court's findings.

In comparing prospective juror Stephens to Humphrey, the trial court found that although defendant alleged that Stephens "answered similarly to excused juror Humphrey regarding suffering depression and being uncomfortable with the death penalty," there are significant differences between the two prospective jurors' experiences. For instance, Stephens's battle with depression ended in 1986, whereas Humphrey was currently employed in the mental health field. Humphrey's current involvement with mental health professionals was notable because "[d]efendant planned to rely heavily on the testimony of mental health

providers in his defense," thus indicating a risk that Humphrey may be partial to those witnesses. Second, Stephens's alleged comfort issues regarding the death penalty only arose during defense questioning. Ultimately, however, Stephens preferred imposing the death penalty over life imprisonment without parole. Indeed, in response to defense counsel questioning him on the death penalty, Stephens stated, "I have said that I have a leaning toward the death penalty in a case as being the appropriate sentence in the case of conviction of first-degree murder." Humphrey, on the other hand, expressed difficulty on the issue, stating that he is "not a killer."

In the next comparison, the trial court found that although defendant alleged that Hardin answered similarly to Humphrey regarding the death penalty and similar experiences working with young people, the differences between the two were significant. First, Hardin expressed no reservations about voting for the death penalty, while Humphrey expressed hesitation and sympathy for defendant. The record shows Hardin expressly stated she "would not have a problem" with considering the death penalty. Humphrey, however, expressly stated he would "be kind of hesitant" to vote for the death penalty. Second, Hardin worked with the youth in her church whereas Humphrey served in group homes helping individuals facing criminal charges and suffering from mental health issues. This distinction is important because Humphrey's involvement in group homes may cause him to identify with defendant's background.

In addition to the comparative juror analysis, the trial court found that the State did not use all of its peremptory strikes and accepted 45% of black prospective jurors after striking Humphrey. The trial court found that both of these factors mitigated against a finding of racial discrimination. The trial court similarly determined that the State's reasoning was not pretextual, which further negated a finding of purposeful racial discrimination.

Accordingly, the trial court concluded that because defendant failed to prove the State acted with purposeful discrimination in striking prospective juror Humphrey, there was no *Batson* violation. The trial court's findings of fact and our own examination of the record support this conclusion. Thus, the trial court's decision regarding prospective juror Humphrey is not clearly erroneous.

2. Robert Layden

Next, the trial court concluded that defendant failed to prove that the State acted with purposeful discrimination in peremptorily striking prospective juror Robert Layden, and thus there was no *Batson* violation.

In reaching this conclusion, the trial court made extensive findings of fact based on the entire evidence in the record. These findings include a side-by-side juror comparison between Layden and similarly situated white prospective jurors whom the State did not strike. Specifically, the trial court compared Layden's responses to the responses of prospective jurors James Elmore, James Stephens, and Johnny Chavis. In each comparison, the trial court found that the differences between the prospective jurors' responses and experiences outweighed any similarities. After conducting our own independent review of the record, we agree with the trial court's findings.

In comparing Elmore and Layden, the trial court found that although defendant alleged that Elmore "answered similarly to excused juror Layden regarding alleged concerns about the death penalty, having an alleged criminal record, and having family members with alcohol problems," there were significant differences between the two prospective jurors' experiences. First, Elmore did not express hesitation about the death penalty, while Layden "had clear hesitations." Indeed, the voir dire transcript reflects that Layden stated that "every human being should have reservations" but that he would have to put his personal feelings aside. On the other hand, Elmore stated he would not "have any reservations" about voting for the death penalty. Second, Elmore's criminal record consisted of various traffic incidents that did not require a court appearance, whereas Layden refused to discuss his breaking and entering conviction. Finally, while Elmore had family members with substance abuse issues, Layden served as a "father figure" to individuals with substance abuse issues and expressed his belief in giving people second chances. Layden's personal involvement in mentoring these individuals and his personal beliefs raised the risk that he would improperly sympathize with defendant.

The trial court's findings similarly emphasized the differences between prospective jurors Stephens and Layden. First, Stephens suffered from depression that ended in 1986, whereas Layden's sister, with whom he had a close relationship, was currently experiencing similar symptoms to those alleged by defendant. Again, similar to the concern with Humphrey, Layden's relationship with his sister may have caused him to give more credibility to the mental health providers on whom defendant relied at trial. Second, Stephens did not know anyone close to him with substance abuse issues, while Layden mentored individuals with substance abuse issues and supported giving them a second chance. Again, this fact raised the concern that Layden would improperly sympathize with defendant. Finally, Stephens expressly preferred the death penalty over life imprisonment without parole, whereas

Layden clearly hesitated on the subject. The record reflects the following exchange between the prosecutor and Layden:

> [PROSECUTOR]: So, if you thought the death penalty was the appropriate punishment after going through the four-step process, then you yourself could vote for it?
>
> [LAYDEN]: Unfortunately I would have to.
>
> . . .
>
> [PROSECUTOR]: Okay. Any hesitations or reservations about either one of them?
>
> [LAYDEN]: I think every human being should have reservations, especially about having someone's life taken . . . .

Furthermore, the trial court's findings highlighted key differences between Chavis and Layden despite some similar answers regarding substance abuse and criminal records. First, Chavis had no reservations about the death penalty, whereas Layden had clear reservations. The record reflects that Chavis stated he had been in favor of the death penalty since he "was old enough to be held accountable for [his] decisions." Layden, on the other hand, expressly stated he would have to "put [his] personal feelings aside and try to follow the letter of the law," and he believed that "every human being should have reservations" about the death penalty. Second, while Chavis had family members with substance abuse issues, he did not mentor those struggling with substance abuse issues as Layden did, and thus there was no clear risk that Chavis would improperly sympathize with defendant. Finally, Chavis willingly disclosed his failure to appear charge on his criminal record, while Layden "did not want to discuss" his breaking and entering conviction.

In addition to the comparative juror analysis, the trial court found that the State's 45% acceptance rate of black jurors after the State excused Layden did not support a finding of purposeful racial discrimination. Moreover, the trial court found that the State's proffered reasons for striking Layden were not pretextual, and the history of the State's use of peremptory strikes in the jurisdiction was not persuasive.

Based on these findings, the trial court determined that defendant failed to prove the State acted with purposeful discrimination in striking prospective juror Layden. Therefore, the trial court concluded there was no *Batson* violation. This conclusion is supported by the trial court's

findings as well as our own independent review of the entire record. Thus, the trial court's conclusions regarding prospective juror Layden are not clearly erroneous.

3. William McNeill

In its final juror comparison, the trial court similarly determined that defendant failed to prove the State acted with purposeful discrimination in peremptorily striking prospective juror William McNeill. Therefore, the trial court concluded there was no *Batson* violation. Based on our own review of the record, the trial court's conclusion is supported by its findings of fact. In making its findings, the trial court considered the relevant factors and conducted a side-by-side juror comparison between McNeill and similarly situated white prospective jurors whom the State did not strike. Specifically, the trial court compared McNeill's responses to the State's questions to prospective jurors James Stephens, Sharon Hardin, Amber Williams, Johnny Chavis, Vickie Cook, and James Elmore. Again, in each comparison, the trial court found that the differences between the two prospective jurors' answers and experiences outweighed any similarities. After conducting our own independent examination of the record, we agree with the trial court's findings.

In comparing Stephens and McNeill, the trial court found that although defendant alleged that the two prospective jurors "answered similarly . . . regarding suffering depression, knowledge of people with substance abuse issues, ministry work, and being uncomfortable with the death penalty," it ultimately found that the differences outweighed the similarities. For instance, the trial court first noted that Stephens suffered from depression that ended over thirty-five years prior, whereas McNeill had a sister with current mental health issues that required his parents to care for her. Like Layden, McNeill's relationship with his sister may have caused him to give more credibility to defendant's mental health witnesses. Second, Stephens did not know anyone close to him with substance abuse issues, while McNeill's father and uncle both drank heavily. This difference is notable because McNeill's experiences may have caused him to improperly sympathize with defendant. Third, Stephens participated in ministry work in assisted living facilities, whereas McNeill participated in outreach in "drug-infested areas." Again, this difference implies that McNeill may be inclined to sympathize with defendant. Finally, Stephens expressed that he preferred the death penalty over life imprisonment without parole, while McNeill preferred life imprisonment without parole over the death penalty. Indeed, the record reflects that McNeill stated he had "some feelings about the death penalty," and he was "not for the death penalty."

The trial court similarly noted the differences between prospective jurors Hardin and McNeill despite Hardin's similar "alleged concerns about the death penalty, working with youth in her church, and her brother's substance abuse issues." First, Hardin had no reservations about the death penalty, while McNeill preferred life imprisonment without parole. Again, the record shows McNeill expressly stated he was "not for the death penalty," whereas Hardin "would not have a problem" with voting for the death penalty. Second, Hardin mentored the youth at her church, whereas McNeill helped people in "drug-infested areas." This fact raised the risk that McNeill would improperly sympathize with defendant. Finally, both Hardin and McNeill had family members who suffered from substance abuse issues. The trial court found, however, that Hardin herself did not have any such issues but McNeill, on the other hand, mentioned prior "sensitive issues with being 'in the streets too, going out to clubs and stuff.' "

Further, the trial court distinguished prospective juror Williams from McNeill. Although defendant alleged that their answers regarding mental health and substance abuse were similar, the trial court found that the notable differences between the two prospective jurors outweighed the similarities. First, Williams was the victim of an armed robbery at a convenience store, a crime similar to the crime committed by defendant. The trial court thus noted that Williams's previous experience made it "more likely that she would identify with the Victims" in defendant's case. Second, Williams expressed no reservations about the death penalty, whereas McNeill preferred life imprisonment without parole. Our review of the evidence shows Williams unequivocally agreed she could consider and vote for the death penalty, whereas McNeill expressly stated he was "not for the death penalty."

The trial court next found that although defendant alleged that prospective jurors Chavis and McNeill had some similarities, there were significant differences between the two. First, Chavis did not express hesitation regarding the death penalty, while McNeill clearly hesitated. Indeed, our examination of the record shows Chavis stated he believed "a person[has] to be held [accountable] for their actions," and he agreed he could consider and vote for the death penalty. Second, while Chavis had family members who suffered from mental health and substance abuse issues like McNeill's family members, the trial court found Chavis himself did not have these issues, whereas McNeill had a previous "lifestyle . . . in the streets [and] going out to clubs and stuff." This distinction suggests that McNeill was more likely to give credibility to defendant's mental health witnesses because of his personal experience.

The trial court similarly distinguished prospective juror Cook from McNeill. First, Cook expressed no hesitation about the death penalty while McNeill expressed a preference for life imprisonment without parole. The record reflects Cook answered definitively that she could consider and vote for the death penalty, whereas McNeill expressly stated he was "not for the death penalty." Second, while Cook's parents suffered from mental health and substance abuse issues, the trial court found she did not have a similar experience as McNeill with his previous "lifestyle."

Lastly, the trial court found that the differences between prospective jurors Elmore and McNeill outweighed the similarities. First, Elmore had no concerns about imposing the death penalty, whereas McNeill preferred life imprisonment without parole. Our review of the record reveals Elmore explicitly stated he would not "have any reservations" about voting for the death penalty. Second, Elmore stated that he was not close with his sister who suffered from substance abuse issues and did not share her lifestyle, while McNeill had a previous "lifestyle . . . in the streets [and] going out to clubs and stuff." Accordingly, Elmore did not seem to possess personal experiences that might cause him to give undue credibility to defendant's mental health witnesses.

In addition to the extensive comparative juror analysis, the trial court found that the State's acceptance rate of black jurors was 50% after the State excused McNeill, which did not support a finding of purposeful discrimination. Moreover, as previously explained, the trial court found that the relevant history of the State's peremptory strikes in the jurisdiction was flawed and therefore misleading. Finally, the trial court found the State's reasoning for striking McNeill was not pretextual.

Based on these findings, the trial court concluded that defendant failed to prove the State acted with purposeful discrimination in striking prospective juror McNeill, and thus there was no *Batson* violation. The trial court's findings of fact, as well as our own independent review of the record, support the trial court's conclusions. Thus, the trial court's conclusions regarding prospective juror McNeill are not clearly erroneous.

III. Conclusion

The trial court is in the best position to weigh credibility and assess the demeanor of both the prosecutor and the prospective jurors. Here the trial court fully complied with this Court's remand instructions in *Hobbs I* by extensively "considering the evidence in its totality" and making findings of fact based on that evidence. *Hobbs I*, 374 N.C. at 360, 841 S.E.2d at 503. After carefully weighing the evidence, the trial

court concluded that defendant had failed to prove there was a *Batson* violation under step three of the analysis. Applying the proper deferential standard of review, the trial court's conclusions are supported by its findings of fact. Additionally, our independent examination of the entire evidence supports the trial court's findings and conclusions. Thus, the trial court's order on remand is not clearly erroneous. The decision of the trial court is affirmed.

AFFIRMED.

Justices BERGER and DIETZ did not participate in the consideration or decision of this case.

Justice EARLS dissenting.

This case involves the State's use of peremptory challenges to strike three Black prospective jurors, Brian Humphrey, Robert Layden, and William McNeill, during Mr. Hobbs's 2014 capital murder trial. While Mr. Hobbs objected to the State's use of peremptory challenges under *Batson v. Kentucky*, 476 U.S. 79 (1986), the trial court denied those objections, and the Court of Appeals found no error. *See State v. Hobbs*, 260 N.C. App. 394, 409 (2018). This Court allowed Mr. Hobbs's petition for discretionary review and subsequently held that the Court of Appeals had erred as a matter of law in deciding Mr. Hobbs's *Batson* claim. *State v. Hobbs* (*Hobbs I*), 374 N.C. 345, 360 (2020). The case was remanded to the trial court with instructions on the proper application of *Batson*. *Id.* On remand, Judge Frank Floyd, the same judge who conducted Mr. Hobbs's 2014 trial, denied Mr. Hobbs's *Batson* challenge.

In *Batson*, the United States Supreme Court held that while peremptory challenges are permissible for almost any reason, "a State may not discriminate on the basis of race when exercising peremptory challenges against prospective jurors in a criminal trial." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2234 (2019) (citing *Batson*, 476 U.S. 79). This is in part because "[e]qual justice under law requires a criminal trial free of racial discrimination in the jury selection process." *Id.* at 2242. Indeed, "racial discrimination in the selection of jurors casts doubt on the integrity of the judicial process and places the fairness of a criminal proceeding in doubt." *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (cleaned up). Furthermore, "[t]he Fourteenth Amendment[ ] mandate[s] that race discrimination be eliminated from all official acts and proceedings of the State." *Id.* at 415; *see also* N.C. Const. art. I, § 19 ("No person shall

be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.").

Although trial judges have the primary responsibility of enforcing *Batson*, on appeal this Court is required to review the same factors the trial court did and determine whether the trial court's ruling was clearly erroneous. *Flowers*, 139 S. Ct. at 2243–44. In doing so, this Court must consider whether "all of the relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the State's peremptory strike of [a] black prospective juror . . . was not 'motivated in substantial part by discriminatory intent.' "[1] *Id.* at 2235 (quoting *Foster v. Chatman*, 578 U.S. 488, 513 (2016)). Despite evidence to the contrary, and through a misapplication of *Batson* and its progeny, the majority holds that the trial court's order is not clearly erroneous. Because the evidence Mr. Hobbs presented supports a finding of racial discrimination in his trial's jury selection process and because the trial court misapplied the *Batson* standard, I dissent.

I. The *Batson* Standard

Under *Batson*, a trial judge must consider "all relevant" evidence a defendant presents that raises an inference of discrimination. *Hobbs I*, 374 N.C. at 356 (quoting *Flowers*, 139 S. Ct. at 2245). This duty requires a trial judge to "appropriately" consider "all of the evidence," conduct a "meaningful" analysis of it, and "explain how it weighed" that evidence. *Id.* at 356, 358–59. In *Flowers*, the United States Supreme Court provided a non-exhaustive list of evidence a defendant may present to support a *Batson* challenge, including:

> • statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
>
> • evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;

1. It is important to note that the reason for the State's use of a peremptory challenge need not be based "solely" on discriminatory intent. Instead, as we explained in *State v. Waring*, 364 N.C. 443, 480 (2010), and reiterated in *Hobbs I*, "the third step in a *Batson* analysis is the less stringent question [of] whether the defendant has shown 'race was *significant* in determining who was challenged and who was not.' " *State v. Hobbs (Hobbs I)*, 374 N.C. 345, 352 n.2 (2020) (quoting *Waring*, 364 N.C. at 480).

> • side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
>
> • a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;
>
> • relevant history of the State's peremptory strikes in past cases; or
>
> • other relevant circumstances that bear upon the issue of racial discrimination.

139 S. Ct. at 2243. Accordingly, in *Hobbs I*, this Court indicated that a trial court must "consider[ ] the evidence [presented] in its totality," compare the responses of the challenged juror to "any similarly situated white juror," and consider historical evidence of the use of peremptory challenges in jury selection in that county, as well as any statistics detailing the prosecution's strike pattern in that particular case. *Hobbs I*, 374 N.C. at 360. At the same time, this Court emphasized that by "[f]ailing to apply the correct legal standard," the trial court had inadequately considered the evidence Mr. Hobbs had presented. *Id.* Despite having delineated these requirements, the trial court has failed again to adequately consider all the evidence Mr. Hobbs presented.

II. Susceptibility to Racial Discrimination

First, the trial court's conclusion that Mr. Hobbs's case was not susceptible to racial discrimination was a clearly erroneous factual finding. In *State v. Tirado*, 358 N.C. 551 (2004), this Court held that "susceptibility of the particular case to racial discrimination" is a relevant factor to consider at the third step of the *Batson* analysis. *Id.* at 569–70 (quoting *State v. Golphin*, 352 N.C. 364, 427 (2000)). The Supreme Court has also acknowledged that it "remains an unfortunate fact in our society that violent crimes perpetrated against members of other racial or ethnic groups often raise [the] possibility" of racial prejudice. *Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981). Similarly, in *State v. Golphin*, this Court explained that a case "may be . . . susceptible to racial discrimination [when] defendants are African-Americans and the victims were Caucasian." 352 N.C. at 432 (citing *State v. White*, 349 N.C. 535, 548–49 (1998)).

In the present case, defendant, Mr. Hobbs, is Black, while four of his victims are white. But rather than focus on these facts, the trial court focused on (1) the race of the victim based on the evidence the State presented under Rule 404(b) of the North Carolina Rules of Evidence,

which was Black, *see* N.C.G.S. § 8C-1, Rule 404(b) (2021); and (2) the race of "key witnesses, some of whom [the court found] to be [B]lack." In doing so, the trial court determined that this "particular case . . . was [not] susceptible to racial discrimination." The trial court also concluded that "the race of the Defendant, the Victim[s], . . . or any of the witnesses was [not] in any way significant before or during the trial of this matter."

While a trial court is permitted to consider the races of witnesses in the case, *see White*, 349 N.C. at 548, it does not necessarily follow that every case involving a Black defendant and a Black witness or a Black victim will lead a trial court to conclude the case is not susceptible to racial discrimination. Although that was the conclusion in *White*, the circumstances here are quite different. Mr. Hobbs's case involves a Black defendant and multiple white victims. As noted above, cases involving interracial violence are particularly susceptible to racial discrimination. *See Rosales-Lopez*, 451 U.S. at 192.

In reaching its conclusion, the trial court ignored our own Court's precedent as well as Supreme Court precedent.[2] *See, e.g.*, *White*, 349 N.C. at 550; *Rosales-Lopez*, 451 U.S. at 192. It also discounted pertinent facts in this case, namely Mr. Hobbs's race, his victims' races, and the fact that he was being tried capitally for crimes against victims who were a different race than him. Taking this information together, the trial court should have found Mr. Hobbs's case was susceptible to racial discrimination. Accordingly, it was clear error for the trial court to find otherwise.

III. The Michigan State University (MSU) Study

Next, the trial court committed clear error in its findings relating to the Michigan State University (MSU) study. This Court as well as the United States Supreme Court has previously said that to establish a *Batson* violation, defendants may present "relevant history of the State's peremptory strikes in past cases." *Hobbs I*, 374 N.C. at 351 (quoting *Flowers*, 139 S. Ct. at 2243); *see also Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322, 346 (2003). In *Hobbs I*, this Court also explained that "a [trial] court must consider historical evidence of discrimination in a jurisdiction." *Hobbs I*, 374 N.C. at 351. Accordingly, Mr. Hobbs presented evidence from a study by scholars at MSU, who reviewed data in Cumberland County from 1990 to 2010. Catherine M.

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2. *See also Flowers v. Mississippi*, 139 S. Ct. 2228, 2274 (2019) (Thomas, J., dissenting) ("The Court knows these prejudices exist. Why else would it say that 'a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias'?").

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). According to two professors who led the MSU study, this data showed that "prosecutors in 11 cases struck qualified black venire members at an average rate of 52.3% but struck qualified non-black venire members at an average rate of only 20.8%." This data also showed that in Cumberland County, the State was "2.5 times more likely to strike qualified venire members who were black" and that "[t]his difference in strike levels [was] significant."

Despite being confronted with statistical evidence showing a disparate pattern of peremptory strikes against Black venire members in Cumberland County, the trial court chose to discount the study as "potentially flawed." Additionally, the trial court determined that the study "[did] not tend to support an inference of racial discrimination . . . [by] the State in this case." To support its conclusion that the study was "potentially flawed," the trial court cited to the trial transcript in *State v. Robinson*, 375 N.C. 173 (2020). However, the court failed to acknowledge the trial court's findings in that case, namely that the "MSU study [was] a valid, highly reliable, statistical study." Furthermore, the *Robinson* trial court determined the study showed that "race [was] highly correlated with strike decisions in North Carolina."

Additionally, the trial court criticized the MSU study for employing "unqualified" recent law school graduates to conduct the study. While the trial court characterized recent law school graduates as "unqualified," the United States Supreme Court has cited studies on racial disparities in jury strikes in which law students were research assistants. *See, e.g.*, *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 268 (2005) (Breyer, J., concurring) (citing David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3, 3 (2000) ("The authors gratefully acknowledge the expert research assistance of Iowa law students . . . .")). Furthermore, the use of recent law school graduates as law clerks and research assistants in this Court and others across the country severely undercuts the trial court's conclusion that recent law school graduates are unqualified.

The trial court was also misguided in disregarding the MSU study because it was based on "cold trial transcripts." As all appellate review is conducted in this manner, this criticism is without merit. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). Indeed, the Supreme Court has decided our nation's most critical cases on a "cold" record. Yet under the trial court's logic, this Court would have to question not only our own past cases but also those decided by any other appellate court.

Moreover, the trial court disregarded the MSU study because the prosecutors in that study were not involved in Mr. Hobbs's case. However, this is a legal error. In *Miller-El I*, the United States Supreme Court addressed and rejected a similar argument. 537 U.S. at 347. There, the Court explained that historical evidence can be used to show "the culture of [a] District Attorney's Office in the past" and that this evidence is "relevant to the extent it casts doubt on the legitimacy of . . . the State's actions." *Id.* Specifically, the Court found it significant that the prosecutors in Miller-El's case were employed during the time the State had used racially discriminatory tactics to exclude prospective jury members. *Id.* Indeed, the Court reasoned that "[e]ven if [it] presume[d] . . . that the prosecutors in Miller-El's case were not part of this culture of discrimination, the evidence suggest[ed] they were likely not ignorant of it." *Id.*

Similarly, in Mr. Hobbs's case, the MSU study provides evidence of the culture in the Cumberland County District Attorney's Office from 1990 to 2010. As noted above, the data indicates a disparate pattern of peremptory strikes, which supports the conclusion that a culture of discrimination existed in the Cumberland County District Attorney's Office. This "casts doubt on the legitimacy of the motives underlying the State's actions in [Mr. Hobbs's] case." *See Miller-El I*, 537 U.S. at 347. Furthermore, the prosecutors in Mr. Hobbs's case, Billy West, Robby Hicks, and Rita Cox, were employed in that office during previous administrations. Thus, just like in *Miller-El I*, the prosecutors in Mr. Hobbs's case were likely "not ignorant" of the culture of discrimination identified by the MSU study. *See id.* Accordingly, it was error for the trial court to disregard the MSU study.

IV. The State's Pattern of Peremptory Challenges in Mr. Hobbs's Case

"[S]tatistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case" can be used to support a *Batson* challenge. *Flowers*, 139 S. Ct. at 2243. In some cases, "the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors." *Miller-El I*, 537 U.S. at 342; *see also Miller-El II*, 545 U.S. at 240–41 ("The numbers describing the prosecution's use of peremptories are remarkable.").

Similarly, to *Miller-El I* and *Miller-El II*, the statistics in Mr. Hobbs's case raise suspicion about whether the State struck prospective jurors Humphrey, Layden, and McNeill because of their races. When Mr. Hobbs raised his *Batson* challenge after Humphrey and Layden were struck, six

of the State's first eight strikes (75%) were used against Black prospective jurors. The State had also struck six of eleven Black prospective jurors, resulting in a Black prospective juror acceptance rate of 45% and a Black prospective juror rejection rate of 55%. In contrast, the State had only struck two of twenty non-Black prospective jurors. This resulted in a non-Black prospective juror rejection rate of 10% and an acceptance rate of 90%.

At the time McNeill was struck, eight of the State's first eleven strikes (72%) had been used against Black prospective jurors. The State had also excused eight of sixteen Black prospective jurors, providing a Black prospective juror rejection rate of 50%. At the same time, the State had only challenged three of twenty-two non-Black prospective jurors, providing a non-Black prospective juror rejection rate of approximately 13%. Ultimately, the State's strike pattern caused a jury pool composed of roughly 50% Black and 50% non-Black prospective jurors, to become a jury of twelve that was 83% non-Black.

"Happenstance is unlikely to produce this disparity." *Miller-El II*, 545 U.S. at 240–41 (quoting *Miller-El I*, 537 U.S. at 342). Despite this, the trial court found that the acceptance rate of Black prospective jurors "tend[ed] to negate an inference of discrimination and motivation." In doing so, the trial court failed to explain how a 45% acceptance rate and a 55% rejection rate for Black prospective jurors at the time Humphrey and Layden were struck is evidence against an inference of discrimination. Similarly, the trial court also did not explain how a 55% rejection rate of Black prospective jurors at the time of the Humphrey and Layden strikes could negate an inference of discrimination when compared to a 10% rejection rate for non-Black prospective jurors. The trial court repeated the same errors in reviewing the statistics at the time of the McNeill strike, failing to explain how the State's strike pattern removing 50% of Black prospective jurors but only 13% percent of non-Black prospective jurors could be evidence against a finding of discrimination.

Our decision in *Hobbs I* found error in part because the trial court did not "explain how it weighed the totality of the circumstances surrounding the prosecution's use of peremptory challenges." *Hobbs I*, 374 N.C at 358. The Court in *Hobbs I* also ordered the trial court to consider all the evidence "in its totality" to determine "whether the primary reason given by the State for challenging . . . McNeill [, Humphrey, and Layden] was pretextual." *Id.* at 360. However, a trial court cannot meet this standard by simply reciting statistics and concluding, without explaining, that those statistics "tend to negate an inference of discrimination and motivation."

V. Comparative Juror Analysis

More powerful than bare statistics are "side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve." *Miller-El II*, 545 U.S. at 241. "Potential jurors do not need to be identical in every regard for this to be true." *Hobbs I*, 374 N.C. at 359. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination . . . ." *Id.* (quoting *Miller-El II*, 545 U.S. at 241). At this step, "the critical question" relates to "the persuasiveness of the prosecutor's justification for his peremptory strike." *Miller-El I*, 537 U.S. at 338–39. "[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Id.* (quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995)).

In this case, a comparative juror analysis shows that the State passed twenty-one non-Black prospective jurors who matched at least one of the reasons the State offered to support its strikes of Black prospective jurors. Many of the non-Black prospective jurors accepted by the State also shared more than one characteristic matching the excuses the State gave for striking Humphrey, Layden, and McNeill. The State's purported reasons for striking Humphrey, Layden, and McNeill fall into four categories: (1) death penalty reservations; (2) mental health connections; (3) substance abuse connections; and (4) criminal record. By providing these reasons, the State asserts their dismissal of Humphrey, Layden, and McNeill was not based on race.

Specifically, the State purports to have struck McNeill because (1) he had "significant" reservations about imposing the death penalty, (2) he had "a sister with some anxiety issues," (3) he had family members with substance abuse problems, and (4) as a pastor, he had provided outreach "to folks . . . going through drugs and other difficult issues."

Next, the State contends it struck Layden because (1) "his sister had significant mental health issues," (2) he had some reservations about the death penalty, (3) he wanted to give soldiers who made "alcohol related or dumb mistakes" a "second chance," and (4) he had a prior arrest that he did not want to answer detailed questions about.

Lastly, the State asserts it struck Humphrey because (1) he had reservations about the death penalty, (2) he had connections to the mental health field and "thought [mental health professionals] did a good job," and (3) the State feared he would identify with Mr. Hobbs because Humphrey previously served as a mentor for people who had mental

health issues and pending criminal charges. However, the reasons the State gave for striking Humphrey, Layden, and McNeill also applied to non-Black prospective jurors the State passed.

A. Death Penalty Reservations

First, the State asserts that Humphrey, Layden, and McNeill had reservations regarding the death penalty and expressed being hesitant to impose it. Specifically, McNeill noted that he "wouldn't say [he was] for the death penalty totally; but, [he could] understand the nature of the crime and—and make a fair—a fair decision based on the evidence." Layden stated he thought "every human being should have reservations, especially about having someone's life taken, . . . but those reservations [wouldn't] keep [him]" from following the court's instructions and that he could impose the death penalty if "the elements line[d] up." Lastly, in response to questioning about the death penalty, Humphrey noted he would "pray on it" and that he would "be kind of hesitant, but . . . wouldn't have no problem going through with it." Based on this information, neither Humphrey, Layden, nor McNeill would have had an issue imposing the death penalty. Yet, the State purported to have struck them based on this issue.

At the same time, the State passed four non-Black prospective jurors who expressed reservations about the death penalty. For example, when asked for his opinion about the death penalty, Antonio Flores stated, "I'm not crazy about it . . . I love life." Furthermore, James Elmore specifically told the State he had "some reservations about the death penalty," and James Stephens expressed being uncomfortable with the process. Additionally, Sharon Hardin noted she would probably be praying about the death penalty throughout the trial. Based on the similarities between Humphrey's, Layden's, and McNeill's answers to those given by Flores, Elmore, Hardin, and Stephens, it is evident their answers do not reflect significant reservations about the death penalty. By excusing Humphrey, Layden, and McNeill for answers that were similar to those given by Flores, Elmore, Hardin, and Stephens, the State's choices illustrate that this rationale was a pretext.

B. Mental Health Connections

Next, the State cited mental health connections as a reason for striking Humphrey, Layden, and McNeill. In doing so, the State speculated that these connections would make Humphrey, Layden, and McNeill more likely to credit the testimony of the defense's mental health experts. The State took issue with Layden having a sister with "significant mental health issues" and McNeill having a sister with anxiety issues

and learning difficulties. Lastly, the State cited the fact that Humphrey worked in a mental health facility, had mentored people with mental health issues, and thought mental health professionals "did a good job" as a reason for its strike.

Yet, the State accepted eight non-Black prospective jurors with mental health connections. First, while the State purported to be concerned Humphrey, Layden, and McNeill would be more likely to credit the testimony of a mental health professional, it did not have the same concern when it came to non-Black jurors. For example, the State accepted prospective juror Stephens who specifically stated that, "if a person [was] presented to [him] as an expert [, he was] going to accept what they say pretty much." Furthermore, Stephens had a second mental health connection, based on his own experience with mental health treatment and depression. The State also accepted Amber Williams who self-identified as having "severe anxiety and depression." Importantly, when asked if she could be fair and impartial and conduct her job as a juror, she responded, "I honestly don't know." Thus, not only were Stephens and Williams perhaps as likely, if not more likely, as Humphrey, Layden, and McNeill to identify with mental health professionals, Williams was also unsure if she could conduct her job as a juror. Despite this, the State struck Humphrey, Layden, and McNeill, while passing both of the non-Black prospective jurors.

Similarly to Layden and McNeill, six non-Black prospective jurors the State passed had family members with mental health concerns. For example, Johnny Chavis had a brother and sister who both required inpatient treatment and were diagnosed with posttraumatic stress disorder. Thus, non-Black prospective juror Chavis, despite having a stronger mental health connection than Black prospective jurors Layden and McNeill, was allowed to serve on the jury, but Layden and McNeill were not.

Moreover, one juror had a family member taking antidepressants, another juror had a nephew with bipolar disorder, and two jurors' family members had attempted suicide. If the State had truly been concerned about Humphrey's, Layden's, and McNeill's mental health connections, it would not have passed thirteen non-Black prospective jurors with that same characteristic. Accordingly, this explanation is pretextual.

C. Substance Abuse Connections

The State also cited substance abuse connections as a reason for striking Layden and McNeill; however, it passed fourteen non-Black prospective jurors who had connections to substance abuse. Specifically, the State took issue with McNeill having family members with substance

abuse problems and that he and his family, in their work as pastors, had conducted outreach to people "going through drugs and other difficult issues." Furthermore, the State purports to have struck Layden because he wanted to give soldiers second chances when they made "alcohol related or dumb mistakes."

However, if McNeill's religious leadership was the true reason for his strike, then the State would not have accepted Sharon Hardin or James Stephens as jurors, both of whom held leadership positions in their church. Additionally, the State's concerns regarding Layden's and McNeill's familial or personal connections to people with substance abuse issues also fails when compared to the fourteen non-Black jurors the State passed who also had connections to substance abuse. Indeed, all fourteen of those jurors knew someone who had substance abuse issues, and thirteen of them identified a family member with drug or alcohol problems.

In some cases, the non-Black jurors the State passed reported having more than one family member with substance abuse concerns (e.g., Amber Williams, Johnny Chavis, David Adams, and Richard Heins). In the end, the prospective jurors the State accepted had connections to substance abuse just as strong or stronger than Layden or McNeill. Accordingly, when comparing Layden's and McNeill's responses with those of similarly situated non-Black prospective jurors, the State's reasons for striking Layden and McNeill are pretextual.

D. Criminal Record

The State also noted Layden's criminal record as a reason he was struck. At the same time, the State passed four non-Black prospective jurors who had criminal records. For example, James Carter had been arrested for several driving while impaired offenses and failed to disclose it during voir dire. Ronnie Trumble had been in jail for a driving while impaired offense, and Elmore had a few issues with speeding. Furthermore, at the time of the trial, Chavis had a pending shoplifting case and a failure to appear related to driving with a revoked license. Additionally, Chavis seemed hesitant to discuss the shoplifting charge and did not initially mention it during the prosecution's questioning.

E. Non-Black Prospective Jurors who Shared More Than One Characteristic with Humphrey, Layden, and McNeill

Perhaps even more compelling is evidence that several of the prospective jurors passed by the State shared more than one of the characteristics the State gave as an excuse to strike Humphrey, Layden,

and McNeill. For example, the record shows that Stephens gave very similar responses to those McNeill had given, yet he was seated as a juror, while McNeill was not. Specifically, Stephens was a minster who engaged in outreach work while McNeill was a pastor who had also engaged in outreach work. Also, both Stephens and McNeill knew people with substance abuse issues. They also both had mental health connections; however, Stephens' connections were likely stronger than McNeill's because while McNeill had a family member with mental illness, Stephens had experienced it himself. Additionally, in regard to the death penalty, McNeill noted that he "wouldn't say [he was] for the death penalty totally; but, [he could] understand the nature of the crime and—and make a fair—a fair decision based on the evidence." Similarly, Stephens had expressed being "uncomfortable" with being on a jury that might impose the death penalty. Moreover, while the State speculated that McNeill might be more likely to credit the testimony of a mental health professional, Stephens actually expressed that he would. When McNeill's and Stephens' responses are compared, the only significant difference between the two men is that McNeill is Black and Stephens is not.

Regarding Layden, the record shows that seated non-Black prospective juror James Elmore gave answers similar to Layden's. Specifically, Elmore demonstrated caution about the death penalty, had a criminal history, and had several family members with substance abuse issues. Layden also had similar characteristics to non-Black prospective juror Stephens, who had mental health and substance abuse connections and explicitly mentioned being uncomfortable with the possibility of imposing the death penalty. Lastly, non-Black prospective juror Johnny Chavis had several family members with a history of mental health and substance abuse issues and had a criminal record. Thus, while many non-Black prospective jurors shared characteristics with Layden, only Layden was struck.

Regarding Humphrey, the record shows that two of the State's reasons for striking him applied to at least two non-Black prospective jurors. Like Humphrey, non-Black prospective juror Stephens had mental health connections and expressed hesitancy about imposing the death penalty. Furthermore, non-Black prospective juror Hardin also shared two similarities with Humphrey. Namely, they both participated in mentorship roles and expressed that they wanted to pray about the death penalty.

Despite the similarities between the non-Black prospective jurors the State passed and Black prospective jurors Humphrey, Layden, and

McNeill, the trial court determined that "the State's explanations for its challenge were [not] merely pretextual." But in conducting its comparative juror analysis, the trial court not only erred in its factual conclusion but also in its application of *Batson*. The question of whether the prosecution's reasons for striking a juror are pretextual is properly addressed during the third step of a *Batson* challenge. Here, the trial court appears to have misapplied the standard, concluding at step two of the analysis that the State's excuses were not "merely pretextual." This is incorrect.

Under *Batson*, step two only addresses "the facial validity of the prosecutor's explanation," *Hernandez v. New York*, 500 U.S. 352, 360 (1991), and it "does not demand an explanation that is persuasive, or even plausible," *Purkett v. Elem*, 514 U.S. 765, 767–68 (1995). This is in contrast to *Batson*'s third step where "the persuasiveness of the justification becomes relevant" and "the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Id.* at 768. Importantly, at the third step, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Id.* Here, the trial court "erred by combining *Batson*'s second and third steps into one." *See id.* In doing so, the trial court foreclosed any meaningful analysis under step three. Indeed, having already decided at step two that the State's reasons for striking Humphrey, Layden, and McNeill were not "merely pretextual," the trial court had no reason to properly consider the comparative juror analysis.

Moreover, instead of focusing on the similarities between the Black stricken prospective jurors and the non-Black seated jurors, the trial court chose to focus on their differences. In doing so, it applied "the State's whole juror approach" and disregarded more than fifteen years of United States Supreme Court precedent. *See Miller-El II*, 545 U.S. at 241; *Snyder v. Louisiana*, 552 U.S. 472, 478–79 (2008); *Foster*, 578 U.S. at 505; *Flowers*, 139 S. Ct. at 2248–49. *Batson*'s progeny does not task the trial court with distinguishing between the jurors, but instead those cases require a trial court to acknowledge similarities among the stricken and non-stricken prospective jurors when they exist and determine whether the prosecution's reasons for striking a prospective juror are pretextual. *See Miller-El II*, 545 U.S. at 241 (focusing the Court's analysis on whether the "prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve"); *see also Snyder*, 552 U.S. at 478–79 (conducting a comparative juror analysis); *Foster*, 578 U.S. at 505 (finding it "difficult to credit [the prosecutor's proffered reasons] because the State willingly accepted white jurors with the same traits that supposedly rendered [a Black juror] an unattractive juror").

In *Miller-El II*, the Supreme Court noted that "[t]he fact that [the State's] reason [for striking a Black prospective juror] also applied to . . . other panel members, most of them white, none of them struck, is evidence of pretext." 545 U.S. at 248. The use of trait-by-trait juror comparison was reaffirmed most recently in *Flowers*, where the Court explained that "[t]he comparison can suggest that the prosecutor's proffered explanations for striking black prospective jurors were a pretext for discrimination." *Flowers*, 139 S. Ct. at 2248. Importantly, on remand, the trial court was instructed to "compare . . . [the responses of the challenged juror] to any similarly situated white juror." *Hobbs I*, 374 N.C. at 360.

Accordingly, the trial court in Mr. Hobbs's case was required to compare the prospective jurors' responses and determine, based on their similarities, if the reasons given by the prosecution for striking Humphrey, Layden, and McNeill were pretextual. *Id.* By focusing on the differences between the jurors, the trial court foreclosed the possibility of any meaningful comparative juror analysis. *See Flowers*, 139 S. Ct. at 2248–49 ("When a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination." (cleaned up)). It will always be possible to find something different between two people, even identical twins. The trial court's "whole juror" analysis was not consistent with well-established legal principles.

VI. Conclusion

"[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race . . . ." *Batson*, 476 U.S. at 89. Ensuring that race is not the basis for a peremptory challenge "enforces the mandate of equal protection and furthers the ends of justice." *Id.* at 99.

As explained above, Mr. Hobbs's case is susceptible to racial discrimination because he is Black and four of his victims are white. The MSU study Mr. Hobbs presented is evidence of a culture of discrimination in Cumberland County from 1990 to 2010. The State's use of peremptory challenges in this case supports an inference of discrimination. And when a comparative juror analysis is properly conducted, it becomes clear that the State's race-neutral excuses for striking Humphrey, Layden, and McNeill are pretextual. Taking all this information together, I would conclude the State impermissibly used race to exclude Black prospective jurors and that the trial court committed several factual and legal errors in concluding otherwise. Accordingly, I dissent.

Justice MORGAN joins in this dissenting opinion.

MICHAEL G. WOODCOCK, M.D., CAROL WADON, CAMILLE WAHBEH, AND GEORGE DEMETRI

v.

CUMBERLAND COUNTY HOSPITAL SYSTEM, INC. AND CAPE FEAR VALLEY AMBULATORY SURGERY CENTER, LLC

No. 376A21

Filed 6 April 2023

Attorney Fees—complex business case—motion for fees as part of costs—section 6-21.5—nonjusticiable case

In a complex business case involving a limited partnership—in which several limited partners (plaintiffs) sued the general partner (an ambulatory surgery center) and its owner (together, defendants)—the trial court did not abuse its discretion either by granting defendants' motion for award of attorney fees as part of their costs under Civil Procedure Rule 41(d) pursuant to N.C.G.S. § 6-21.5 or by entering an order that required plaintiffs to pay $599,262.00 in attorney fees as costs. The court's unchallenged findings and conclusions established that defendants were the prevailing party pursuant to section 6-21.5 because plaintiffs lacked standing to bring their claims as direct, individual actions, and therefore had no justiciable case.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order on defendants' motion for award of attorneys' fees as part of costs under Rule 41(d) of the North Carolina Rules of Civil Procedure entered on 23 March 2021 and an order on defendants' application for attorneys' fees and costs entered on 17 June 2021 both 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(a). Heard in the Supreme Court on 1 February 2023.

Douglas S. Harris for plaintiff-appellants.

K&L Gates LLP, by Susan K. Hackney, Marla T. Reschly, and Daniel D. McClurg, for defendant-appellees.

BARRINGER, Justice.

In this matter, we address plaintiffs' challenges to the trial court's entry of an order granting defendants' motion for award of attorneys' fees as part of their costs under North Carolina Rule of Civil Procedure 41(d) pursuant to N.C.G.S. § 6-21.5 and the trial court's subsequent order awarding $599,262.00 in attorneys' fees as costs. Given the unchallenged findings of fact and unchallenged conclusions of law, we affirm the trial court's order allowing attorneys' fees as part of costs and the resulting order awarding $599,262.00 in attorneys' fees. On the record and arguments before us, the trial court did not abuse its discretion as it relates to either order.

I. Background

As set forth in the trial court's order allowing an award of attorneys' fees, plaintiffs are limited partners of the Fayetteville Ambulatory Surgery Center Limited Partnership (FASC), which operates an ambulatory surgery center in Fayetteville, North Carolina. Plaintiffs in their individual capacities sued the general partner of FASC, defendant Cape Fear Valley Ambulatory Surgery Center, LLC (CFV), and CFV's owner, defendant Cumberland County Hospital System, Inc. (CCHS).

Specifically, the trial court found the procedural history of this matter to be as follows:[1]

> 2. Plaintiff Michael Woodcock ("Woodcock") filed his initial Complaint against CCHS on September 26, 2019, asserting various causes of action in his individual capacity, all of which related to the ownership and operation of FASC. On October 14, 2019, Woodcock filed his first Amended Complaint, adding an additional claim, also in his individual capacity.
>
> 3. On December 12, 2019, CCHS filed a motion to stay, forecasting that it intended to seek dismissal under Rules 12(b)(1) and 12(b)(6) "because Plaintiff lack[ed] standing to assert any of the claims that he purport[ed] to bring." A week later, on December 18, 2019, CCHS filed its Motion to Dismiss Plaintiff's Amended Complaint Pursuant to Rule 12(b)(1) or, Alternatively, Rule 12(b)(6). Featured prominently in the introduction section of CCHS's brief in support of their Motion to Dismiss, Defendants argued "Plaintiff

1. For readability, the trial court's citations to the record have been omitted.

[Woodcock] lacks standing to assert any of the claims that he purports to bring." In its reply in support of the Motion to Dismiss filed January 31, 2020, CCHS again argued that Woodcock lacked individual standing: "[t]he sole ground upon which [CCHS] moves to dismiss is that Plaintiff lacks individual standing to assert any of the claims that he purports to bring."

4. A week later, on February 5, 2020, Woodcock moved for leave to amend the First Amended Complaint, and simultaneously filed a proposed Second Amended Complaint. The Court granted Woodcock's motion, allowed Wadon, Wahbeh, and Demitri[2] to join as plaintiffs, deemed the Second Amended Complaint filed as of that date, and denied the pending Motion to Dismiss as Moot. Through the Second Amended Complaint, Plaintiffs, in their individual capacities, asserted five claims against CCHS and/or CFV.

5. On March 19, 2020, Defendants filed their Answer and Affirmative Defenses to Plaintiffs' Second Amended Complaint. Among Defendants' affirmative defenses, Defendants contended that "Plaintiffs' claims were barred due to subject matter jurisdiction" and "for failure to state a claim upon which relief may be granted."

6. On June 26, 2020, Defendants filed a Motion for Judgment on the Pleadings Pursuant to Rule 12(c). In the first two sentences of the introduction section of Defendants' brief in support of the Motion for Judgment, Defendants argued:

> [The Second Amended Complaint] suffers from the same fatal deficiency as Woodcock's [F]irst Amended Complaint, a deficiency addressed at length in [CCHS's] prior [M]otion to [D]ismiss. Plaintiffs, all of whom are limited partners, improperly attempt to bring individual claims against Defendants.

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2. This plaintiff's name is spelled "Demetri" in the case caption and elsewhere in the Record on Appeal.

7. Plaintiffs only responded to the Defendants' standing argument with respect to the second cause of action—breach of contract against CFV—advancing arguments completely absent from their Second Amended Complaint; notably, that Plaintiffs' [sic] were denied their voting rights under Section 14.3 of the Partnership Agreement, and that such deprivation of voting rights creates an individual right properly the subject of a direct claim. In their reply, Defendants argue, *inter alia*, that Plaintiffs did not plead facts in their complaint that Plaintiffs now argue confer standing. At the September 23, 2020 hearing on the Motion for Judgment, the Court expressed skepticism as to Plaintiffs' arguments, noting Plaintiffs' failure to include facts in the Second Amended Complaint that would support their theories, and explaining that North Carolina law requires Plaintiffs to assert their claims derivatively, not individually.

8. For the next two months, Plaintiffs served discovery and sought to depose senior CCHS executives and the corporate representative of CFV.

9. On November 24, 2020, Plaintiffs voluntarily dismissed the case, without prejudice, pursuant to Rule 41(a)(1), and forecasted their intent to re-file some or all of their claims as derivative claims on behalf of FASC.

10. On January 11, 2021, Plaintiffs' counsel sent a formal demand to CFV, demanding CFV re-assert the claims Plaintiffs previously brought in this action, plus a claim arising out of the PPP.[3] The letter indicated that:

> [i]f the General Partner does not take these actions, then the Limited Partners will take these actions in place of the General Partner in a combination of derivative actions on behalf of FAC [sic] and actions to pursue the Limited Partner's [sic] individual rights—their voting rights—which have been wholly denied . . . .

3. "PPP" stands for "Paycheck Protection Program."

> 11. On February 3, 2021, Defendants brought the Motion for Fees. Plaintiff's [sic] filed a Response to Defendants' Motion for Attorneys' Fees and Defendants filed a Reply in Support of Motion for Award of Attorneys' Fees. The Motion for Fees is now ripe for decision.

(Alterations in original and footnotes omitted).

The trial court further found and concluded:[4]

> 18. The Initial Complaint, First Amended Complaint, and Second Amended Complaint all brought claims against Defendants in Plaintiffs' individual capacities for what essentially amounted to breaches of Section 14.5, Section 10.1, and Article XII of the Partnership Agreement.
>
> . . . .
>
> 21. . . . Plaintiffs did not allege derivative claims and did not allege that a pre-suit demand was made on the general partner or partnership relating to the claims they raised in this lawsuit, or any reason that would have excused such a demand. . . .
>
> 22. . . . Plaintiffs do not argue that their claims were subject to the "special duty" exception in their response to the Motion for Judgment or in their Response Brief to the Motion for Fees. . . .
>
> 23. Instead of a special duty owed by Defendants, Plaintiffs argue that they suffered a "separate and distinct injury" because they were denied their contractual right to vote under Section 14.3 and Section 19.1 of the Partnership Agreement. However, nowhere in the Initial Complaint, First Amended Complaint, or Second Amended Complaint is there any reference to or allegation that Defendants denied Plaintiffs' voting rights under the Partnership Agreement, nor is there

4. Because plaintiffs have not challenged the trial court's conclusions of law, we do not address the soundness of the trial court's legal analysis herein. We also have omitted the trial court's statement of the law and citations to court decisions to avoid any suggestion that we are affirming the trial court's summary of the law and legal analysis as it relates to standing.

> any mention of Section 14.3 or 19.1 of the agreement. In other words, despite their multiple amendments and opportunities to raise claims, Plaintiffs failed to make allegations supporting their claim of separate and distinct injury. . . .
>
> 24. The [c]ourt concludes that Plaintiffs lacked standing to bring the claims asserted in the Initial Complaint, First Amended Complaint, and Second Amended Complaint as direct, individual actions. Defendants repeatedly placed Plaintiffs on notice of the deficiency in their claims through multiple motions and briefs expressly and specifically challenging Plaintiffs' standing. . . . Instead, Plaintiffs ignored Defendants' standing arguments, and persisted litigating their non-justiciable claims despite having multiple opportunities to amend.

(Footnotes omitted).

The trial court thus granted defendants' motion for attorneys' fees as part of their costs under Rule 41(d) pursuant to N.C.G.S. § 6-21.5. The trial court also ordered defendants to file an application for attorneys' fees and costs and submit invoices for in camera review by the trial court.

Defendants subsequently filed the application and submitted the invoices for in camera review. Plaintiffs filed a response and objection to the contents of the application. The trial court requested additional billing information, to which plaintiffs also objected. After its review of the filings and submissions, the trial court awarded $3,277.34 in costs and $599,262.00 in attorneys' fees. Plaintiffs appealed both orders but do not challenge the award of costs.

II. Analysis

Although attorneys' fees generally are not recoverable under the common law, our legislature has enacted provisions allowing for the recovery of attorneys' fees, including N.C.G.S. § 6-21.5. *See Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 257 (1991).

Section 6-21.5 provides that:

> In any civil action, special proceeding, or estate or trust proceeding, the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was

> a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. The filing of a general denial or the granting of any preliminary motion, such as a motion for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12, a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), a motion for a directed verdict pursuant to G.S. 1A-1, Rule 50, or a motion for summary judgment pursuant to G.S. 1A-1, Rule 56, is not in itself a sufficient reason for the court to award attorney's fees, but may be evidence to support the court's decision to make such an award. A party who advances a claim or defense supported by a good faith argument for an extension, modification, or reversal of law may not be required under this section to pay attorney's fees. The court shall make findings of fact and conclusions of law to support its award of attorney's fees under this section.

N.C.G.S. § 6-21.5 (2021).

This Court previously construed this statute in *Sunamerica Financial Corp. v. Bonham*, explaining that:

> A justiciable issue has been defined as an issue that is real and present as opposed to imagined or fanciful. In order to find complete absence of a justiciable issue it must conclusively appear that such issues are absent even giving the pleadings the indulgent treatment they receive on motions for summary judgment or to dismiss. However, it is also possible that a pleading which, when read alone sets forth a justiciable controversy, may, when read with a responsive pleading, no longer present a justiciable controversy.

328 N.C. at 257–58 (cleaned up). In that matter, this Court affirmed on the grounds that "the trial court's findings and conclusions suffice to support the court's order of an attorney's fee." *Id.* at 261–22. Here, we reach the same result: the unchallenged findings and conclusions suffice to support the trial court's order of attorneys' fees.[5]

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5. Plaintiffs only challenged the finding that "this matter involved a dispute over the ownership and operation of the limited partnership." We have disregarded this finding for purposes of our review.

Plaintiffs make several arguments: The trial court erred by allowing attorneys' fees without finding that plaintiffs voluntarily dismissed their action in bad faith; plaintiffs advanced a claim supported by a good faith argument for an extension, modification, or reversal of law; and the trial court abused its discretion by allowing attorneys' fees when the trial court previously directed plaintiffs to continue with discovery.

These arguments fail or are not preserved. First, plaintiffs rely on a decision from this Court, *Brisson v. Santoriello*, 351 N.C. 589, 597 (2000), which stated that "[t]he only limitations [on Rule 41 voluntary dismissals] are that the dismissal not be done in bad faith and that it be done prior to a trial court's ruling dismissing plaintiff's claim or otherwise ruling against plaintiff at any time prior to plaintiff resting his or her case at trial." *Id.* Yet, we are not reviewing plaintiffs' Rule 41 voluntary dismissal. Rather, we are reviewing an order allowing attorneys' fees to defendants as the prevailing party pursuant to N.C.G.S. § 6-21.5. Thus, we are not persuaded by this argument.

Second, plaintiffs only advanced before the trial court one "good faith argument for an extension, modification, or reversal of law" in opposition to defendants' motion for attorneys' fees as the prevailing party pursuant to N.C.G.S. § 6-21.5. Plaintiffs argued before the trial court and now this Court that because the Partnership Agreement of FASC was incorporated by reference in the amended complaint, "defendants could easily deduce that there was only one way not to violate Section 14.5 after the actions they had taken and that was for [CCHS] to have successfully sought to modify or amend the [Partnership] Agreement, [which] in turn could only be done by the use of Section 19.1 which required a vote of two-thirds in interest of the limited partners."

We are bound by the trial court's unchallenged determination that all claims brought against defendants were alleged breaches of Section 14.5, Section 10.1, and Article XII of the Partnership Agreement, which plaintiffs brought in their *individual* capacities. Also unchallenged is the trial court's conclusion that plaintiffs lacked standing to bring direct, individual claims for these alleged breaches. We are further bound by the trial court's finding that plaintiffs' "good faith argument" concerns a non-pleaded breach of the Partnership Agreement. Thus, we disagree with plaintiffs' assertion that the trial court abused its discretion.[6]

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6. The remaining arguments that plaintiffs make or allude to in their briefing before this Court concerning "good faith arguments" were not advanced before the trial court. Therefore, these arguments are not preserved, and we decline to address them. N.C. R. App. P. 10(a).

Third, plaintiffs did not argue before the trial court that its actions concerning discovery precluded the court from exercising its discretion to award attorneys' fees. Hence, we do not address this unpreserved argument that is raised for the first time on appeal. N.C. R. App. P. 10(a).

Concerning the award of attorneys' fees in the amount of $599,262.00, plaintiffs also raise objections. Plaintiffs allege that the trial court improperly relied on billing records that were not provided to plaintiffs for their review, contrary to plaintiffs' due process rights under the Fourteenth Amendment. But plaintiffs did not object to the trial court's in camera consideration of these billing invoices in their response to defendants' application for attorneys' fees. "Constitutional issues not raised and passed upon [by the] trial [court] will not be considered for the first time on appeal." *State v. Lloyd*, 354 N.C. 76, 86–87 (2001) (citing *State v. Benson*, 323 N.C. 318, 322 (1988)). Plaintiffs did subsequently raise an objection to the trial court's request for additional billing information. However, plaintiffs' counsel was copied on both related e-mails—the message from the trial court requesting additional billing information and the response from defendants' counsel providing the additional documentation. From our review of the record, we are not persuaded that this objection has merit.

Plaintiffs additionally complain that the trial court erred and abused its discretion in the order on defendants' application for attorneys' fees and costs by not considering some of plaintiffs' arguments and by reciting the parties' contentions rather than making findings of fact. Nonetheless, after reviewing the trial court's order, we conclude that the trial court's findings and conclusions are sufficient. The order reflects that the trial court considered plaintiffs' objections to the fee application and scrutinized the time and monies expended by defendants.

III. Conclusion

Based on the record before us and the preserved arguments, we conclude that the trial court did not abuse its discretion by granting defendants' motion for award of attorneys' fees as part of their costs under Rule 41(d) of the North Carolina Rules of Civil Procedure pursuant to N.C.G.S. § 6-21.5 and awarding $599,262.00 in attorneys' fees as costs. Accordingly, we affirm the trial court's orders.

AFFIRMED.

JABARI HOLMES, FRED CULP, DANIEL E. SMITH, BRENDON JADEN PEAY, AND PAUL KEARNEY, SR.

v.

TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; DAVID R. LEWIS, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON ELECTIONS FOR THE 2018 THIRD EXTRA SESSION; RALPH E. HISE, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE SENATE SELECT COMMITTEE ON ELECTIONS FOR THE 2018 THIRD EXTRA SESSION; THE STATE OF NORTH CAROLINA; AND THE NORTH CAROLINA STATE BOARD OF ELECTIONS

From N.C. Court of Appeals
19-762

From N.C. Court of Appeals
22-16

From Wake
18CVS15292

N0. 342PA19-3

ORDER

Pursuant to this Court's Administrative Order of 23 December 2021, and after thorough and thoughtful deliberation, I have concluded that I can and will be fair and impartial in deciding the rehearing of *Holmes, et al. v. Moore, et al.* (No. 342PAl9-3). Accordingly, the 3 March 2023 Motion for Disqualification filed therein is Dismissed as Moot since the almost identical Motion in this same case was denied on the merits over one year ago.

In reaching this conclusion, I thoughtfully considered:

(1) the arguments presented by the parties, giving special attention to the possibility, however remote, that any material circumstances may have changed since my previous decision in this case, and it is self-evident that no facts or circumstances of my State Senate service have or even could have changed since I left that office on December 31, 2018;

(2) my ethical responsibilities as an Associate Justice of the Supreme Court of North Carolina under our Code of Judicial Conduct;

(3) my solemn oath to serve on North Carolina's Court of last resort, rather than recusing myself to avoid public scrutiny or criticism; and,

(4) my resulting judicial duty to all North Carolinians and my personal ability to fairly and impartially discharge that duty.

For the reasons summarized above, specifically including the denial on the merits of the identical Motion in this same case over a year ago, the present Motion for Disqualification is Dismissed as Moot.

This the 13th day of March 2023.

/s/ Tamara Patterson Barringer

Tamara Patterson Barringer
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13th day of March 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

IN THE MATTER OF R.D.	From Mecklenburg 17JT614

No. 268A19

ORDER

This matter is before the Court on Counsel for Respondent-Father's motion to release his brief to the State Bar in connection with his application for appellate specialization certification. On 18 December 2020, this Court issued its opinion in *In re R.D.*, 376 N.C. 244 (2020). Respondent-Father filed his brief in this matter on 17 September 2019 under seal as provided in N.C. R. App. P. 42(b). Counsel for Respondent-Father now moves this Court for leave to provide the brief he authored on behalf of Respondent-Father to the North Carolina State Bar Appellate Specialization Committee in partial satisfaction of the certification requirements.

The motion is allowed, provided that:

1. To the extent the brief contains the correct names of the parents of the child who was the subject of this action, or any other identifying information, Counsel must redact such information from the copy of the brief made available to the North Carolina State Bar appellate specialization committee in whatever format the brief is transmitted; and

2. The North Carolina State Bar Appellate Specialization Committee maintains the confidentiality of the brief. Counsel must attach a copy of this Order to the redacted brief provided to the State Bar.

By order of the Court in Conference, this the 21st day of March 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of March 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

IN RE R.G.L

[384 N.C. 183 (2023)]

IN THE MATTER OF R.G.L.	From Person 18JT75

No. 99A21

ORDER

This matter is before the Court on Counsel for Respondent-Father's motion to release his brief to the State Bar in connection with his application for appellate specialization certification. On 17 December 2021, this Court issued its opinion herein, *In re R.G.L.*, 397 N.C. 452 (2021). Respondent-Father filed his brief in this matter on 14 May 2021 under seal as provided in N.C. R. App. P. 42(b). Counsel for Respondent-Father now moves this Court for leave to provide the brief he authored on behalf of Respondent-Father to the North Carolina State Bar Appellate Specialization Committee in partial satisfaction of the certification requirements.

The motion is allowed, provided that:

1. To the extent the brief contains the correct names of the parents of the child who was the subject of this action, or any other identifying information, Counsel must redact such information from the copy of the brief made available to the North Carolina State Bar appellate specialization committee in whatever format the brief is transmitted; and

2. The North Carolina State Bar Appellate Specialization Committee maintains the confidentiality of the brief. Counsel must attach a copy of this Order to the redacted brief provided to the State Bar.

By order of the Court in Conference, this the 21st day of March 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of March 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. LANE

[384 N.C. 184 (2023)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 20-764
v.	
MATTHEW LANE, JR.	From Wake 16CRS203857

No. 415P21

ORDER

The Court denies defendant's petition for discretionary review.

However, upon reviewing the Court of Appeals opinion, we note that the opinion suggests that an individual traveling by motor vehicle never has a reasonable expectation of privacy in his or her movement. *See State v. Lane*, 280 N.C. App. 264, 271, 866 S.E.2d 912, 918 (2021) ("A person traveling in an automobile on public throughfares [sic] has no reasonable expectation of privacy in his movements from one place to another." (emphasis omitted) (quoting *United States v. Knotts*, 460 U.S. 276, 281, 103 S. Ct. 1081, 1085 (1983))). Although this is an accurate quotation, the Court of Appeals took the quotation out of context. *Knotts* concerned whether an individual had a reasonable expectation of privacy to guard against "visual observation" of his travels "over particular roads in a particular direction . . . whatever stops he made, and . . . his final destination." *Knotts*, 460 U.S. at 281–82, 103 S. Ct. at 1085. This statement is irrelevant to the issue in this case which involves a GPS monitoring device placed on a vehicle pursuant to a warrant. We note that "[o]ne who owns and possesses a car, like one who owns and possesses a house, almost always has a reasonable expectation of privacy in it." *Byrd v. United States*, 138 S. Ct. 1518, 1527 (2018).

Therefore, we disavow use of the quotation from *Knotts* in this circumstance to prevent confusion and improper reliance on the language of the Court of Appeals in this case.

By order of the Court in Conference, this the 6th day of April 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of April 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. RUTH

[384 N.C. 185 (2023)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 20-657
v.	
BRODERICK TYWONE RUTH	From Forsyth 17CRS55391 17CRS55399-400 17CRS56332

No. 21P22

ORDER

Upon consideration of the State's petition for discretionary review, the Court allows defendant's petition for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of this Court's opinion in *State v. Campbell* issued 6 April 2023.

By order of the Court in Conference, this the 6th day of April 2023.

/s/ Allen, J.
For the Court

Justice EARLS dissenting.

The State's petition in this case seeks to raise the following specific question: "Did the Court of Appeals err as a matter of law by ordering a new trial when the record revealed that remand would be sufficient to protect defendant's rights under *Batson v. Kentucky*." That question does not arise in, and was not addressed by, this Court's opinion in *State v. Campbell*. Therefore, *Campbell* is not controlling in this case as it was presented to us and I dissent from this order remanding for reconsideration.

Justice MORGAN joins in this dissent.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of April 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

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

6 APRIL 2023

11P23	State v. Juan Renardo Chunn	Def's PDR Under N.C.G.S. § 7A-31 (COA22-486)	Denied
13P23	Dianne G. Nickles v. Tabitha Gwynn	1. Plt's Pro Se Motion for Notice of Appeal 2. Plt's Pro Se Petition for Writ of Certiorari 3. Plt's Pro Se Motion to Proceed *In Forma Pauperis* 4. Def's Motion to Dismiss Appeal 5. Plt's Pro Se Petition for Writ of Certiorari 6. Plt's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed 3. Allowed 4. Dismissed as moot 5. Dismissed 6. Allowed
21P22	State v. Broderick Tywone Ruth	1. State's Motion for Temporary Stay (COA20-657) 2. State's Petition for Writ of Supersedeas 3. State's Motion for Extension of Time to File PDR 4. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/19/2022** Dissolved 2. Denied 3. Allowed **01/25/2022** 4. Special Order
23P23	In the Matter of T.B.	1. Respondent's Pro Se Motion for En Banc Rehearing (COA22-337) 2. Respondent's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed 2. Denied
30P23	State v. Leopoldo Andrade Gomez	Def's PDR Under N.C.G.S. § 7A-31 (COA21-696)	Denied
32P23	In the Matter of the Adoption of B.M.T., a Minor	1. Petitioners' PDR Under N.C.G.S. § 7A-31 (COA22-377) 2. Petitioners' Motion for Temporary Stay 3. Petitioners' Petition for Writ of Supersedeas	1. Allowed 2. Allowed **02/14/2023** 3. Allowed
35PA21	In the Matter of A.J.L.H., C.A.L.W., M.J.L.H.	Respondent-Father's Motion for Clarification Regarding Which of the Sixteen Proposed Issues Are Now Under Discretionary Review	Dismissed as moot
35P22	State v. Edward Thorpe	Def's PDR Under N.C.G.S. § 7A-31 (COA21-268)	Dismissed

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

6 APRIL 2023

45PA18-3	State v. Pierre Alexander Amerson	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Lee County 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed
48P23	Eric S. Erickson v. North Carolina Department of Public Safety, Adult Corrections and Juvenile Justice	Petitioner's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA20-704)	Denied
67P23	Lorraine Ghee v. Walmart Stores East, LP	1. Plt's Pro Se Motion to Proceed *In Forma Pauperis* 2. Plt's Pro Se Motion for Review	1. Allowed 2. Dismissed
69P23	In the Matter of the Imprisonment of Rayvon Marquis Flowers	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **03/07/2023**
72A23	Earl James Watson v. North Carolina Department of Public Safety	Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-538)	Dismissed *ex mero motu* **Dietz, J., recused**
77A19-2	In the Matter of the Proposed Foreclosure of a Claim of Lien Filed on Calmore George and Hygiena Jennifer George by the Crossings Community Association, Inc. Dated August 22, 2016, Recorded in Docket NO. 16-M-6465 in the Office of the Clerk of Court of Superior Court for Mecklenburg County Registry by Sellers, Ayers, Dortch & Lyons, P.A. Trustee	1. Intervenor's (National Indemnity Group) PDR Under N.C.G.S. § 7A-31 (COA22-33) 2. Respondent's (KPC Holdings) PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied

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

6 APRIL 2023

79P23	James Chandler Abbott, et al. v. Michael C. Abernathy, et al.	1. Defs' (Rodney and Lynne Worthington) Motion for Temporary Stay (COA22-162) 2. Defs' (Rodney and Lynne Worthington) Petition for Writ of Supersedeas 3. Defs' (Rodney and Lynne Worthington) PDR Under N.C.G.S. § 7A-31	1. Allowed **03/16/2023** 2. 3.
80P23	State v. Jim Robinson, III	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **03/16/2023**
83P23	In re T.H., R.H., J.P.	Respondent-Mother's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-452)	Denied **04/03/2023**
87P23	Camden Summit Partnership, LP v. Mone't Byrd	Def's Pro Se Petition for Writ of Supersedeas	Dismissed **03/27/2023**
89P22	Eric Steven Fearrington, Craig D. Malmrose v. City of Greenville, Pitt County Board of Education	1. Defs' Motion for Temporary Stay (COA20-877) 2. Defs' Petition for Writ of Supersedeas 3. Def's (City of Greenville) Notice of Appeal Based Upon a Constitutional Question 4. Def's (City of Greenville) PDR Under N.C.G.S. § 7A-31 5. Plts' Conditional PDR Under N.C.G.S. § 7A-31 6. Def's (City of Greenville) Motion to File Supplement to PDR 7. Def's (City of Greenville) Motion for Judicial Review	1. Allowed **03/30/2022** 2. Allowed 3. Dismissed *ex mero motu* 4. Allowed 5. Denied 6. Allowed 7. Allowed **Dietz, J., recused**
89P23	Barcelo v. Wijewickrama, et al.	Petitioner's Pro Se Motion for Void Judgment Relief Habeas Writ	Dismissed **04/03/2023**
99A21	In the Matter of R.G.L.	Counsel's Motion to Release Brief to State Bar for Appellate Specialization Application	Special Order **03/21/2023**
100P19-2	Linda Byrd-Russ v. Nefertiti Byrd	Def's Petition for Writ of Certiorari to Review Order of District Court, Warren County	Denied **Dietz, J., recused**
102P13-6	State v. Charles Anthony Ball	Def's Pro Se Motion for Petition for Rehearing	Dismissed **03/31/2023**

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

6 APRIL 2023

102P19-5	State v. Christopher Lee Neal	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **03/29/2023**
109P16-3	State v. Curtis Joel Smith	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Cumberland County	Dismissed
122P22	State v. Kiyona Lashawn Brown	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-737) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
131P16-25	State v. Somchai Noonsab	Def's Pro Se Motion for Injunctions to Supreme Court's Claimed Jurisdiction	Dismissed
131P16-26	State v. Somchai Noonsab	1. Def's Pro Se Motion for Direct Attack Complaint 2. Def's Pro Se Motion for Immediate Release	1. Dismissed **03/31/2023** 2. Dismissed **03/31/2023**
163P22	Warren Paul Kean v. Amy Delene Kean	Def's Motion for Reconsideration	Dismissed **03/16/2023**
225P22	Gleason v. The Charlotte-Mecklenburg Hosp. Auth.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA21-501) 2. Plt's Motion to Amend PDR	1. Denied 2. Allowed
226P06-5	State v. De'Norris L. Sanders	1. Def's Pro Se Motion to Void Judgments and/or Nullify Jury Verdict 2. Def's Pro Se Motion for Restoration of Liberty Post-Haste and for Reasonable Compensation and Restitution	1. Denied **03/02/2023** 2. Denied **03/02/2023**
235P21	North Carolina Farm Bureau Mutual Insurance Company, Inc. v. Lanier Law Group, P.A., and Lisa Lanier	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA19-926) 2. Plt's Conditional PDR	1. Allowed 2. Allowed **Dietz, J., recused**
245P22	Lakisha Smith v. AutoMoney, Inc.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-271) 2. Def's Motion to Amend PDR	1. Denied 2. Allowed
246P22	Joshua Hundley v. AutoMoney, Inc.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-305) 2. Def's Motion to Amend PDR	1. Denied 2. Allowed

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

6 APRIL 2023

247P22	Jennifer Leake and Elizabeth Wakeman v. AutoMoney, Inc.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-411) 2. Def's Motion to Amend PDR	1. Denied 2. Allowed
248P22	Martha Wallace v. AutoMoney, Inc.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-418) 2. Def's Motion to Amend PDR	1. Denied 2. Allowed
249P22	Doris Wall, Patricia Smith, Corey Davis, Mario Robinson, Timothy Smith, Gloria Gilliam, Michael Waddell, Teria Bouknight, June Barbour, Emmanuel Smith, Donquis Jones, Dianne Kirkpatrick, Asbury Forte, III, Aretha Hayes, and Poonam Patel v. AutoMoney, Inc.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-419) 2. Def's Motion to Amend PDR	1. Denied 2. Allowed
250P22	Becky Troublefield v. AutoMoney, Inc.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-421) 2. Def's Motion to Amend PDR	1. Denied 2. Allowed
254P22	County of Moore v. Randy Acres and Soek Yie Phan	1. Defs' Notice of Appeal Based Upon a Constitutional Question (COA21-552) 2. Defs' PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
263P22-2	State v. David Anthony Harris	1. Def's Pro Se Motion to File as Indigent Pro Se Litigant 2. Def's Pro Se Petition for Writ of Habeas Corpus	1. Dismissed 2. Denied **03/09/2023**
268A19	In the Matter of R.D.	Counsel's Motion to Release Brief to State Bar for Appellate Specialization Application	Special Order **03/21/2023**
268A22	Schooldev East, LLC v. Town of Wake Forest	1. Petitioner's Notice of Appeal Based Upon a Dissent (COA21-359) 2. Petitioner's PDR as to Additional Issues 3. Respondent's Conditional PDR Under N.C.G.S. § 7A-31	1. --- 2. Allowed 3. Allowed

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

6 APRIL 2023

281P06-12	Joseph E. Teague, Jr., P.E., C.M. v. N.C. Department of Transportation	1. Plt's Pro Se Motion for Procedural Challenge 2. Plt's Pro Se Petition in the Alternative for Writ of Habeas Corpus	1. Dismissed **03/21/2023** 2. Dismissed **03/21/2023**
282P22	Jennifer Snipes v. TitleMax of Virginia, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA21-374)	Denied
306A20	Sound Rivers, Inc., et al. v. NC Department of Environmental Quality, et al.	Intervenor's Motion to Extend Time for Oral Argument by Twenty Minutes	Denied **03/24/2023** **Berger, J., recused**
317P22-2	State v. Joseph Ngigi Kariuki	1. Def's Pro Se Motion for Appropriate Relief 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
339P22	State v. Jimmy Harris	Def's Pro Se Motion for Notice of Appeal (COAP22-331)	Dismissed **Dietz, J., recused**
342PA19-3	Holmes, et al. v. Moore, et al.	1. Plts' Motion for Disqualification of Justice Tamara Patterson Barringer 2. Plts' Motion for Disqualification of Justice Berger, Jr.	1. Special Order **03/13/2023** 2. Dismissed **03/14/2023**
346P22	Richard L. Neeley v. William C. Fields, Jr.; Willcox, McFadyen, Fields & Sutherland PLLC; Nancy Y. Wiggins, as the Executrix of the Estate of Richard M. Wiggins; Kenneth B. Dantinne; and McCoy Wiggins, PLLC	Plt's PDR Under N.C.G.S. § 7A-31 (COA22-30)	Denied **Dietz, J., recused**
366P21-2	State v. Sharif Hakim Moore	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-368)	Denied **Dietz, J., recused**
366P22	Alice Bracey (formerly Murdock) v. Michael Welborn Murdock	Def's PDR Under N.C.G.S. § 7A-31 (COA22-198)	Denied

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

6 APRIL 2023

376A21	Woodcock, et al. v. Cumberland County Hospital System, et al.	Defs' Motion for Sanctions	Denied
384P16-3	Phillip Wayne Broyal v. Todd Ishee, Secretary of North Carolina Department of Adult Correction; Brett Bullis, Superintendent of Avery Mitchell Correctional Institution	1. Def's Pro Se Petition for Writ of Habeas Corpus 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Denied **03/07/2023** 2. Allowed **03/07/2023** 3. Dismissed as moot **03/07/2023** **Dietz, J., recused**
384P16-4	Phillip Wayne Broyal v. Todd Ishee, Secretary of North Carolina Department of Adult Correction; Brett Bullis, Superintendent of Avery Mitchell Correctional Institution	Def's Pro Se Motion for Reconsideration of Petition for Writ of Habeas Corpus	Dismissed **03/28/2023** **Dietz, J., recused**
403P21	Louis M. Bouvier, Jr., Karen Andrea Niehans, Samuel R. Niehans, and Joseph D. Golden v. William Clark Porter, IV, Holtzman Vogel Josefiak Torchinsky PLLC, Steve Roberts, Erin Clark, Gabriela Fallon, Steven Saxe, and the Pat McCrory Committee Legal Defense Fund	1. Defs' (Holtzman Vogel Josefiak Torchinsky PLLC, Steve Roberts, Erin Clark, Gabriela Fallon, Steven Saxe, and the Pat McCrory Committee Legal Defense Fund) PDR Under N.C.G.S. § 7A-31 2. Plts' Motion to Expedite Consideration of PDR 3. Defs' (Holtzman Vogel Josefiak Torchinsky PLLC, Steve Roberts, Erin Clark, Gabriela Fallon, Steven Saxe, and the Pat McCrory Committee Legal Defense Fund) Motion to Recuse 4. Plts' Motion to Withdraw Allison Riggs as Counsel of Record 5. Defs' (Holtzman Vogel Josefiak Torchinsky PLLC, Steve Roberts, Erin Clark, Gabriela Fallon, Steven Saxe, and the Pat McCrory Committee Legal Defense Fund) Motion for Temporary Stay. 6. Defs' (Holtzman Vogel Josefiak Torchinsky PLLC, Steve Roberts, Erin Clark, Gabriela Fallon, Steven Saxe, and the Pat McCrory Committee Legal Defense Fund) Petition for Writ of Supersedeas	1. Allowed 2. Dismissed as moot 3. Dismissed as moot **01/18/2022** 4. Allowed **01/03/2023** 5. Allowed **02/07/2023** 6. Allowed **Earls, J., recused**

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

6 APRIL 2023

415P21	State v. Matthew Lane, Jr.	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-764) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Special Order 3. Allowed
428P21	State v. Brandon Tyler Stacy	Def's Pro Se Motion for Grievance	Dismissed
450P20-2	State v. Clifton William Batts	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **03/20/2023**

ORDER RESCINDING "ADMINISTRATIVE ORDER CONCERNING THE FORMATTING OF OPINIONS AND THE ADOPTION OF A UNIVERSAL CITATION FORM"

This Court's order entitled "ADMINISTRATIVE ORDER CONCERNING THE FORMATTING OF OPINIONS AND THE ADOPTION OF A UNIVERSAL CITATION FORM" dated 4 December 2019, which is attached hereto, is hereby rescinded effective 1 February 2023.

Ordered by the Court in Conference, this the 11th day of January 2023.

/s/ Allen, J.
For the Court

Justice Morgan and Justice Earls dissent from this order.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13th day of January 2023.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

ADMINISTRATIVE ORDER CONCERNING THE FORMATTING OF OPINIONS AND THE ADOPTION OF A UNIVERSAL CITATION FORM

Effective 1 January 2021, an opinion number and paragraph numbers will appear in every opinion filed by the Supreme Court of North Carolina and the North Carolina Court of Appeals. Like a docket number or a party's name, these opinion and paragraph numbers will be native to the text of the opinion and may therefore appear across mediums of publication. Accordingly, opinions filed on or after 1 January 2021 will have an immediate, permanent, and medium-neutral ("universal") citation the moment they are issued.

Because a universal citation is medium-neutral, it does not point to an official publication of the opinion. The *North Carolina Reports* and the *North Carolina Court of Appeals Reports* remain the official reports of the opinions of the Supreme Court of North Carolina and of the North Carolina Court of Appeals, respectively.

Opinions of the Supreme Court of North Carolina and the North Carolina Court of Appeals that are filed on or after 1 January 2021 should be cited using this format: [Case Name], [Traditional Citation to the Bound Volume and Page Number of the Court's Official Reporter], [Universal Citation to the Year, Court, and Opinion Number], [Pinpoint Paragraph Number].

e.g., *State v. Smith*, 375 N.C. 152, 2020-NCSC-45, ¶ 16.

State v. Smith, 255 N.C. App. 43, 2020-NCCOA-118, ¶ 23.

By virtue of this administrative order, the Appellate Reporter, the Director of Appellate Division Computing, and the Supreme Court's Administrative Counsel are hereby instructed to implement this formatting and citation form and to promote its use by the stakeholders in our legal and judicial communities, subject to further orders of the Court.

Ordered by the Court in Conference, this the 4th day of December, 2019.

s/Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of December, 2019.

s/Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

ORDER RESCINDING "ORDER ESTABLISHING THE OFFICE OF APPELLATE DIVISION STAFF"

This Court's order entitled "Order Establishing the Office of Appellate Division Staff" and dated 19 December 2018, which appears on the following page, is hereby rescinded.

Ordered by the Court in Conference, this the 11th day of January 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 11th day of January 2023.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

ORDER CONCERNING APPELLATE DIVISION STAFF

IN THE SUPREME COURT OF NORTH CAROLINA

****

ORDER ESTABLISHING THE OFFICE OF APPELLATE DIVISION STAFF

The Office of Staff Counsel at the North Carolina Court of Appeals is hereby converted into the Office of Appellate Division Staff, which shall provide support to the Supreme Court of North Carolina and the North Carolina Court of Appeals.

Ordered by the Court in Conference, this the 19th day of December, 2018.

Michael R. Morgan

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 19 day of December, 2018.

Amy L. Funderburk

AMY L. FUNDERBURK

Clerk of the Supreme Court

ORDER AMENDING THE
GENERAL RULES OF PRACTICE
FOR THE SUPERIOR AND DISTRICT COURTS

Pursuant to section 7A-34 of the General Statutes of North Carolina, the Court hereby amends Rule 5 and Rule 5.1 of the General Rules of Practice for the Superior and District Courts.

* * *

Rule 5. Filing of Pleadings and Other Documents in Counties with *Odyssey*

(a) **Scope.** This rule applies only in those counties that have implemented *Odyssey*, the Judicial Branch's new electronic-filing and case-management system. The Administrative Office of the Courts maintains a list of the counties with *Odyssey* at https://www.nccourts.gov/ecourts. In a county without *Odyssey*, a person must proceed under Rule 5.1 of these rules.

(b) **Electronic Filing in *Odyssey*.**

(1) **Registration**. A person must register for a user account to file documents electronically. The Administrative Office of the Courts must ensure that the registration process includes security procedures consistent with N.C.G.S. § 7A-49.5(b1).

(2) **Requirement**. An attorney must file pleadings and other documents electronically. A person who is not represented by an attorney is encouraged to file pleadings and other documents electronically but is not required to do so.

(3) **Signing a Document Electronically**. A person who files a document electronically may sign ~~a~~the document electronically by typing his or her name in the document preceded by "/s/." If the document requires additional signatures, then the filer may type the name of each signatory preceded by "/s/" or scan a document that includes all of the necessary signatures. By filing a document with multiple signatures, the filer certifies that each of the other signatories has expressly agreed to the form and substance of the document and that the filer has authority to submit the document on each signatory's behalf.

(4) **Time**.

a. W**hen Filed**. A document is filed when it is received by the court's electronic-filing system, as evidenced by the file stamp on the face of the document.

b. **Deadline**. If a document is due on a date certain, then the document must be filed by 5:00 p.m. Eastern Time on that date.

(5) **Relief if Emergency Prevents Timely Filing**. If an *Odyssey* service outage, natural disaster, or other emergency prevents an attorney from filing a document in a timely manner by use of the electronic-filing system, then the attorney may file a motion in paper that asks the court for permission to file the document in paper or for any other relief that is permitted by law. The attorney must attach the document that he or she was prevented from filing to the motion.

(6) **Withdrawal of a Document by Filer**. After a person files a document electronically, the person may withdraw the document in *Odyssey* up until the point at which the clerk of superior court or the judicial official who is authorized by law to accept the document begins processing it. If withdrawn, the document will be treated as if it had never been filed with the court.

(7) **Acceptance or Rejection of a Document by Court**. When processing a document that has been filed electronically, the clerk of superior court or the judicial official who is authorized by law to accept the document will accept it unless:

a. the document is prohibited by order, statute, or rule from being filed with the court;

b. the filer, after being contacted by the clerk's office, has submitted a rejection request in writing to the clerk who is processing the document; or

c. the document cannot be opened by the court because it is corrupted or the document has been quarantined in *Odyssey* for containing a virus or other malicious software.

If the clerk or judicial official rejects the document for one of the reasons specified above, then (i) the document will be treated as if it had never been filed with the

court and (ii) the clerk or judicial official will notify the filer that it has been rejected and specify the reason it was rejected.

~~(6)~~(8) **Orders, Judgments, Decrees, and Court Communications**. ~~The court may sign an order, judgment, decree, or other document electronically and may file a document electronically.~~Barring exceptional circumstances, the court must sign and file its orders, judgments, decrees, and other documents electronically in *Odyssey*. A document filed by the court in *Odyssey* is filed when it is electronically file-stamped by the clerk of superior court or by another judicial official who is authorized by law to accept the document. The court may ~~also~~ send notices and other communications to a person ~~by use of the electronic-filing system~~in *Odyssey*.

(c) **Paper Filing**. Documents filed in paper with the court should be unfolded and firmly bound with no manuscript cover. They must be letter size (8 ½" x 11"), except for wills and exhibits. The clerk of superior court may require a party to refile a document that does not conform to these requirements.

In civil actions, special proceedings, and estates, documents filed in paper with the court must include a cover sheet that summarizes the critical elements of the document in a format that the Administrative Office of the Courts prescribes. The clerk of superior court may not reject the filing of a document that does not include a cover sheet. Instead, the clerk must file the document, notify the party of the omission, and grant the party no more than five days to file the cover sheet. Other than dismissing the case, the court should not act on the document before the cover sheet is filed.

A document filed in paper is filed when it is file-stamped by the clerk of superior court or by another judicial official who is authorized by law to accept the document.

(d) **Service.** Service of pleadings and other documents must be made as provided by the General Statutes. A Notification of Service generated by the court's electronic-filing system is an "automated certificate of service" under Rule 5(b1) of the Rules of Civil Procedure.

(e) **Private Information**. A person should omit or redact nonpublic and unneeded sensitive information in a document before filing it with the court.

(f) **Business Court Cases**. The filing of documents with the North Carolina Business Court is governed by the North Carolina Business Court Rules. This rule defines how a person must file a document "with the Clerk of Superior Court in the county of venue" under Rule 3.11 of the North Carolina Business Court Rules in counties with *Odyssey*.

Comment

The North Carolina Judicial Branch ~~will implement~~is implementing *Odyssey*, a statewide electronic-filing and case-management system, ~~beginning in July 2021~~. The system will be made available across the state in phases ~~over a five-year period~~.

Rule 5 of the General Rules of Practice defines filing in those counties with *Odyssey*. Rule 5.1 defines filing in those counties without *Odyssey*.

Subsection (b)(2) of Rule 5 requires an attorney to file pleadings and other documents electronically in *Odyssey*. An attorney who seeks relief from this filing requirement for a particular document should be prepared to show the existence of an exceptional circumstance. In an exceptional circumstance, the attorney should exercise due diligence to file the document electronically before the attorney asks the court for relief.

Subsection (b)(4) of Rule 5 indicates that a document is filed when it is received by the court's electronic-filing system, not when it is processed by the clerk's office. The file stamp on the face of the document will therefore reflect the date and time of receipt. Subsection (b)(4) also implements a 5:00 p.m. filing deadline on the due date for a document. If a document is filed on its due date, then it is timely if it is filed by 5:00 p.m. and late if it is filed after 5:00 p.m.

Subsection (b)(5) of Rule 5 describes the process of asking the court for relief if an emergency prevents an attorney from filing a document electronically in a timely manner. Subsection (b)(5) should not be construed to expand the court's authority to extend time or periods of limitation. The court will provide relief only as permitted by law.

Subsection (b)(6) of Rule 5 indicates that a person may withdraw a document that has been filed electronically. The functionality for withdrawing a document is built into the filer's *Odyssey* interface and is available until the clerk of superior court or the judicial official who is authorized by law to accept the document begins processing it.

Subsection (b)(7) of Rule 5 specifies the reasons the clerk of superior court or another judicial official who is authorized by law to accept a document may nevertheless reject it. The first category permits the clerk or judicial official to reject a document if there is an order, a statute, or a rule that prohibits the document from being filed. For example, a clerk may reject a document if a gatekeeper order directs the clerk not to accept it, if a document is ordered null and void pursuant to N.C.G.S. § 14-118.6 because it is a false lien or encumbrance, or if a document is not permitted to be filed under Rule 5(d) of the Rules of Civil Procedure (e.g., a discovery request or response, an offer of settlement, or a document submitted to the court for in camera review). The second category permits the clerk or judicial official to reject a document if the filer submits a rejection request in writing to the clerk who is processing the document. This category gives the clerk's office an opportunity

to inform the filer of potential issues with a document so that the filer can correct mistakes and make changes to the document before it is accepted and added to the case file. The final category permits the clerk or judicial official to reject a document that is either unviewable due to corruption or potentially harmful because of a virus or other malicious software. If a document is rejected, the rule requires the clerk or judicial official to notify the filer that the document has been rejected and specify the reason it was rejected.

The North Carolina Business Court currently accepts filings through *eFlex*, a legacy electronic-filing and case-management system. Until *Odyssey* is implemented both in the Business Court and in the county of venue, duplicate filings in Business Court cases will still be required (see Rule 3.11 of the North Carolina Business Court Rules). Subsection (f) of Rule 5 of the General Rules of Practice clarifies that in Business Court cases, Rule 5 governs filings "with the Clerk of Superior Court in the county of venue."

As *Odyssey* is implemented, litigants should expect the General Rules of Practice, the North Carolina Business Court Rules, and the Supplemental Rules of Practice and Procedure for the North Carolina eFiling Pilot Project to undergo change.

* * *

Rule 5.1. Filing of Pleadings and Other Documents in Counties without *Odyssey*

(a) **Scope**. This rule applies only in those counties that have not yet implemented *Odyssey*, the Judicial Branch's new electronic-filing and case-management system. In a county with *Odyssey*, a person must proceed under Rule 5 of these rules.

(b) **Electronic Filing**. Electronic filing is available only in (i) cases that are either designated "complex business" or assigned to a Business Court judge under Rule 2.1 of these rules and (ii) cases subject to the legacy North Carolina eFiling Pilot Project. The procedure for filing documents electronically in those cases is governed by the North Carolina Business Court Rules and by the Supplemental Rules of Practice and Procedure for the North Carolina eFiling Pilot Project, respectively. In all other cases, only paper filing is available.

(c) **Paper Filing**. Documents filed in paper with the court should be unfolded and firmly bound with no manuscript cover. They must be letter size (8 ½" x 11"), except for wills and exhibits. The clerk of superior court may require a party to refile a document that does not conform to these requirements.

In civil actions, special proceedings, and estates, documents filed in paper with the court must include a cover sheet that summarizes the critical elements of the document in a format that the Administrative Office of the Courts prescribes. The clerk of superior court may not reject the

filing of a document that does not include a cover sheet. Instead, the clerk must file the document, notify the party of the omission, and grant the party no more than five days to file the cover sheet. Other than dismissing the case, the court should not act on the document before the cover sheet is filed.

A document filed in paper is filed when it is file-stamped by the clerk of superior court or by another judicial official who is authorized by law to accept the document.

Comment

The North Carolina Judicial Branch ~~will implement~~is implementing *Odyssey*, a statewide electronic-filing and case-management system, ~~beginning in July 2021~~. The system will be made available across the state in phases ~~over a five-year period~~.

Rule 5 of the General Rules of Practice defines filing in those counties with *Odyssey*. Rule 5.1 defines filing in those counties without *Odyssey*.

Subsection (b) of Rule 5.1 lists those contexts in which electronic filing exists in the counties without *Odyssey*.

As *Odyssey* is implemented, litigants should expect the General Rules of Practice, the North Carolina Business Court Rules, and the Supplemental Rules of Practice and Procedure for the North Carolina eFiling Pilot Project to undergo change.

* * *

These amendments to the General Rules of Practice for the Superior and District Courts become effective on 13 February 2023.

These amendments shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 1st day of February 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of February 2023.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

ORDER AMENDING THE GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Pursuant to section 7A-34 and subsection 7A-49.5(e) of the General Statutes of North Carolina, the Court hereby adopts Rule 29 of the General Rules of Practice for the Superior and District Courts.

* * *

Rule 29. Definition of "Seal."

In all cases in which the seal of any court or judicial office is required by law to be affixed to any paper issuing from a court or office, the word "seal" shall be construed to include an impression of the official seal, made upon the paper alone, an impression made by means of a wafer or of wax affixed thereto, or an electronic image adopted as the official seal affixed thereto. The Administrative Office of the Courts may prescribe the format and appearance of an electronic image adopted for use as an official seal.

* * *

This amendment to the General Rules of Practice for the Superior and District Courts becomes effective on 13 February 2023.

This amendment shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 9th day of February 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of February 2023.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

ORDER AMENDING THE RULES OF APPELLATE PROCEDURE

Pursuant to Article IV, Section 13(2), of the Constitution of North Carolina, the Court hereby amends Rule 26 of the North Carolina Rules of Appellate Procedure.

* * *

Rule 26. Filing and Service

(a) **Filing**. Counsel must file documents in the appellate courts electronically~~. The electronic-filing site for the appellate courts is located~~ at https://www.ncappellatecourts.org. If a technical failure prevents counsel from filing a document by use of the electronic-filing site, then the clerk of the appellate court may permit the document to be filed in paper by hand delivery, mail, or fax. Counsel may file copies of oversized documents and non-documentary items electronically if permitted to do so by the electronic-filing site, but otherwise by hand delivery or mail.

A person who is not represented by counsel is encouraged to file items in the appellate courts electronically but is not required to do so. A person not represented by counsel may file items by hand delivery or mail.

An item is filed in the appellate court electronically when it is received by the electronic-filing site. An item is filed in paper when it is received by the clerk, except that motions, responses to petitions, the record on appeal, and briefs filed by mail are deemed filed on the date of mailing as evidenced by the proof of service.

(b) **Service Required**. Copies of all items filed by any party ~~and not required by these rules to be served by the clerk~~ shall, at or before the time of filing, be served on all other parties to the appeal.

(c) **Manner of Service**. Service of any item may be made upon a party's attorney of record or upon a party in the manner provided for service and return of process in Rule 4 of the Rules of Civil Procedure ~~and may be so made upon a party or upon its attorney of record~~. Service of any item may ~~also~~alternatively be made upon a ~~party or its attorney of record~~party's attorney of record or upon a party by delivering a copy to either or by mailing a copy to the recipient's last known address, or if no address is known, by filing it in the office of the clerk with whom the original item is filed. Delivery of a copy within this rule means handing it to the attorney or to the party~~,~~; or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the item enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United

States Postal Service, or, for those having access to such services, upon deposit with the State Courier Service or Inter-Office Mail. ~~When a document is filed electronically to the electronic filing site, service also may be accomplished electronically by use of the other counsel's correct and current e-mail address(es), or service may be accomplished in the manner described previously in this subsection.~~

If the item to be served is filed electronically in the appellate courts using the appellate courts' electronic-filing site, then service may alternatively be made upon a party's attorney of record by e-mail to the attorney's correct and current e-mail address. If the item to be served is filed with the clerk of superior court using *Odyssey*, the trial court's electronic-filing system, then service may alternatively be made using the service feature in that system.

(d) **Proof of Service**. Items presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the items filed. But if the item is filed with the clerk of superior court and served using *Odyssey*, then a Notification of Service generated by that system satisfies the requirements of this subsection.

(e) **Joint Appellants and Appellees**. Any item required by these rules to be served on a party is properly served upon all parties joined in the appeal by service upon any one of them.

(f) **Numerous Parties to Appeal Proceeding Separately**. When there are unusually large numbers of appellees or appellants proceeding separately, the trial tribunal, upon motion of any party or on its own initiative, may order that any items required by these rules to be served by a party on all other parties need be served only upon parties designated in the order, and that the filing of such an item and service thereof upon the parties designated constitutes due notice of it to all other parties. A copy of every such order shall be served upon all parties to the action in such manner and form as the court directs.

(g) **Formatting of Documents Filed with Appellate Courts**.

(1) **Form of Documents**. Documents composed for an appeal and presented to either appellate court for filing shall be letter size (8½ x 11"). Documents shall be prepared using a proportionally spaced font with serifs that is no smaller than 12-point and no larger than 14-point in size. Examples of proportionally spaced fonts with serifs include, but are not limited to, Constantia and Century typeface as described in Appendix B to these rules. The

body of text shall be presented with double spacing between each line of text. Lines of text shall be no wider than 6½ inches, leaving a margin of approximately one inch on each side. The format of all documents presented for filing shall follow the additional instructions found in the appendixes to these rules. The format of briefs shall follow the additional instructions found in Rule 28(j).

(2) **Index Required**. Documents composed for an appeal and presented to either appellate court, other than records on appeal, which in this respect are governed by Rule 9, shall, unless they are less than ten pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and textbooks cited, with references to the pages where they are cited.

(3) **Closing**. The body of a document composed for an appeal shall at its close bear the printed name, post office address, telephone number, State Bar number, and e-mail address of counsel of record, and in addition, at the appropriate place, the signature of counsel of record.

* * *

These amendments to the North Carolina Rules of Appellate Procedure are effective 13 February 2023 and apply to cases that are appealed on or after that date.

These amendments shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 1st day of March 2023, *nunc pro tunc* 13 February 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of March 2023.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE DISCIPLINE & DISABILITY OF ATTORNEYS

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 21, 2022.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01B, Section .0100, *Discipline and Disability of Attorneys*, be amended as shown in the following attachment:

ATTACHMENT 1: 27 N.C.A.C. 01B, Section .0100, Rule .0119, *Effect of a Finding of Guilt in Any Criminal Case*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 21, 2022.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of February, 2023.

s/Alice Neece Mine
Alice Neece Mine, Secretary

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

This the 1st day of March, 2023.

s/Paul M. Newby
Paul M. Newby, Chief Justice

On this date, the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was entered upon the minutes of the Supreme Court. The amendment shall be published in the forthcoming

volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 1st day of March, 2023.

s/Allen, J.
For the Court

SUBCHAPTER 1B DISCIPLINE AND DISABILITY RULES

SECTION .0100 DISCIPLINE AND DISABILITY OF ATTORNEYS

27 NCAC 01B .0119 EFFECT OF A FINDING OF GUILT IN ANY CRIMINAL CASE

(a) Conclusive Evidence of Guilt - A certified copy of the conviction of ~~an attorney~~ **a member** for any crime or a certified copy of a judgment entered against ~~an attorney where~~ **a member in which** a plea of guilty, *nolo contenedre*, or no contest has been accepted by a court will be conclusive evidence of guilt of that crime in any disciplinary proceeding instituted against a member. For purposes of any disciplinary proceeding against a member, such conviction or judgment ~~shall~~ conclusively establish**es** all elements of the criminal offense and ~~shall~~ conclusively establishes all facts set out in the document charging the member with the criminal offense.

. . .

(c) When Conviction is Expunged, Overturned or Otherwise Eliminated -

(1) Any request for relief as a result of an expunction of any kind shall be made under the provisions of this rule, including but not limited to expunctions of convictions, expunctions from dismissals of charges or findings of not guilty, and expunctions related to prayer for judgment continued and conditional discharges.

(2) Definitions.

(A) "Expunged action" refers to the thing expunged, which may include but is not limited to a conviction, a judgment entered against a member in which the member is adjudged guilty of a criminal offense, a judgment entered against a member in which a plea of guilty, *nolo contendere*, or no contest was accepted by the court, a charge dismissed or otherwise resolved pursuant to a prayer for judgment disposition, or a charge dismissed pursuant to a conditional discharge disposition.

(B) An order of discipline or other disciplinary action issued by the Grievance Committee or the commission ("the discipline") is based solely upon a conviction or other expunged action when there is no evidence in the record before the body that issued

the discipline other than documentation of the conviction or expunged action.

(C) Any admissions of the member contained in a consent order of discipline entered by the commission and signed by the member or an affidavit surrendering the member's law license constitute evidence in the record other than documentation of the conviction or expunged action.

(3) Discipline Based Solely Upon Conviction or Expunged Action.

(A) If discipline was imposed upon a member based solely upon a conviction or expunged action and the conviction or expunged action is reversed, vacated, expunged, or otherwise eliminated, the discipline shall be vacated.

(B) The State Bar may initiate another disciplinary proceeding against the member alleging rule violations and seeking imposition of discipline based upon the facts or events underlying the conviction or expunged action.

(4) Discipline Based in Part Upon Conviction or Expunged Action. If discipline was imposed upon a member based in part upon a conviction or expunged action and the conviction or expunged action is reversed, vacated, expunged, or otherwise eliminated, the member may petition the body that issued the discipline for one of the following forms of relief:

(A) Redaction. All references to the conviction, charges, and/or expunged action redacted from the original discipline.

(B) Substituted Discipline. All references to the conviction, charges, and/or expunged action omitted in a substituted discipline identical in all other respects to the original discipline. Substituted discipline will be entered *nunc pro tunc* to the date of entry of the original discipline and will have the same effective date as the original discipline. Substituted discipline will reflect the filing date on which the substituted discipline is entered.

(C) Modified Discipline. When the original discipline was not a consent order of discipline entered by the

commission and signed by the member, the member may seek an order replacing the original discipline with modified discipline imposing a different disposition and omitting all references to the conviction, charges, and/or expunged action. Modified discipline will be entered *nunc pro tunc* to the date of entry of the original discipline and will have the same effective date as the original discipline. Modified discipline will reflect the filing date on which the modified discipline is entered.

(5) Procedures.

(A) A member may petition the body that issued the original discipline for relief under this section. The petition must be served simultaneously upon the counsel. If the action that eliminated the conviction is sealed or otherwise not public record, the member may file the petition under seal without seeking leave to do so. The petition shall be accompanied by documentation of the action that eliminated the conviction or expunged action, and shall specify which form of relief the member seeks. If the member seeks relief under section (c)(4)(A) or (c)(4)(B) above, the petition shall include proposed redacted or substituted discipline.

(B) The State Bar shall have thirty days from receipt of the petition to file a written response, which must be served simultaneously upon the member. If the petition was filed under seal, the response shall be filed under seal. If the member seeks relief under section (c)(4)(A) or (c)(4)(B) above, the response (i) shall indicate whether the State Bar consents to the redacted or substituted discipline proposed by the member or (ii) shall include redacted or substituted discipline proposed by the State Bar.

(C) When the original discipline was issued by the Grievance Committee, the counsel shall forward to the Grievance Committee within forty days of the date of service of the petition upon the counsel (i) the member's petition for relief and accompanying supporting documentation, (ii) the State Bar's response, and (iii) the evidence considered by the Grievance Committee when it issued the original discipline.

(D) When the original discipline was issued by the commission after a hearing, the member shall obtain a transcript of the hearing at the member's sole expense. The member shall provide official copies of the transcript to the commission and to the counsel within ninety days of the date of the petition. For good cause shown, the commission may enlarge the time for provision of the transcript. If the member does not timely provide official copies of the transcript to the commission and to the counsel, the member will be ineligible for the relief described in section (c)(4)(C).

(E) Consideration and Action.

(i) Grievance Committee - The Grievance Committee will not consider new evidence. The committee will take action on the petition at its next available quarterly meeting occurring at least two weeks after the materials required by section (c)(5)(C) above were forwarded to the committee. The Grievance Committee will consider the matter, determine whether the discipline was based in whole or in part upon the conviction or expunged action, and take action as set forth in sections (c)(3) and (c)(4) above.

(ii) Commission - The commission will not consider new evidence. Upon receipt of the petition and response, the chairperson of the commission will appoint a hearing panel. If the original discipline was issued after a hearing, within thirty days of appointment of the hearing panel the clerk will ensure the hearing panel has the exhibits that were entered into evidence and a list of witnesses who testified at the original hearing. In a case to which (c)(5)(D) applies, the hearing panel will not consider the petition until the member has provided the transcript to the hearing panel and to the counsel or until the time has run for the transcript to be provided. The hearing panel will consider the matter, determine whether the discipline was based in whole or in part upon the conviction or expunged action, and will take action as set forth in sections (c)(3) and (c)(4) above.

The hearing panel will enter an order containing findings of fact and conclusions of law and ordering the action to be taken. The order will be entered under seal if the petition seeking relief was filed under seal.

(F) Expunged Action Referenced in Public Commission Records. Upon relief granted by the commission as set forth above, the commission shall also redact from all public commission records any reference to the expunged action.

History Note: *Authority G.S. 84-23; 84-28;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: November 7, 1996; March 6, 1997; December 30, 1998; February 3, 2000; September 22, 2016; March 1, 2023.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES CONCERNING PROCEDURES FOR THE ADMINISTRATIVE COMMITTEE

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 21, 2022.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .0900, *Procedures for the Administrative Committee*, be amended as shown in the following attachment:

ATTACHMENT 2: 27 N.C.A.C. 01D, Section .0900, Rule .0902, *Reinstatement from Inactive Status*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 21, 2022.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of February, 2023.

s/Alice Neece Mine
Alice Neece Mine, Secretary

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

This the 1st day of March, 2023.

s/Paul M. Newby
Paul M. Newby, Chief Justice

On this date, the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was entered upon the minutes of the

Supreme Court. The amendment shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 1st day of March, 2023.

s/Allen, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .0900 – PROCEDURES FOR THE ADMINISTRATIVE COMMITTEE

27 NCAC 01D .0902 REINSTATEMENT FROM INACTIVE STATUS

(a) Eligibility to Apply for Reinstatement

. . .

(c) Requirements for Reinstatement

(1) Completion of Petition.

. . . .

. . .

(5) Bar Exam and MPRE Requirement If Inactive Seven or More Years.

(A) . . . .

(B) A member may offset the inactive status period for the purpose of calculating the seven years necessary to actuate the requirements of paragraph (A) as follows:

(1) . . . .

. . .

(3) Federal Court Judicial Service. Each calendar year in which an inactive member served in the federal judiciary, whether for the entire calendar year or some portion thereof, shall offset one year of inactive status for the purpose of calculating the seven years necessary to actuate the requirements of paragraph (A). Such service shall also satisfy the CLE requirements set forth in paragraph (c)(4) for each year, or portion thereof, that the member served as a federal judge.

(6) Payment of Fees, Assessments and Costs.

. . .

(d) . . . .

. . .

PROCEDURES FOR ADMINISTRATIVE COMMITTEE

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: September 7, 1995; March 7, 1996; March 5, 1998; March 3, 1999; February 3, 2000; March 6, 2002; February 27, 2003; March 3, 2005; March 10, 2011; August 25, 2011; March 8, 2012; March 8, 2013; March 6, 2014; October 2, 2014; September 22, 2016; September 20, 2018; September 25, 2020; December 14, 2021; March 1, 2023.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES CONCERNING PREPAID LEGAL SERVICES PLANS

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 21, 2022.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01E, Section .0300, *Rules Concerning Prepaid Legal Services Plans*, be amended as shown in the following attachment:

ATTACHMENT 3: 27 N.C.A.C. 01E, Section .0300, Rule .0301, *Definitions*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 21, 2022.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of February, 2023.

s/Alice Neece Mine
Alice Neece Mine, Secretary

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

This the 1st day of March, 2023.

s/Paul M. Newby
Paul M. Newby, Chief Justice

On this date, the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was entered upon the minutes of the Supreme Court. The amendment shall be published in the forthcoming

volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 1st day of March, 2023.

s/Allen, J.
For the Court

SUBCHAPTER 1E - REGULATIONS FOR ORGANIZATIONS PRACTICING LAW

SECTION .0300 RULES CONCERNING PREPAID LEGAL SERVICES PLANS

27 NCAC 01E .0301 DEFINITIONS

The following words and phrases when used in this subchapter shall have the meanings given to them in this rule:

(a) . . . .

. . .

(c) Prepaid Legal Services Plan or Plan – any arrangement by which a person or entity, not authorized to engage in the practice of law, in exchange for any valuable consideration, offers to arrange the provision of specified legal services that are paid for in advance of any immediate need for the specified legal services ("covered services"). ~~In addition to covered services, a plan may arrange the provision of specified legal services at fees that are less than what a non-member of the plan would normally pay.~~ The North Carolina legal services arranged by a plan must be provided by a North Carolina licensed attorney who is not an employee, director, or owner of the plan. A plan does not include the sale of an identified, limited legal service, such as drafting a will, for a fixed, one-time fee.

History Note: *Authority G.S. 84-23; 84-23.1;*
Approved by the Supreme Court: February 5, 2002;
Amendments Approved by the Supreme Court: August 23, 2007; September 25, 2020; March 1, 2023;
Rule was transferred from 27 NCAC 01E .0303 on September 25, 2020.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 21, 2022.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct of the North Carolina State Bar as set forth in 27 N.C.A.C. 02, Section .0100, *Client-Lawyer Relationship*, and Section .0400, *Transactions with Persons Other Than Clients*, be amended as shown in the following attachments:

ATTACHMENT 4 - A: 27 N.C.A.C. 02, Section .0100, Rule 1.15-1, *Definitions*

ATTACHMENT 4 - B: 27 N.C.A.C. 02, Section .0100, Rule 1.15-2, *General Rules*

ATTACHMENT 4 - C: 27 N.C.A.C. 02, Section .0100, Rule 1.15-3, *Records and Accountings*

ATTACHMENT 4 - D: 27 N.C.A.C. 02, Section .0400, Rule 4.1, *Truthfulness in Statements to Others*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 21, 2022.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of February, 2023.

s/Alice Neece Mine
Alice Neece Mine, Secretary

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

This the 1st day of March, 2023.

s/Paul M. Newby
Paul M. Newby, Chief Justice

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

This the 1st day of March, 2023.

s/Allen, J.
For the Court

CHAPTER 02 - RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

27 NCAC 02 RULE 1.15-1 DEFINITIONS

For purposes of this Rule 1.15, the following definitions apply:

(a) "Administrative ledger" denotes a written or computerized register, maintained for lawyer or firm funds deposited into a general or dedicated trust account or fiduciary account pursuant to Rule 1.15-2(g)(1) that lists, in chronological order, every deposit into and each disbursement from the trust account or fiduciary account of such funds, and shows the current balance of funds after each such transaction.

(~~a~~**b**) "Bank" denotes a bank savings and loan association, or credit union chartered under North Carolina or federal law.

(~~b~~**c**) "Client" denotes a person, firm, or other entity for whom a lawyer performs, or is engaged to perform, any legal services.

(d) "Client ledger" denotes a written or computerized register, maintained for each client (person or entity) whose funds are deposited into a trust account that lists, in chronological order, every deposit into and each disbursement from the trust account for the client, and shows the current balance of funds after each such transaction.

(~~c~~**e**) "Dedicated trust account" denotes a trust account that is maintained for the sole benefit of a single client or with respect to a single transaction or series of integrated transactions.

(~~d~~**f**) "Demand deposit" denotes any account from which deposited funds can be withdrawn at any time without notice to the depository institution.

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

(~~f~~**h**) "Entrusted property" denotes trust funds, fiduciary funds and other property belonging to someone other than the lawyer which is in the lawyer's possession or control in connection with the performance of legal services or professional fiduciary services.

(~~g~~**i**) "Fiduciary account" denotes an account, designated as such, maintained by a lawyer solely for the deposit of fiduciary funds or other entrusted property of a particular person or entity.

(~~h~~**j**) "Fiduciary funds" denotes funds belonging to someone other than the lawyer that are received by or placed under the control of the lawyer in connection with the performance of professional fiduciary services.

(~~i~~**k**) "Funds" denotes any form of money, including cash, payment instruments such as checks, money orders, or sales drafts, and receipts from electronic fund transfers.

(l) "General ledger" denotes a written or computerized register, maintained for each general and dedicated trust account and each fiduciary account, that lists in chronological order every deposit into and each disbursement from the account, and shows the current balance of funds after each such transaction.

(~~j~~**m**) "General trust account" denotes any trust account other than a dedicated trust account.

(~~k~~**n**) "Item" denotes any means or method by which funds are credited to or debited from an account; for example: a check, substitute check, remotely created check, draft, withdrawal order, automated clearinghouse (ACH) or electronic transfer, electronic or wire funds transfer, electronic image of an item and/or information in electronic form describing an item, or instructions given in person or by telephone, mail, or computer.

(~~l~~**o**) "Legal services" denotes services (other than professional fiduciary services) rendered by a lawyer in a client-lawyer relationship.

(~~m~~**p**) "Professional fiduciary services" denotes compensated services (other than legal services) rendered by a lawyer as a trustee, guardian, personal representative of an estate, attorney-in-fact, or escrow agent, or in any other fiduciary role customary to the practice of law.

(q) "Subsidiary ledger" denotes a client ledger or administrative ledger.

(~~n~~**r**) "Trust account" . . . .

(~~o~~**s**) "Trust funds" denotes funds belonging to someone other than the lawyer that are received by or placed under the control of the lawyer in connection with the performance of legal services.

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court: July 24, 1997;
Amendments Approved by the Supreme Court: May 4, 2000; March 1, 2003; March 6, 2008; October 8, 2009; August 23, 2012; June 9, 2016; April 5, 2018; March 1, 2023.

CHAPTER 02 - RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

27 NCAC 02 RULE 1.15-2 GENERAL RULES

(a) . . . .

(b) Deposit of Trust Funds. . . . General trust accounts are to be administered in accordance with the Rules of Professional Conduct and the provisions of 27 NCAC Chapter 1, Subchapter D, Sections .1300.

. . .

(e) Location of Accounts. . . . .

(f) ~~(f)~~ **Bank Directive. Every lawyer maintaining a trust account or fiduciary account with demand deposit at a bank or other financial institution shall file with the bank or other financial institution a written directive requiring the bank or other financial institution to report to the executive director of the North Carolina State Bar when an instrument drawn on the account is presented for payment against insufficient funds. No trust account or fiduciary account shall be maintained in a bank or other financial institution that does not agree to make such reports.**

(**f**~~g~~) Funds in Accounts. A trust or fiduciary account may only hold entrusted property. Third party funds that are not received by or placed under the control of the lawyer in connection with the performance of legal services or professional fiduciary services may not be deposited or maintained in a trust or fiduciary account. Additionally, no funds belonging to ~~a~~ the lawyer shall be deposited or maintained in a trust account or fiduciary account of the lawyer except:

. . . .

(**g**~~h~~) Mixed Funds Deposited Intact. . . . .

(~~h~~**i**) Items Payable to Lawyer. . . . .

(~~i~~**j**) No Bearer Items. . . . .

(~~j~~**k**) Debit Cards Prohibited. . . . .

(~~k~~**l**) No Benefit to Lawyer or Third Party. . . . .

~~(f)~~

(m) Notification of Receipt. . . . .

. . .

(p) Duty to Report Misappropriation. A lawyer who discovers or reasonably believes that entrusted property has been misappropriated or misapplied shall promptly inform the Trust Account Compliance Counsel (TACC) in the North Carolina State Bar Office of Counsel. Discovery of intentional theft or fraud must be reported to the TACC immediately. When an accounting or bank error results in an unintentional and inadvertent use of one client's trust funds to pay the obligations of another client, the event must be reported unless the misapplication is discovered and rectified on or before the next quarterly reconciliation required by Rule 1.15-3(d)**(2)**~~(1)~~. This rule requires disclosure of information otherwise protected by Rule 1.6 if necessary to report the misappropriation or misapplication.

. . . .

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court: July 24, 1997;
Amendments Approved by the Supreme Court: March 1, 2003; March 6, 2008; February 5, 2009; August 23, 2012; June 9, 2016; April 5, 2018; March 1, 2023.

CHAPTER 02 - RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

27 NCAC 02 RULE 1.15-3 RECORDS AND ACCOUNTINGS

(a) Check Format. . . . .

. . .

(d) Reconciliations of General Trust Accounts.

(~~2~~**1**) **Monthly Reconciliations. Each month, the balance of the trust account as shown on the lawyer's records shall be reconciled with the current bank statement balance for the trust account.**

(~~1~~**2**) Quarterly Reconciliations. For each general trust account, a reconciliation report shall be prepared at least quarterly. Each reconciliation report shall show all of the following balances and verify that they are identical:

. . . .

(3) The lawyer shall review, sign, date, and retain a copy of the reconciliations of the general trust account for a period of six years in accordance with Rule 1.15-3**(h)**~~(g)~~.

(~~i~~**e**) Reviews.

(1) Each month, for each general trust account, dedicated trust account, and fiduciary account, the lawyer shall review the bank statement and cancelled checks for the month covered by the bank statement.

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

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

(4) The lawyer shall take the necessary steps to investigate, identify, and resolve within ten days any discrepancies discovered during the monthly and quarterly reviews.

(5) A report of each monthly and quarterly review, including a description of the review, the transactions sampled, and any remedial action taken, shall be prepared. The lawyer shall sign, date, and retain a copy of the report and associated documentation for a period of six years in accordance with Rule 1.15-3(h)~~(g)~~.

(~~e~~**f**) Accountings for Trust Funds. . . . .

(~~f~~**g**) Accountings for Fiduciary Property. . . . .

(~~g~~**h**) Minimum Record Keeping Period. . . . .

(~~j~~i) Retention of Records in Electronic Format. Records required by Rule 1.15-3 may be created, updated, and maintained electronically, provided:

(1) the records otherwise comply with Rule 1.15-3, to wit: electronically created reconciliations and reviews that are not printed must be reviewed by the lawyer and electronically signed using a "digital signature" as defined in 21 CFR 11.3(b)(5);

(2) printed and electronic copies of the records in industry-standard formats can be made on demand; and

(3) the records are regularly backed up by an appropriate storage device.

(~~h~~**j**) Audit by State Bar. . . . .

History Note: *Authority G.S. 84-23;*
Adopted by the Supreme Court: July 24, 1997;
Amendments Approved by the Supreme Court: March 1, 2003; October 6, 2004; March 6, 2008; June 9, 2016; April 5, 2018; March 1, 2023.

CHAPTER 02 - RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

27 NCAC 02 RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

COMMENT

. . .

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortuous misrepresentation.

. . . .

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court July 24, 1997;
Amendments Approved by the Supreme Court: February 27, 2003; March 1, 2023.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING STANDING COMMITTEES OF THE COUNCIL

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 20, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01A, Section .0700, *Standing Committees of the Council*, be amended as shown in the following attachment:

ATTACHMENT 5: 27 N.C.A.C. 01A, Section .0700, Rule .0701, *Standing Committees and Boards*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 20, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of February, 2023.

s/Alice Neece Mine
Alice Neece Mine, Secretary

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

This the 1st day of March, 2023.

s/Paul M. Newby
Paul M. Newby, Chief Justice

On this date, the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was entered upon the minutes of the

Supreme Court. The amendment shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 1st day of March, 2023.

s/Allen, J.
For the Court

SUBCHAPTER 1A – ORGANIZATION OF THE NORTH CAROLINA STATE BAR

SECTION .0700 – STANDING COMMITTEES OF THE COUNCIL

27 NCAC 01A .0701 STANDING COMMITTEES AND BOARDS

(a) Standing Committees. Promptly after his or her election, the president shall appoint members to the standing committees identified below to serve for one year beginning January 1 of the year succeeding his or her election. Members of the committees need not be councilors, except to the extent expressly required by these rules, and may include non-lawyers. Unless otherwise directed by resolution of the council, all members of a standing committee, whether councilors or non-councilors, shall be entitled to vote as members of the standing committee or any subcommittee or panel thereof.

(1) Executive Committee. It shall be the duty of the Executive Committee to receive reports and recommendations from standing committees, boards, and special committees; to nominate individuals for appointments made by the council; to make long range plans for the State Bar; and to perform such other duties and consider such other matters as the council or the president may designate.

. . .

(9) Access to Justice Committee. It shall be the duty of the Access to Justice Committee to study and to recommend to the council programs and initiatives that respond to the profession's responsibility, set forth in the Preamble to the Rules of Professional Conduct, "to ensure equal access to our system of justice for all those who, because of economic or social barriers, cannot afford or secure adequate legal counsel." 27 N.C. Admin. Code 2.0.1, *Preamble*.

(b) Boards. . . . .

. . . .

History Note: *Authority G.S. 84-22; G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court:
June 12, 1996; February 3, 2000; October 6, 2004;
November 16, 2006; March 8, 2007; March 11, 2010;
October 7, 2010; September 22, 2016; April 5, 2018;
September 25, 2019; March 1, 2023.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE ADMINISTRATION OF THE PLAN FOR INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA)

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 20, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .1300, *Rules Governing the Administration of the Plan for Interest on Lawyers' Trust Accounts (IOLTA)*, be amended as shown in the following attachments:

ATTACHMENT 7 - A: 27 N.C.A.C. 01D, Section .1300, Rule .1306, *Appointment of Members; When; Removal*

ATTACHMENT 7 - B: 27 N.C.A.C. 01D, Section .1300, Rule .1313, *Fiscal Responsibility*

ATTACHMENT 7 - C: 27 N.C.A.C. 01D, Section .1300, Rule .1314, *Meetings*

ATTACHMENT 7 - D: 27 N.C.A.C. 01D, Section .1300, Rule .1316, *IOLTA Accounts*

ATTACHMENT 7 - E: 27 N.C.A.C. 01D, Section .1300, Rule .1319, *Certification*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 20, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of February, 2023.

s/Alice Neece Mine
Alice Neece Mine, Secretary

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

This the 1st day of March, 2023.

s/Paul M. Newby
Paul M. Newby, Chief Justice

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

This the 1st day of March, 2023.

s/Allen, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1300 - RULES GOVERNING THE ADMINISTRATION OF THE PLAN FOR INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA)

27 NCAC 01D .1306 APPOINTMENT OF MEMBERS; WHEN; REMOVAL

The members of the board shall be appointed by the Council of the North Carolina State Bar. **The council will make appointments for upcoming vacancies occurring at the end of a member's term prior to the term ending on August 31.** ~~The July quarterly meeting is when the appointments are made~~. Vacancies occurring by reason of death, resignation or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term. Any member of the board may be removed at any time by an affirmative vote of a majority of the members of the council in session at a regularly called meeting.

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 1, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1300 - RULES GOVERNING THE ADMINISTRATION OF THE PLAN FOR INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA)

27 NCAC 01D .1313 FISCAL RESPONSIBILITY

All funds of the board shall be considered funds of the North Carolina State Bar, with the beneficial interest in those funds being vested in the board for grants to qualified applicants in the public interest, less administrative costs. . . . .

(a) Maintenance of Accounts: Audit - The funds of the IOLTA program shall be maintained in a separate account from funds of the North Carolina State Bar such that the funds and expenditures therefrom can be readily identified. The accounts of the board shall be audited on an annual basis. The audit will be conducted after the books are closed at a time determined by the auditors, but not later than ~~March 31~~ **April 30** of the year following the year for which the audit is to be conducted.

. . . .

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: September 28, 2017; March 1, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1300 - RULES GOVERNING THE ADMINISTRATION OF THE PLAN FOR INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA)

27 NCAC 01D .1314 MEETINGS

The board by resolution may set regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice chairperson or any two members of the board. Notice of **the** meeting shall be given **to all members of the board** at least two days prior to the meeting **as directed by the board.** ~~by mail, telegram, facsimile transmission, or telephone.~~ **Notice shall also be provided as required by any statutory provision regulating notice of public meetings of agencies of the state**. A quorum of the board for conducting its official business shall be a majority of the total membership of the board.

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 1, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1300 - RULES GOVERNING THE ADMINISTRATION OF THE PLAN FOR INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA)

27 NCAC 01D .1316 IOLTA ACCOUNTS

(a) IOLTA Account Defined. . . . Additionally, pursuant to G.S. 45A-9, a settlement agent who maintains a trust or escrow account for the purposes of receiving and disbursing closing funds and loan funds shall direct that any interest earned on funds held in that account be paid to the N**orth** C**arolina** State Bar to be used for the purposes authorized under the Interest on Lawyers' Trust Account Program according to Section .1316(d) below. . . . .

(b) Eligible Banks. Lawyers may **only** maintain **an** ~~one or more~~ IOLTA Account~~(s) only~~ at banks and savings and loan associations chartered under North Carolina or federal law, as required by Rule 1.15 of the Rules of Professional Conduct, that offer and maintain IOLTA Accounts that comply with the requirements set forth in this Subchapter (Eligible Banks). . . . .

(c) Notice Upon Opening or Closing IOLTA Account. . . . Such notice shall include (i) the name of the bank where the account is maintained, (ii) the name of the account, (iii) the account number, and (iv) the name**s** and bar number**s** of the lawyer~~(s)~~ in the firm and/or the name~~(s)~~ of any non-lawyer settlement agent~~(s)~~ maintaining the account. The North Carolina State Bar shall furnish to each lawyer/law firm or settlement agent maintaining an IOLTA Account a ~~suitable plaque~~ **notice to clients** explaining the program, which ~~plaque~~ shall be exhibited in the office **of** the lawyer/law firm or settlement agent.

(d) Directive to Bank. Every lawyer/**law firm** or ~~law firm and every~~ settlement agent maintaining a North Carolina IOLTA Accounts shall direct any bank in which an IOLTA Account is maintained to:

(1) . . . ;

(2) transmit with each remittance to NC IOLTA a statement showing for each account: (i) the name of the **lawyer**/law firm ~~/lawyer~~ or settlement agent maintaining the account, . . . ; and

(3) transmit to the **lawyer**/law firm~~/lawyer~~ or settlement agent maintaining the account a report showing the amount remitted to NC IOLTA, the earnings period, and the rate of interest applied in computing the remittance.

(e) Allowable Reasonable Service Charges. . . . All service charges other than allowable reasonable service charges assessed against an IOLTA Account are the responsibility of and shall be paid by the lawyer/~~ or~~ law firm **or settlement agent**. . . . .

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 6, 2008; February 5, 2009; January 28, 2010; March 8, 2012; August 23, 2012; March 1, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1300 - RULES GOVERNING THE ADMINISTRATION OF THE PLAN FOR INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA)

27 NCAC 01D .1319 CERTIFICATION

Every lawyer admitted to practice in North Carolina shall certify annually on or before June 30 to the North Carolina State Bar that all general trust accounts maintained by the lawyer or his or her law firm are established and maintained as IOLTA accounts as prescribed by Rule 1.15 of the Rules of Professional Conduct and Rule .1316 of this subchapter or that the lawyer ~~is exempt from this provision because he or she~~ does not maintain any general trust account(s) for North Carolina client funds. Any lawyer acting as a settlement agent who maintains a trust or escrow account used for the purpose of receiving and disbursing closing and loan funds shall certify annually on or before June 30 to the North Carolina State Bar that such accounts are established and maintained as IOLTA accounts as prescribed by G.S. 45A-9 and Rule .1316 of this subchapter.

History Note: *Authority - Order of the N.C. Supreme Court;*
Approved by the Supreme Court: March 6, 2008;
Amendments Approved by the Supreme Court: February 5, 2009;
Recodified from Rule .1318 Eff. July 1, 2010;
Amendments Approved by the Supreme Court: March 8, 2012; March 1, 2023.

ORDER AMENDING THE STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

Pursuant to subsection 7A-38.2(a) of the General Statutes of North Carolina, the Court hereby adopts Standard 9 of the Standards of Professional Conduct for Mediators.

* * *

Standard 9. Unlawful Discrimination Prohibited

A mediator shall not engage in unlawful discriminatory conduct within the mediation process.

A mediator shall not engage in conduct within the mediation process that the mediator knows, or reasonably should know, discriminates against a person on an unlawful basis. This standard does not limit the prerogative of a mediator to accept, decline, or withdraw from a matter in accordance with these standards.

* * *

This amendment to the Standards of Professional Conduct for Mediators becomes effective on 1 May 2023.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 4th day of April 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of April 2023.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

ORDER AMENDING THE RULES OF MEDIATION FOR FARM NUISANCE DISPUTES

Pursuant to subsection 7A-38.3(e) of the General Statutes of North Carolina, the Court hereby amends Rule 3 and Rule 5 of the Rules of Mediation for Farm Nuisance Disputes.

* * *

Rule 3. Selection of the Mediator

(a) **Time Period for Selection**. The parties to the dispute shall have twenty-one days from the date of the filing of the Request Form to select a mediator to conduct their mediation and to file an Appointment of Mediator in Prelitigation Farm Nuisance Dispute, Form AOC-CV-821 (Appointment Form).

(b) **Selection of the Certified Mediator by Agreement**. The clerk of superior court shall provide each party to the dispute with a list of certified superior court mediators serving the judicial district encompassing the county in which the Request Form was filed. If the parties are able to agree on a mediator from that list to conduct their mediation, then the party who filed the Request Form shall notify the clerk of superior court by filing an Appointment Form. The Appointment Form shall state: (i) the name, address, and telephone number of the certified mediator selected; (ii) the rate of compensation to be paid to the mediator; and (iii) that the mediator and the parties to the dispute have agreed on the selection and the rate of compensation.

(c) **Court Appointment of the Mediator**. If the parties to the dispute cannot agree on the selection of a certified superior court mediator, then the party who filed the Request Form shall file an Appointment Form with the clerk of superior court, moving the senior resident superior court judge to appoint a certified superior court mediator. The Appointment Form shall be filed with the clerk of superior court within twenty-one days of the date of the filing of the Request Form. The Appointment Form shall state whether any party prefers the mediator to be a certified attorney mediator or a certified nonattorney mediator. If the parties state a preference, then the senior resident superior court judge shall appoint a mediator in accordance with that preference. If no preference is expressed, then the senior resident superior court judge may appoint any certified superior court mediator.

As part of the application or annual certification renewal process, all mediators shall designate those judicial districts for which they are

willing to accept court appointments. Each designation shall be deemed to be a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated district, and will not charge for travel time and expenses incurred in carrying out his or her duties associated with those appointments. A mediator's refusal to accept an appointment in a judicial district designated by the mediator may be grounds for removal from that district's court appointment list by the Dispute Resolution Commission (Commission), or by the senior resident superior court judge.

The Commission shall provide the senior resident superior court judge of each judicial district a list of those certified superior court mediators requesting appointments in that district. The list shall contain each mediator's name, address, and telephone number. The list shall be provided to the senior resident superior court judge electronically through the Commission's website at https://www.ncdrc.gov.

The Commission shall promptly notify the senior resident superior court judge of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

(d) **Mediator Information Directory**. To assist parties in learning more about the qualifications and experience of certified mediators, the Commission shall post a list of certified superior court mediators on its website at https://www.ncdrc.gov, accompanied by each mediator's contact ~~and biographical~~ information, ~~availability~~the judicial districts in which each mediator is available to serve, and whether ~~the~~each mediator is willing to mediate farm nuisance disputes. If a mediator has supplied it to the Commission, the list shall also provide the mediator's designated attendance method and the mediator's biographical information, including information about the mediator's education, professional experience, and mediation training and experience.

* * *

Rule 5. Authority and Duties of the Mediator

(a) **Authority of the Mediator**.

(1) **Control of the Mediation**. The mediator shall at all times be in control of the mediation and the procedures to be followed. The mediator's conduct shall be governed by the Standards of Professional Conduct for Mediators.

(2) **Private Consultation**. The mediator may communicate privately with any participant prior to, and during, the

mediation. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3) **Scheduling the Mediation**. The mediator shall make a good faith effort to schedule the mediation at a time that is convenient to the participants, attorneys, and mediator. In the absence of agreement, the mediator shall select the date for the mediation.

(b) **Duties of the Mediator**.

(1) **Informing the Parties**. At the beginning of the mediation, the mediator shall define and describe for the parties:

a. the process of mediation;

b. the differences between mediation and other forms of conflict resolution;

c. the costs of mediation;

d. the fact that mediation is not a trial, that the mediator is not a judge, and that the parties may pursue their dispute in court if mediation is not successful;

e. the circumstances under which the mediator may meet and communicate privately with any of the parties, or with any other person;

f. whether, and under what conditions, communications with the mediator will be held in confidence during the mediation;

g. the inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1(*l*);

h. the duties and responsibilities of the mediator and the participants; ~~and~~

i. the fact that any agreement reached will be reached by mutual consent.~~;~~

j. the fact that subsection (b)(5) of this rule prohibits any recording of the mediation; and

k. the fact that the parties may be subject to sanctions for violating these rules.

(2) **Disclosure**. The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice, or partiality.

(3) **Declaring Impasse**. It is the duty of the mediator to determine timely when an impasse exists and when the mediation should end.

(4) **Scheduling and Holding the Mediation**. It is the duty of the mediator to schedule and conduct the mediation within the time frame established by Rule 4. The mediator shall strictly observe Rule 4 unless an extension has been granted in writing by the senior resident superior court judge.

(5) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

* * *

These amendments to the Rules of Mediation for Farm Nuisance Disputes become effective on 1 May 2023.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 4th day of April 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of April 2023.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

ORDER AMENDING THE RULES OF MEDIATION FOR MATTERS IN DISTRICT CRIMINAL COURT

Pursuant to subsection 7A-38.3D(d) of the General Statutes of North Carolina, the Court hereby amends Rule 6 of the Rules of Mediation for Matters in District Criminal Court.

* * *

Rule 6. Authority and Duties of the Mediator

(a) **Authority of the Mediator**.

(1) **Control of the Mediation**. The mediator shall at all times be in control of the mediation process and the procedures to be followed. The mediator's conduct shall be governed by the Standards of Professional Conduct for Mediators.

(2) **Private Consultation**. The mediator may communicate privately with any participant or counsel prior to, and during, the mediation. The fact that a private communication has occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3) **Inclusion and Exclusion of Participants at the Mediation**. In the mediator's discretion, the mediator may encourage or allow persons other than the parties or their attorneys to attend and participate in the mediation, provided that the mediator has determined the presence of such persons to be helpful in resolving the dispute or addressing an issue underlying it. Mediators may also exclude persons other than the parties and their attorneys whose presence the mediator deems would likely be, or which has been, counterproductive.

(4) **Scheduling the Mediation**. The mediator or community mediation center staff involved in scheduling, shall make a good faith effort to schedule the mediation at a time that is convenient to the parties and any parent, guardian, or attorney who will be attending. In the absence of agreement, the mediator or staff member shall select the date for the mediation and notify those who will be participating. Parties are to cooperate with the mediator in scheduling the mediation, including providing information as required by Rule 5(a)(4).

(b) **Duties of the Mediator**.

(1) **Informing the Parties.** At the beginning of the mediation, the mediator shall define and describe for the parties:

a. the process of mediation;

b. the fact that mediation is not a trial and that the mediator is not a judge, attorney, or therapist;

c. the fact that the mediator is present only to assist the parties in reaching their own agreement;

d. the circumstances under which the mediator may meet and communicate privately with the parties or with any other person;

e. whether, and under what conditions, communications with the mediator will be held in confidence during the mediation;

f. the inadmissibility of conduct and statements as provided in N.C.G.S. § 7A-38.3D(i);

g. the duties and responsibilities of the mediator and the participants;

h. the fact that any agreement reached will be by mutual consent;

i. the fact that, if the parties are unable to agree and the mediator declares an impasse, the parties and the case will return to court; ~~and~~

j. the fact that, if an agreement is reached in mediation and the parties agree to request a dismissal of the charges pending in the case, the defendant shall pay a dismissal fee in accordance with N.C.G.S. § 7A-38.7 and N.C.G.S. § 7A-38.3D(m), unless: (i) the court, in its discretion, has waived the fee for good cause; or (ii) the parties agree to some other apportionment. Payment of the dismissal fee shall be made to the clerk of superior court in the county where the case was filed, and the community mediation center must provide the district attorney with a dismissal form and proof that the defendant has paid the dispute resolution fee before the charges can be dismissed~~.~~;

k. the fact that Rule 4(e) prohibits any recording of the mediation; and

l. the fact that the parties may be subject to sanctions for violating these rules.

(2) **Disclosure**. Consistent with the Standards of Professional Conduct for Mediators, the mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice, or partiality.

(3) **Declaring Impasse**. Consistent with the Standards of Professional Conduct for Mediators, it is the duty of the mediator to determine timely when an impasse exists and when the mediation should end. The mediator shall inquire of and consider the desires of the parties to cease or continue the mediation.

(4) **Reporting Results of the Mediation**. The mediator or community mediation center shall report the outcome of mediation to the court in writing on a NCAOC form by the date the case is next calendared. If the criminal case is scheduled for court on the same day as the mediation, then the mediator shall inform the attending district attorney of the outcome of the mediation before the close of court on that date, unless alternative arrangements are approved by the district attorney.

(5) **Scheduling and Holding the Mediation**. It is the duty of the mediator and the community mediation center to schedule and conduct the mediation prior to any deadline set by the court. Deadlines shall be strictly observed by the mediator and the community mediation center, unless the deadline is extended by the court.

* * *

These amendments to the Rules of Mediation for Matters in District Criminal Court become effective on 1 May 2023.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 4th day of April 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of April 2023.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

ORDER AMENDING THE RULES FOR SETTLEMENT PROCEDURES IN DISTRICT COURT FAMILY FINANCIAL CASES

Pursuant to subsection 7A-38.4A(k) and subsection 7A-38.4A(*o*) of the General Statutes of North Carolina, the Court hereby amends the Rules for Settlement Procedures in District Court Family Financial Cases. This order affects Rules 2, 4, 6, 8, and 9.

* * *

Rule 2. Designation of the Mediator

(a) **Designation of a Mediator by Agreement of the Parties**. By agreement, the parties may designate a family financial mediator certified under these rules by filing a Designation of Mediator in Family Financial Case, Form AOC-CV-825 (Designation Form), with the court at the scheduling and discovery conference. The Designation Form shall state: (i) the name, address, and telephone number of the designated mediator; (ii) the rate of compensation of the mediator; (iii) that the mediator and opposing counsel have agreed upon the designation and rate of compensation; and (iv) that the mediator is certified under these rules.

A copy of each form submitted to the court and the court's order requiring a mediated settlement conference shall be delivered to the mediator by the parties.

(b) **Appointment of a Mediator by the Court**. If the parties cannot agree on the designation of a certified mediator, then the parties shall notify the court by filing a Designation Form requesting that the court appoint a certified mediator. The Designation Form shall be filed at the scheduling and discovery conference and state that the attorneys for the parties have discussed the designation of a mediator and have been unable to agree on a mediator. Upon receipt of a Designation Form requesting the appointment of a mediator, or upon the parties' failure to file a Designation Form with the court, the court shall appoint a family financial mediator certified under these rules who has expressed a willingness to mediate disputes within the judicial district.

In appointing a mediator, the court shall rotate through a list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation, or whether the mediator is a licensed attorney. The court shall retain discretion to depart from a strict rotation of mediators when, in the court's discretion, there is good cause in a case to do so.

RULES FOR SETTLEMENT PROCEDURES IN
DISTRICT COURT FAMILY FINANCIAL CASES

As part of the application or certification renewal process, all mediators shall designate the judicial districts in which they are willing to accept court appointments. Each designation is a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated district and will not charge for travel time and expenses incurred in carrying out his or her duties associated with those appointments. A mediator's refusal to accept an appointment in a judicial district designated by the mediator may be grounds for the mediator's removal from the district's appointment list by the Dispute Resolution Commission (Commission) or the chief district court judge.

The Commission shall provide the district court judges in each judicial district a list of certified family financial mediators requesting appointments in that district. The list shall contain each mediator's name, address, and telephone number. The list shall be provided to the judges electronically through the Commission's website at https://www.ncdrc.gov.

The Commission shall promptly notify the district court of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

(c) **Mediator Information Directory**. To assist the parties in designating a mediator, the Commission shall assemble, maintain, and post a list of certified family financial mediators on its website at https://www.ncdrc.gov, accompanied by each mediator's contact information and the judicial districts in which each mediator is available to serve. ~~When~~If a mediator has supplied it to the Commission, the list shall also provide the mediator's designated attendance method and the mediator's biographical information, including information about the mediator's education, professional experience, and mediation training and experience.

(d) **Withdrawal or Disqualification of the Mediator**.

(1) Any party may move the chief district court judge of the judicial district where the case is pending for an order disqualifying the mediator using a Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, Form AOC-DRC-20. For good cause, an order disqualifying the mediator shall be entered.

(2) A mediator who wishes to withdraw from a case may file a Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, Form AOC-DRC-20,

with the chief district court judge of the judicial district where the case is pending.

(3) If a mediator withdraws or is disqualified, then a substitute mediator shall be designated or appointed under this rule. A mediator who has withdrawn or been disqualified shall not be entitled to receive an administrative fee, unless the mediation has been commenced.

* * *

Rule 4. Duties of Parties, Attorneys, and Other Participants in Mediated Settlement Conferences

(a) **Attendance**.

(1) **Persons Required to Attend.** The following persons shall attend a mediated settlement conference:

a. The parties.

b. At least one counsel of record for each party whose counsel has appeared in the case.

~~(2) **Attendance Required Through the Use of Remote Technology**. Any party or person required to attend a mediated settlement conference shall attend the conference using remote technology, for example, by telephone, videoconference, or other electronic means. The conference shall conclude when an agreement is reduced to writing and signed, as provided in subsection (c) of this rule, or when an impasse is declared. Notwithstanding this remote attendance requirement, the conference may be conducted in person if:~~

~~a. the mediator and all parties and persons required to attend the conference agree to conduct the conference in person and to comply with all federal, state, and local safety guidelines that have been issued; or~~

~~b. the court, upon motion of a party and notice to the mediator and to all parties and persons required to attend the conference, so orders.~~

(2) **Attendance Method**.

a. **Determination**.

1. All parties and persons required to attend a mediated settlement conference may agree to conduct the conference in person, using

remote technology, or using a hybrid of in-person attendance and remote technology.

2. If all parties and persons required to attend the conference do not agree on an attendance method and the mediator has designated in the Mediator Information Directory that he or she will conduct conferences only using remote technology, then the conference shall be conducted using remote technology.

3. If all parties and persons required to attend the conference do not agree on an attendance method and the mediator has not selected remote technology as his or her designated attendance method in the Mediator Information Directory, then the conference shall be conducted in person.

b. **Order by Court; Mediator Withdrawal**. The chief district court judge, upon motion of a party and notice to the mediator and to all other parties and persons required to attend the mediated settlement conference, may order that the conference be conducted in person, using remote technology, or using a hybrid of in-person attendance and remote technology.

If the method of attendance ordered by the judge is contrary to the attendance method the mediator has designated in the Mediator Information Directory, then the mediator may withdraw from the case under Rule 2(d).

(3) **Excusing the Attendance Requirement**. Any party or person may be excused from the requirement to attend a mediated settlement conference with the consent of all parties and persons required to attend the conference and the mediator.

(4) **Safety Compliance**. The mediator and all parties and persons required to attend a mediated settlement conference shall comply with all federal, state, and local safety guidelines that are in place for trial court proceedings at the time of the conference.

(b) **Scheduling**. Participants required to attend the mediated settlement conference shall promptly notify the mediator, after selection

or appointment, of any significant problems that they may have with the dates for mediated settlement conference sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated conference session is scheduled by the mediator. If a scheduling conflict in another court proceeding arises after a conference session has been scheduled by the mediator, then participants shall promptly attempt to resolve the conflict under Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina on 20 June 1985.

(c) **Finalizing Agreement**.

(1) If an agreement is reached at the mediated settlement conference, then the parties shall reduce the essential terms of the agreement to writing.

a. If the parties conclude the mediated settlement conference with a written document containing all of the terms of their agreement for property distribution and do not intend to submit their agreement to the court for approval, then the agreement shall be signed by all parties and formally acknowledged as required by N.C.G.S. § 50-20(d). If the parties conclude the conference with a written document containing all of the terms of their agreement and intend to submit their agreement to the court for approval, then the agreement shall be signed by all parties, but need not be formally acknowledged. In all cases, the mediator shall report a settlement to the court and include in the report the name of the person responsible for filing closing documents with the court.

b. If the parties reach an agreement at the mediated settlement conference regarding property distribution and do not intend to submit their agreement to the court for approval, but are unable to complete a final document reflecting their settlement or have it signed and acknowledged as required by N.C.G.S. § 50-20(d), then the parties shall produce a written summary of their understanding and use it to guide them in writing any agreements as may be required to give legal effect to their understanding. If the parties intend to submit their agreement to the court

for approval, then the agreement must be in writing and signed by the parties, but need not be formally acknowledged. The mediator shall facilitate the production of the summary and shall either:

1. report to the court that the matter has been settled and include in the report the name of the person responsible for filing closing documents with the court; or
2. declare, in the mediator's discretion, a recess of the mediated settlement conference.

If a recess is declared, then the mediator may schedule another session of the conference if the mediator determines that it would assist the parties in finalizing a settlement.

(2) In all cases where an agreement is reached after being ordered to mediation, whether prior to, or during, the mediation, or during a recess, the parties shall file a consent judgment or voluntary dismissal with the court within thirty days of the agreement or before the expiration of the mediation deadline, whichever is later. The mediator shall report to the court that the matter has been settled and who reported the settlement.

(3) An agreement regarding the distribution of property, reached at a proceeding conducted under this section or during a recess of the mediated settlement conference, which has not been approved by a court, shall not be enforceable unless it has been reduced to writing, signed by the parties, and acknowledged as required under N.C.G.S. § 50-20(d).

(d) **Payment of the Mediator's Fee**. The parties shall pay the mediator's fee as provided by Rule 7.

(e) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

Comment

Comment to Rule 4(a). Rule 4(a)(2)(a) describes the attendance methods used for mediated settlement conferences. If a conference is conducted using remote technology, then the mediator should ensure that the

parties are able to fully communicate with all other participants and video-conferencing is encouraged.

Comment to Rule 4(c). Consistent with N.C.G.S. § 7A-38.4A(j), no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall ensure that the terms of the agreement are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which an agreement on all issues has been reached should be disposed of as expeditiously as possible. This assures that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep the terms of the settlement confidential, then they may timely file closing documents with the court, as long as those documents do not contain confidential terms (e.g., a voluntary dismissal or consent judgment resolving all claims). Mediators will not be required by local rules to submit agreements to the court.

* * *

Rule 6. Authority and Duties of the Mediator

(a) **Authority of the Mediator.**

(1) **Control of the Mediated Settlement Conference**. The mediator shall at all times be in control of the mediated settlement conference and the procedures to be followed. The mediator's conduct shall be governed by the Standards of Professional Conduct for Mediators.

(2) **Private Consultation**. The mediator may communicate privately with any participant during the mediated settlement conference. However, there shall be no ex parte communication before or outside the conference between the mediator and any counsel or party regarding any aspect of the proceeding, except about scheduling matters. Nothing in this rule prevents the mediator from engaging in ex parte communications with the consent of the parties for the purpose of assisting settlement negotiations.

(b) **Duties of the Mediator.**

(1) **Informing the Parties**. At the beginning of the mediated settlement conference, the mediator shall define and describe for the parties:

a. the process of mediation;

b. the differences between mediation and other forms of conflict resolution;

c. the costs of the mediated settlement conference;

d. the fact that the mediated settlement conference is not a trial, that the mediator is not a judge, and that the parties retain their right to a trial if they do not reach settlement;

e. the circumstances under which the mediator may meet and communicate privately with any of the parties, or with any other person;

f. whether, and under what conditions, communications with the mediator will be held in confidence during the mediated settlement conference;

g. the inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.4A(j);

h. the duties and responsibilities of the mediator and the participants; ~~and~~

i. the fact that any agreement reached will be reached by mutual consent.~~;~~

j. the fact that Rule 4(e) prohibits any recording of the mediated settlement conference; and

k. the fact that the parties may be subject to sanctions for violating these rules.

(2) **Disclosure**. The mediator has a duty to be impartial and to disclose to all participants any circumstance bearing on possible bias, prejudice, or partiality.

(3) **Declaring Impasse**. It is the duty of the mediator to determine in a timely manner that an impasse exists and that the mediated settlement conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) **Reporting Results of the Mediated Settlement Conference**.

a. The mediator shall report the results of the mediated settlement conference and any settlement reached by the parties prior to, or during, a recess of the conference to the court. Mediators shall also report the results of mediations held in other district

court family financial cases in which a mediated settlement conference was not ordered by the court. The report shall be filed on a Report of Mediator in Family Financial Case, Form AOC-CV-827, within ten days of the conclusion of the conference or within ten days of being notified of the settlement, and shall include the names of the persons who attended the conference, if a conference was held. If a partial agreement was reached at the conference, then the report shall state the issues that remain for trial. Local rules shall not require the mediator to send a copy of the parties' agreement to the court.

b. If an agreement upon all issues was reached at the mediated settlement conference, then the mediator's report shall state whether the dispute will be resolved by a consent judgment or voluntary dismissal, and the name, address, and telephone number of the person designated by the parties to file the consent judgment or dismissal with the court, as required under Rule 4(c)(2). The mediator shall advise the parties that, consistent with Rule 4(c)(2), their consent judgment or voluntary dismissal is to be filed with the court within thirty days of the conference or before the expiration of the mediation deadline, whichever is later. The mediator's report shall indicate that the parties have been so advised.

c. The Commission or the North Carolina Administrative Office of the Courts (NCAOC) may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.

d. A mediator who fails to report as required by this rule shall be subject to sanctions by the court. The sanctions shall include, but are not limited to, fines or other monetary penalties, decertification as a mediator, and any other sanctions available through the court's contempt power. The court shall notify the Commission of any sanction imposed against a mediator under this section.

(5) **Scheduling and Holding the Mediated Settlement Conference**. The mediator shall schedule and conduct the mediated settlement conference prior to the

conference completion deadline set out in the court's order. The mediator shall make an effort to schedule the conference at a time that is convenient to all participants. In the absence of agreement, the mediator shall select a date and time for the conference. The deadline for completion of the conference shall be strictly observed by the mediator, unless the deadline is changed by written order of the court.

A mediator selected by agreement of the parties shall not delay scheduling or conducting the conference because one or more of the parties has not paid an advance fee deposit as required by the agreement.

* * *

Rule 8. Mediator Certification and Decertification

(a) The Commission may receive and approve applications for certification of persons to be appointed as mediators for family financial matters in district court. In order to be certified, an applicant must satisfy the requirements of this subsection.

(1) The applicant for certification must have a basic understanding of North Carolina family law and have completed the requirements of this subsection prior to taking the forty hours of Commission-certified family and divorce mediation training or the sixteen hours of Commission-certified supplemental family and divorce mediation training under subsection (a)(2)(b) of this rule. Applicants should be able to demonstrate that they have completed at least twelve hours of basic family law education by:

a. attending workshops or programs on topics such as separation and divorce, alimony and postseparation support, equitable distribution, child custody and support, and domestic violence;

b. completing an independent study on these topics, such as viewing or listening to video or audio programs on family law topics; or

c. having equivalent North Carolina family law experience, including work experience that satisfies one of the categories set forth in the Commission's policy on interpreting Rule 8(a)(1) (e.g., the applicant is an experienced family law judge or a North Carolina State Bar board certified family law ~~attorney~~specialist).

(2) The applicant for certification must:

a. have ~~an~~been designated a Family Mediator Advanced Practitioner ~~Designation from~~by the Association for Conflict Resolution (ACR) and have earned an undergraduate degree from an accredited four-year college or university; or

b. have completed either (i) forty hours of Commission-certified family and divorce mediation training; or (ii) forty hours of Commission-certified trial court mediation training and sixteen hours of Commission-certified supplemental family and divorce mediation training; and be

1. a member in good standing of the North Carolina State Bar or a member similarly in good standing of the bar of another state and eligible to apply for admission to the North Carolina State Bar under Chapter 1, Subchapter C, of the North Carolina State Bar Rules and the Rules Governing the Board of Law Examiners and the Training of Law Students, 27 N.C. Admin. Code 1C.0105, with at least five years of experience after the date of licensure as a judge, practicing attorney, law professor, or mediator, or must possess equivalent experience;

2. a licensed psychiatrist under N.C.G.S. § 90-9.1, with at least five years of experience in the field after the date of licensure;

3. a licensed psychologist under N.C.G.S. §§ 90-270.1 to -270.22, with at least five years of experience in the field after the date of licensure;

4. a licensed marriage and family therapist under N.C.G.S. §§ 90-270.45 to -270.63, with at least five years of experience in the field after the date of licensure;

5. a licensed clinical social worker under N.C.G.S. § 90B-7, with at least five years of experience in the field after the date of licensure;

6. a licensed professional counselor under N.C.G.S. §§ 90-329 to -345, with at least five years of experience in the field after the date of licensure; or

7. an accountant certified in North Carolina, with at least five years of experience in the field after the date of certification.

~~c. Any person who has not been certified as a mediator pursuant to these rules may be certified without compliance with subsection (a)(2)(b) and subsection (a)(5) of this rule if~~

~~1. the applicant for certification is a member in good standing of the North Carolina State Bar or a member similarly in good standing of the bar of another state and eligible to apply for admission to the North Carolina State Bar under Chapter 1, Subchapter C, of the North Carolina State Bar Rules and the Rules Governing the Board of Law Examiners and the Training of Law Students, 27 N.C. Admin. Code 1C.0105, with at least five years of experience after the date of licensure as a judge, practicing attorney, law professor, or mediator, or must possess equivalent experience; and meets the following additional requirements:~~

~~i. the applicant applies for certification within one year from 10 June 2020;~~

~~ii. the applicant has, by selection of the parties, mediated at least ten family financial settlement cases in the North Carolina District Court within the last five years, as shown by proof satisfactory to the Commission staff; and~~

~~iii. the applicant has taken a sixteen-hour supplemental family and divorce mediation training program approved by the Commission wherein the statutes, program rules, advisory opinions, and ethics, including the Standards of Professional Conduct for Mediators, are discussed;~~

~~or~~

~~2. the applicant for certification is a nonattorney who meets one of the required licensures set forth in subsection (a)(2)(b)(2) through subsection (a)(2)(b)(7) of this rule, and meets the following additional requirements:~~

~~i. the applicant applies for certification within one year from 10 June 2020;~~

~~ii. the applicant has, by selection of the parties, mediated at least fifteen family financial settlement cases in the North Carolina District Court within the last five years, as shown by proof satisfactory to the Commission staff; and~~

~~iii. the applicant has taken a forty-hour family and divorce mediation training course and the six-hour training on North Carolina legal terminology, court structure, and civil procedure course approved by the Commission.~~

(3) If the applicant is not licensed to practice law in one of the United States, then the applicant must have, as a prerequisite for the forty hours of Commission-certified family and divorce mediation training under subsection (a)(2)(b) of this rule, completed six hours of training on North Carolina legal terminology, court structure, and civil procedure, provided by a Commission-certified trainer. An attorney licensed to practice law in a state other than North Carolina shall satisfy this requirement by completing a self-study course, as directed by Commission staff.

(4) If the applicant is not licensed to practice law in North Carolina, then the applicant must provide three letters of reference to the Commission about the applicant's good character, including at least one letter from a person with knowledge of the applicant's professional practice and experience qualifying the applicant under subsection (a) of this rule.

(5) The applicant must have observed, as a neutral observer and with the permission of the parties, two mediations involving a custody or family financial issue conducted by a mediator who (i) is certified under these rules, (ii) has an Advanced Practitioner Designation from the ACR, or (iii) is a mediator certified by the NCAOC for custody matters. Mediations eligible for observation shall also include mediations conducted in matters prior to litigation of family financial disputes that are mediated by agreement of the parties and incorporate these rules.

If the applicant is not an attorney licensed to practice law in one of the United States, then the applicant must observe three additional mediations involving civil or family-related

disputes, or disputes prior to litigation that are conducted by a Commission-certified mediator and are conducted pursuant to a court order or an agreement of the parties incorporating the mediation rules of a North Carolina state or federal court.

All mediations shall be observed from their beginning until settlement, or until the point that an impasse has been declared, and shall be reported by the applicant on a Certificate of Observation - Family Financial Settlement Conference Program, Form AOC-DRC-08. All observers shall conform their conduct to the Commission's policy on *Guidelines for Observer Conduct*.

(6) The applicant must demonstrate familiarity with the statutes, rules, standards of practice, and standards of conduct governing mediated settlement conferences conducted in North Carolina.

(7) The applicant must be of good moral character and adhere to the Standards of Professional Conduct for Mediators when acting under these rules. On his or her application(s) for certification or application(s) for certification renewal, an applicant shall disclose any:

a. pending criminal charges;

b. criminal convictions;

c. restraining orders issued against him or her;

d. failures to appear;

e. closed grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country;

f. disciplinary action taken against him or her by a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country, including, but not limited to, disbarment, revocation, decertification, or suspension of any professional license or certification, including the suspension or revocation of any license, certification, registration, or qualification to serve as a mediator in another state or country, even if stayed;

g. judicial sanctions imposed against him or her in any jurisdiction;

h. civil judgments, tax liens, or bankruptcy filings that occurred within the ten years preceding the date that

the initial or renewal application was filed with the Commission; or

i. pending grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country.

If a matter listed in subsections (a)(7)(a) through (a)(7)(h) of this rule arises after a mediator submits his or her initial or renewal application for certification, then the mediator shall report the matter to the Commission no later than thirty days after receiving notice of the matter.

If a pending grievance or complaint described in subsection (a)(7)(i) of this rule is filed after a mediator submits his or her initial or renewal application for certification, then the mediator shall report the matter to the Commission no later than thirty days after receiving notice of the matter or, if a response to the grievance or complaint is permitted by the professional licensing, certifying, or regulatory body, no later than thirty days after the due date for the response.

As referenced in this subsection, criminal charges or convictions (excluding infractions) shall include felonies, misdemeanors, or misdemeanor traffic violations (including driving while impaired) under the law of North Carolina or another state, or under the law of a federal, military, or foreign jurisdiction, regardless of whether adjudication was withheld (prayer for judgment continued) or the imposition of a sentence was suspended.

(8) The applicant must submit proof of the qualifications set out in this rule on a form provided by the Commission.

(9) The applicant must pay all administrative fees established by the NCAOC upon the recommendation of the Commission.

(10) The applicant must agree to accept the fee ordered by the court under Rule 7 as payment in full of a party's share of the mediator's fee.

(11) The applicant must comply with the requirements of the Commission for completing and reporting continuing mediator education or training.

(12) The applicant must agree, once certified, to make reasonable efforts to assist applicants for mediator certification in completing their observation requirements.

(b) No mediator who held a professional license and relied upon that license to qualify for certification under subsection (a)(2)(b) of this rule shall be decertified or denied recertification because the mediator's license lapses, is relinquished, or becomes inactive; provided, however, that this subsection shall not apply to a mediator whose professional license is revoked, suspended, lapsed, or relinquished, or whose professional license becomes inactive due to disciplinary action, or the threat of disciplinary action, from the mediator's licensing authority. Any mediator whose professional license is revoked, suspended, lapsed, relinquished, or whose professional license becomes inactive shall report the matter to the Commission.

(c) A mediator's certification may be revoked or not renewed at any time if it is shown to the satisfaction of the Commission that a mediator no longer meets the qualifications set out in this rule or has not faithfully observed these rules or those of any judicial district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible for certification under this rule. No application for certification renewal shall be denied on the ground that the mediator's training and experience does not satisfy a training and experience requirement promulgated after the date of the mediator's original certification.

Comment

Comment to Rule 8(a)(3). Commission staff has discretion to waive the requirements set out in Rule 8(a)(3) if an applicant can demonstrate sufficient familiarity with North Carolina legal terminology, court structure, and civil procedure.

* * *

Rule 9. Certification of Mediation Training Programs

(a) Certified training programs for mediators who are seeking certification under Rule 8(a)(2)(b) shall consist of a minimum of forty hours of instruction. The curriculum of such programs shall include the following topics:

(1) Conflict resolution and mediation theory.

(2) Mediation process and techniques, including the process and techniques of mediating family and divorce matters in district court.

(3) Communication and information gathering.

(4) Standards of conduct for mediators, including, but not limited to, the Standards of Professional Conduct for Mediators.

(5) Statutes, rules, and practices governing mediated settlement conferences for family financial matters in district court.

(6) Demonstrations of mediated settlement conferences, both with and without attorney involvement.

(7) Simulations of mediated settlement conferences, involving student participation as the mediator, attorneys, and disputants, which shall be supervised, observed, and evaluated by program faculty.

~~(8) An overview of North Carolina law as it applies to child custody and visitation, equitable distribution, alimony, child support, and postseparation support.~~

~~(9)~~(8) An overview of family dynamics, the effect of divorce on children and adults, and child development.

~~(10)~~(9) Protocols for screening cases for issues involving domestic violence and substance abuse.

~~(11)~~(10) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules, and practices governing settlement procedures for family financial matters in district court.

~~(12)~~(11) Technology and how to effectively utilize technology during a mediation.

(b) Certified training programs for mediators certified under Rule 8(a) shall consist of a minimum of sixteen hours of instruction and the curriculum shall include the topics listed in subsection (a) of this rule. There shall be at least two simulations as required by subsection (a)(7) of this rule.

(c) A training program must be certified by the Commission before a mediator's attendance at the program may be used to satisfy the training requirement under Rule 8(a). Certification does not need to be given in advance of attendance. Training programs attended prior to the promulgation of these rules, attended in other states, or approved by the ACR may be approved by the Commission if they are in substantial compliance with the standards set forth in this rule. The Commission may require attendees of an ACR-approved program to demonstrate compliance with the requirements of subsections (a)(5) ~~and (a)(8)~~ of this rule.

(d) To complete certification, a training program shall pay all administrative fees required by the NCAOC, in consultation with the Commission.

* * *

These amendments to the Rules for Settlement Procedures in District Court Family Financial Cases become effective on 1 May 2023.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 4th day of April 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of April 2023.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

ORDER AMENDING THE RULES FOR MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

Pursuant to subsection 7A-38.1(c) of the General Statutes of North Carolina, the Court hereby amends the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions. This order affects Rules 2, 4, 6, 8, and 11.

* * *

Rule 2. Designation of the Mediator

(a) **Designation of a Mediator by Agreement of Parties**. Within twenty-one days of the court's order, the parties may, by agreement, designate a mediator who is certified under these rules. A Designation of Mediator in Superior Court Civil Action, Form AOC-CV-812 (Designation Form), must be filed with the court within twenty-one days of the court's order. The plaintiff's attorney should file the Designation Form; however, any party may file the Designation Form. The party filing the Designation Form shall serve a copy on all parties and the mediator designated to conduct the mediated settlement conference. The Designation Form shall state: (i) the name, address, and telephone number of the mediator; (ii) the rate of compensation of the mediator; (iii) that the mediator and opposing counsel have agreed upon the designation and rate of compensation; and (iv) that the mediator is certified under these rules.

(b) **Appointment of a Mediator by the Court.** If the parties cannot agree on the designation of a mediator, then the plaintiff or the plaintiff's attorney shall notify the court by filing a Designation Form, requesting, on behalf of the parties, that the senior resident superior court judge appoint a mediator. The Designation Form must be filed within twenty-one days of the court's order and shall state that the attorneys for the parties have discussed the designation of a mediator and have been unable to agree.

Upon receipt of a Designation Form requesting the appointment of a mediator, or in the event that the parties fail to file a Designation Form with the court within twenty-one days of the court's order, the senior resident superior court judge shall appoint a mediator certified under these rules who has expressed a willingness to mediate actions within the senior resident superior court judge's district.

In appointing a mediator, the senior resident superior court judge shall rotate through a list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation, or whether

the mediator is a licensed attorney. The senior resident superior court judge shall retain discretion to depart from a strict rotation of mediators when, in the judge's discretion, there is good cause in a case to do so.

As part of the application or annual certification renewal process, all mediators shall designate the judicial districts in which they are willing to accept court appointments. Each designation is a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated district and will not charge for travel time and expenses incurred in carrying out his or her duties associated with those appointments. A mediator's refusal to accept an appointment in a judicial district designated by the mediator may be grounds for removal from the district's appointment list by the Dispute Resolution Commission (Commission) or the senior resident superior court judge.

The Commission shall provide the senior resident superior court judge of each judicial district a list of certified superior court mediators requesting appointments in that district. The list shall contain each mediator's name, address, and telephone number. The list shall be available on the Commission's website at https://www.ncdrc.gov.

The Commission shall promptly notify the senior resident superior court judge of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

(c) **Mediator Information Directory**. To assist the parties in designating a mediator, the Commission shall post a list of certified superior court mediators on its website at https://www.ncdrc.gov, accompanied by each mediator's contact information and the judicial districts in which each mediator is available to serve. If a mediator has supplied it to the Commission, the list shall also provide the mediator's designated attendance method and the mediator's biographical information, including information about the mediator's education, professional experience, and mediation training and experience.

(d) **Withdrawal or Disqualification of the Mediator.**

(1) Any party may move the senior resident superior court judge of the judicial district where the action is pending for an order disqualifying the mediator using a Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, Form AOC-DRC-20. For good cause, an order disqualifying the mediator shall be entered.

(2) A mediator who wishes to withdraw from a case may file a Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, Form AOC-DRC-20, with the senior resident superior court judge of the judicial district where the action is pending.

(3) If a mediator withdraws or is disqualified, then a substitute mediator shall be designated or appointed under this rule. A mediator who has withdrawn or been disqualified shall not be entitled to receive an administrative fee, unless the mediation has been commenced.

* * *

Rule 4. Duties of Parties, Attorneys, and Other Participants in Mediated Settlement Conferences

(a) **Attendance.**

(1) **Persons Required to Attend.** The following persons shall attend a mediated settlement conference:

a. Parties to the action, to include the following:

1. All individual parties.

2. Any party that is a nongovernmental entity shall be represented at the mediated settlement conference by an officer, employee, or agent who is not the entity's outside counsel and who has been authorized to decide whether, and on what terms, to settle the action on behalf of the entity, or who has been authorized to negotiate on behalf of the entity and can promptly communicate during the conference with persons who have decision-making authority to settle the action; provided, however, that if a specific procedure is required by law (e.g., a statutory pre-audit certificate) or the entity's governing documents (e.g., articles of incorporation, bylaws, partnership agreement, articles of organization, or operating agreement) to approve the terms of the settlement, then the representative shall have the authority to negotiate and make recommendations to the applicable approval authority in accordance with that procedure.

3. Any party that is a governmental entity shall be represented at the mediated settlement conference by an employee or agent who is not the entity's outside counsel and who: (i) has authority to decide on behalf of the entity whether and on what terms to settle the action; (ii) has been authorized to negotiate on behalf of the entity and can promptly communicate during the conference with persons who have decision-making authority to settle the action; or (iii) has authority to negotiate on behalf of the entity and to make a recommendation to the entity's governing board, if under applicable law the proposed settlement terms can be approved only by the entity's governing board.

Notwithstanding anything in these rules to the contrary, any agreement reached which involves a governmental entity may be subject to the provisions of N.C.G.S. § 159-28(a).

b. A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier, which may be obligated to pay all or part of any claim presented in the action. Each carrier shall be represented at the mediated settlement conference by an officer, employee, or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of the carrier, or who has been authorized to negotiate on behalf of the carrier, and can promptly communicate during the conference with persons who have decision-making authority.

c. At least one counsel of record for each party or other participant whose counsel has appeared in the action.

~~(2)~~ **~~Attendance Required Through the Use of Remote Technology.~~** ~~Any party or person required to attend a mediated settlement conference shall attend the conference using remote technology, for example, by telephone, videoconference, or other electronic means. The conference shall conclude when an agreement is reduced to writing and signed, as provided in subsection (c) of this~~

~~rule, or when an impasse is declared. Notwithstanding this remote attendance requirement, the conference may be conducted in person if:~~

~~a. the mediator and all parties and persons required to attend the conference agree to conduct the conference in person and to comply with all federal, state, and local safety guidelines that have been issued; or~~

~~b. the senior resident superior court judge, upon motion of a party and notice to the mediator and to all parties and persons required to attend the conference, so orders.~~

(2) **Attendance Method.**

a. **Determination.**

1. All parties and persons required to attend a mediated settlement conference may agree to conduct the conference in person, using remote technology, or using a hybrid of in-person attendance and remote technology.

2. If all parties and persons required to attend the conference do not agree on an attendance method and the mediator has designated in the Mediator Information Directory that he or she will conduct conferences only using remote technology, then the conference shall be conducted using remote technology.

3. If all parties and persons required to attend the conference do not agree on an attendance method and the mediator has not selected remote technology as his or her designated attendance method in the Mediator Information Directory, then the conference shall be conducted in person.

b. **Order by Court; Mediator Withdrawal**. The senior resident superior court judge, upon motion of a party and notice to the mediator and to all other parties and persons required to attend the mediated settlement conference, may order that the conference be conducted in person, using remote technology, or using a hybrid of in-person attendance and remote technology.

If the method of attendance ordered by the judge is contrary to the attendance method the mediator has designated in the Mediator Information Directory, then the mediator may withdraw from the case under Rule 2(d).

(3) **Scheduling**. Participants required to attend the mediated settlement conference shall promptly notify the mediator after designation or appointment of any significant problems that they may have with the dates for conference sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated mediated settlement conference session is scheduled by the mediator. If a scheduling conflict in another court proceeding arises after a conference session has been scheduled by the mediator, then the participants shall promptly attempt to resolve the conflict under Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina on 20 June 1985.

(4) **Excusing the Attendance Requirement**. Any party or person may be excused from the requirement to attend a mediated settlement conference with the consent of all parties and persons required to attend the conference and the mediator.

(5) **Safety Compliance**. The mediator and all parties and persons required to attend a mediated settlement conference shall comply with all federal, state, and local safety guidelines that are in place for trial court proceedings at the time of the conference.

(b) **Notifying Lienholders**. Any party or attorney who has received notice of a lien, or other claim upon proceeds recovered in the action, shall notify the lienholder or claimant of the date, time, and location of the mediated settlement conference, and shall request that the lienholder or claimant attend the conference or make a representative available with whom to communicate during the conference.

(c) **Finalizing Agreement**.

(1) If an agreement is reached at the mediated settlement conference, then the parties shall reduce the terms of

the agreement to writing and sign the writing, along with their counsel. By stipulation of the parties and at the parties' expense, the agreement may be electronically recorded. If the agreement resolves all issues in the dispute, then a consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

(2) If the agreement resolves all issues at the mediated settlement conference, then the parties shall give a copy of the signed agreement, consent judgment, or voluntary dismissal to the mediator and to all parties at the conference, and shall file the consent judgment or voluntary dismissal with the court within thirty days of the conference, or within ninety days if the State or a political subdivision of the State is a party to the action, or before expiration of the mediation deadline, whichever is later. In all cases, a consent judgment or voluntary dismissal shall be filed prior to the scheduled trial.

(3) If an agreement that resolves all issues in the dispute is reached prior to the mediated settlement conference, or is finalized while the conference is in recess, then the parties shall reduce the terms of the agreement to writing and sign the writing, along with their counsel, and shall file a consent judgment or voluntary dismissal disposing of all issues with the court within thirty days of the conference, or within ninety days if the State or a political subdivision of the State is a party to the action, or before expiration of the mediation deadline, whichever is later.

(4) A designee may sign the agreement on behalf of a party only if the party does not attend the mediated settlement conference and the party provides the mediator with a written verification that the designee is authorized to sign the agreement on the party's behalf.

(5) When an agreement is reached upon all issues, all attorneys of record must notify the senior resident superior court judge within four business days of the settlement and advise who will file the consent judgment or voluntary dismissal.

(d) **Payment of the Mediator's Fee**. The parties shall pay the mediator's fee as provided by Rule 7.

(e) **Related Cases**. Upon application of any party or person, the senior resident superior court judge may order that an attorney of record or a party in a pending superior court civil action, or a representative of an insurance carrier that may be liable for all or any part of a claim pending in superior court, shall, upon reasonable notice, attend a mediation conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance ordered under this rule. Any attorney, party, or representative of an insurance carrier that properly attends a mediation conference under this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Any disputed issue concerning an order entered under this rule shall be determined by the senior resident superior court judge who entered the order.

(f) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

Comment

Comment to Rule 4(a). Parties subject to Chapter 159 of the General Statutes of North Carolina—which provides, among other things, that if an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, then the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been pre-audited to assure compliance with N.C.G.S. § 159-28(a) and that an obligation incurred in violation of N.C.G.S. § 159-28(a) or (a1) is invalid and may not be enforced—should, as appropriate, inform all participants at the beginning of the mediation of the preaudit requirement and the consequences for failing to preaudit under N.C.G.S. § 159-28.

Rule 4(a)(2)(a) describes the attendance methods used for mediated settlement conferences. If a conference is conducted using remote technology, then the mediator should ensure that the parties are able to fully communicate with all other participants and videoconferencing is encouraged.

Comment to Rule 4(c). Consistent with N.C.G.S. § 7A-38.1(*l*), if a settlement is reached during a mediated settlement conference, then the mediator shall ensure that the terms of the settlement are reduced to writing and signed by the parties, or by the parties' designees, and by the parties' attorneys before ending the conference. No settlement shall be enforceable unless it has been reduced to writing and signed by the parties or by the parties' designees.

Cases in which an agreement upon all issues has been reached should be disposed of as expeditiously as possible. This assures that the mediator and the parties move the case toward disposition while honoring the private

nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep the terms of the settlement confidential, then they may timely file with the court closing documents that do not contain confidential terms (e.g., voluntary dismissal or a consent judgment resolving all claims). Mediators will not be required by local rules to submit agreements to the court.

Comment to Rule 4(e). Rule 4(e) clarifies a senior resident superior court judge's authority to order a party, attorney of record, or representative of an insurance carrier to attend proceedings in another forum that are related to the superior court civil action. For example, when there are workers' compensation claims being asserted in a case before North Carolina Industrial Commission, there are typically additional claims asserted in superior court against a third-party tortfeasor. Because of the related nature of the claims, it may be beneficial for a party, attorney of record, or representative of an insurance carrier in the superior court civil action to attend the North Carolina Industrial Commission mediation conference in order to resolve the pending claims. Rule 4(e) specifically authorizes a senior resident superior court judge to order a party, attorney of record, or representative of an insurance carrier to attend a proceeding in another forum, provided that all parties in the related matter consent and the persons ordered to attend receive reasonable notice of the proceeding. The *North Carolina Industrial Commission Rules for Mediated Settlement and Neutral Evaluation Conferences* contain a similar provision, which provides that persons involved in a North Carolina Industrial Commission case may be ordered to attend a mediated settlement conference in a related matter.

* * *

Rule 6. Authority and Duties of the Mediator

(a) **Authority of the Mediator.**

(1) **Control of the Mediated Settlement Conference**. The mediator shall at all times be in control of the mediated settlement conference and the procedures to be followed. The mediator's conduct shall be governed by the Standards of Professional Conduct for Mediators.

(2) **Private Consultation**. The mediator may communicate privately with any participant prior to, and during, the mediated settlement conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

(b) **Duties of the Mediator**.

(1) **Informing the Parties**. At the beginning of the mediated settlement conference, the mediator shall define and describe for the parties:

a. the process of mediation;

b. the differences between mediation and other forms of conflict resolution;

c. the costs of the mediated settlement conference;

d. the fact that the mediated settlement conference is not a trial, that the mediator is not a judge, and that the parties retain their right to a trial if they do not reach settlement;

e. the circumstances under which the mediator may meet and communicate privately with any of the parties, or with any other person;

f. whether, and under what conditions, communications with the mediator will be held in confidence during the mediated settlement conference;

g. the inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1;

h. the duties and responsibilities of the mediator and the participants; ~~and~~

i. the fact that any agreement reached will be reached by mutual consent~~.~~;

j. the fact that Rule 4(f) prohibits any recording of the mediated settlement conference; and

k. the fact that the parties may be subject to sanctions for violating these rules.

(2) **Disclosure**. The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice, or partiality.

(3) **Declaring Impasse**. It is the duty of the mediator to determine in a timely manner that an impasse exists and that the mediated settlement conference should end. The mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) **Reporting Results of the Mediated Settlement Conference.**

a. The mediator shall report to the court the results of the mediated settlement conference and any settlement reached by the parties prior to, or during, a

recess of the conference. Mediators shall also report the results of mediations held in other superior court civil cases in which a conference was not ordered by the court. The report shall be filed on a Report of Mediator in Superior Court Civil Action, Form AOC-CV-813, within ten days of the conclusion of the conference or within ten days of the mediator being notified of the settlement, and shall include the names of the persons who attended the conference, if a conference was held. If a partial agreement was reached at the conference, then the report shall state the claims for relief that were resolved and the names of any parties that have no claims remaining for trial. Local rules shall not require the mediator to send a copy of the parties' agreement to the court.

b. If an agreement upon all issues is reached prior to or at the mediated settlement conference, or during a recess of the conference, then the mediator's report shall state whether the action will be concluded by consent judgment or voluntary dismissal and state the name, address, and telephone number of the person designated by the parties to file the consent judgment or dismissal with the court. The mediator shall advise the parties that Rule 4(c) requires them to file the consent judgment or voluntary dismissal with the court within thirty days of the conference, or within ninety days if the State or a political subdivision of the State is a party to the action, or before expiration of the mediation deadline, whichever is later. The mediator shall indicate on the report that the parties have been so advised.

c. The Commission or the North Carolina Administrative Office of the Courts (NCAOC) may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.

d. A mediator who fails to report as required by this rule shall be subject to sanctions by the senior resident superior court judge. The sanctions shall include, but are not limited to, fines or other monetary penalties, decertification as a mediator, and

any other sanction available through the court's contempt power. The senior resident superior court judge shall notify the Commission of any action taken against a mediator under this subsection.

(5) **Scheduling and Holding the Mediated Settlement Conference**. It is the duty of the mediator to schedule and conduct the mediated settlement conference prior to the conference completion deadline set out in the court's order. The mediator shall make an effort to schedule the conference at a time that is convenient to all participants. In the absence of agreement, the mediator shall select a date and time for the conference. The deadline for completion of the conference shall be strictly observed by the mediator, unless the deadline is changed by written order of the senior resident superior court judge.

A mediator selected by agreement of the parties shall not delay scheduling or holding a conference because one or more of the parties has not paid an advance fee deposit as required by the agreement.

Comment

Parties subject to Chapter 159 of the General Statutes of North Carolina—which provides, among other things, that if an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, then the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been pre-audited to assure compliance with N.C.G.S. § 159-28(a) and that an obligation incurred in violation of N.C.G.S. § 159-28(a) or (a1) is invalid and may not be enforced—should, as appropriate, inform all participants at the beginning of the mediation of the preaudit requirement and the consequences for failing to preaudit under N.C.G.S. § 159-28.

* * *

Rule 8. Mediator Certification and Decertification

(a) The Commission may receive and approve applications for certification of persons to be appointed as superior court mediators. In order to be certified, an applicant must satisfy the requirements of this subsection.

(1) The applicant must complete: (i) at least forty hours of Commission-certified trial court mediation training, or (ii) at least forty hours of Commission-certified

family and divorce mediation training and a sixteen-hour Commission-certified supplemental trial court mediation training.

(2) The applicant must have the following training, experience, and qualifications:

a. An attorney-applicant may be certified if he or she:

1. is a member in good standing of the North Carolina State Bar; or

2. is a member similarly in good standing of the bar of another state and eligible to apply for admission to the North Carolina State Bar under Chapter 1, Subchapter C, of the North Carolina State Bar Rules and the Rules Governing the Board of Law Examiners and the Training of Law Students, 27 N.C. Admin. Code 1C.0105; demonstrates familiarity with North Carolina court structure, legal terminology, and civil procedure; provides to the Commission three letters of reference about the applicant's good character, including at least one letter from a person with knowledge of the applicant's professional practice; and possesses the experience required by this subsection; and

3. has at least five years of experience after date of licensure as a judge, practicing attorney, law professor, or mediator, or has equivalent experience.

b. A nonattorney-applicant may be certified if he or she:

1. has, as a prerequisite for the forty hours of Commission-certified trial court mediation training, completed a six-hour training provided by a Commission-certified trainer on North Carolina court organization, legal terminology, civil court procedure, the attorney–client privilege, the unauthorized practice of law, and the common legal issues arising in superior court civil actions;

2. has provided to the Commission three letters of reference as to the applicant's good character, including at least one letter from a person

with knowledge of the applicant's experience qualifying the applicant under subsection (a)(2)(b)(3) of this rule; and

3. has completed ~~either~~one of the following:

i. a minimum of twenty hours of basic mediation training provided by a trainer acceptable to the Commission and, after completing the twenty-hour training, has mediated at least thirty disputes over the course of at least three years, or has equivalent experience, and possesses a four-year college degree from an accredited institution, and has four years of a high or relatively high level of professional or management experience of an executive nature in a professional, business, or governmental entity; ~~or~~

ii. ten years of a high or relatively high level of professional or management experience of an executive nature in a professional, business, or governmental entity, and possesses a four year college degree from an accredited institution.; or

iii. a master's degree or doctoral degree in alternative dispute resolution studies from an accredited institution and possesses five years of a high or relatively high level of professional or management experience of an executive nature in a professional, business, or governmental entity.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible for certification under subsections (a)(2)(a) and (a)(2)(b) of this rule.

(3) The applicant must complete the following observations:

a. **All Applicants**. All applicants for certification shall observe two mediated settlement conferences, at least one of which shall be of a superior court civil action.

b. **Nonattorney-Applicants**. Nonattorney-applicants for certification shall observe three mediated settlement conferences, in addition to those required under subsection (a)(3)(a) of this rule, that are conducted by at least two different mediators. At least one of the additional observations shall be of a superior court civil action.

c. **Conferences Eligible for Observation**. Conferences eligible for observation under subsection (a)(3) of this rule shall be those in cases pending before the North Carolina superior courts, the North Carolina Court of Appeals, the North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, or the federal district courts in North Carolina that are ordered to mediation or conducted by an agreement of the parties which incorporates the rules of mediation of one of those entities.

Conferences eligible for observation shall also include those conducted in disputes prior to litigation that are mediated by an agreement of the parties and incorporate the rules for mediation of one of the entities named above.

All conferences shall be conducted by a certified superior court mediator under rules adopted by one of the above entities and shall be observed from their beginning to settlement or when an impasse is declared. Observations shall be reported on a Certificate of Observation – Mediated Settlement Conference Program, Form AOC-DRC-07.

All observers shall conform their conduct to the Commission's policy on *Guidelines for Observer Conduct*.

(4) The applicant must demonstrate familiarity with the statutes, rules, and practices governing mediated settlement conferences in North Carolina.

(5) The applicant must be of good moral character and adhere to the Standards of Professional Conduct for Mediators when acting under these rules. On his or her

application(s) for certification or application(s) for certification renewal, an applicant shall disclose any:

a. pending criminal charges;

b. criminal convictions;

c. restraining orders issued against him or her;

d. failures to appear;

e. closed grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country;

f. disciplinary action taken against him or her by a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country, including, but not limited to, disbarment, revocation, decertification, or suspension of any professional license or certification, including the suspension or revocation of any license, certification, registration, or qualification to serve as a mediator in another state or country, even if stayed;

g. judicial sanctions imposed against him or her in any jurisdiction;

h. civil judgments, tax liens, or bankruptcy filings that occurred within the ten years preceding the date that the initial or renewal application was filed with the Commission; or

i. pending grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country.

If a matter listed in subsections (a)(5)(a) through (a)(5)(h) of this rule arises after a mediator submits his or her initial or renewal application for certification, then the mediator shall report the matter to the Commission no later than thirty days after receiving notice of the matter.

If a pending grievance or complaint described in subsection (a)(5)(i) of this rule is filed after a mediator submits his or her initial or renewal application

for certification, then the mediator shall report the matter to the Commission no later than thirty days after receiving notice of the matter or, if a response to the grievance or complaint is permitted by the professional licensing, certifying, or regulatory body, no later than thirty days after the due date for the response.

As referenced in this subsection, criminal charges or convictions (excluding infractions) shall include felonies, misdemeanors, or misdemeanor traffic violations (including driving while impaired) under the law of North Carolina or another state, or under the law of a federal, military, or foreign jurisdiction, regardless of whether the adjudication was withheld (prayer for judgment continued) or the imposition of a sentence was suspended.

(6) The applicant must submit proof of qualifications set out in this rule on a form provided by the Commission.

(7) The applicant must pay all administrative fees established by the NCAOC upon the recommendation of the Commission.

(8) The applicant must agree to accept the fee ordered by the court under Rule 7 as payment in full of a party's share of the mediator's fee.

(9) The applicant must comply with the requirements of the Commission for completing and reporting continuing mediator education or training.

(10) The applicant must agree, once certified, to make reasonable efforts to assist applicants for mediator certification in completing their observation requirements.

(b) No mediator who held a professional license and relied upon that license to qualify for certification under subsections (a)(2)(a) or (a)(2)(b) of this rule shall be decertified or denied recertification because that mediator's license lapses, is relinquished, or becomes inactive; provided, however, that this subsection shall not apply to any mediator whose professional license is revoked, suspended, lapsed, relinquished, or whose professional license becomes inactive due to disciplinary action or the threat of disciplinary action from his or her licensing authority. Any mediator whose professional license is revoked, suspended, lapsed,

or relinquished, or whose professional license becomes inactive, shall report the matter to the Commission.

(c) A mediator's certification may be revoked or not renewed at any time it is shown to the satisfaction of the Commission that a mediator no longer meets the qualifications set out in this rule or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible for certification under this rule. No application for certification renewal shall be denied on the grounds that the mediator's training and experience does not meet the training and experience required under rules which were promulgated after the date of the applicant's original certification.

Comment

Comment to Rule 8(a)(2). Commission staff has discretion to waive the requirements set out in Rule 8(a)(2)(a)(2) and Rule 8(a)(2)(b)(1), if the applicant can demonstrate sufficient familiarity with North Carolina legal terminology, court structure, and procedure.

Comment to Rule 8(a)(2)(b)(3). Administrative, secretarial, and paraprofessional experience will not generally qualify as "a high or relatively high level of professional or management experience of an executive nature."

* * *

Rule 11. Rules for Neutral Evaluation

(a) **Nature of Neutral Evaluation**. Neutral evaluation is an informal, abbreviated presentation of the facts and issues by the parties to a neutral at an early stage of the case. The neutral is responsible for evaluating the strengths and weaknesses of the case, providing a candid assessment of liability, the settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The neutral is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

(b) **When the Neutral Evaluation Conference Is to Be Held**. As a guiding principle, the neutral evaluation conference should be held at an early stage of the case after the time for the filing of answers has expired, but in advance of the expiration of the discovery period.

(c) **Preconference Submissions**. No later than twenty days prior to the date established for the neutral evaluation conference to begin, each party shall provide the neutral with written information about the

case and shall certify to the neutral that they provided a copy of such summary to all other parties in the case. The information provided to the neutral and the other parties shall be a summary of the significant facts and issues in the party's case, shall not be more than five pages in length, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the neutral and to the other parties under this paragraph shall not be filed with the court.

(d) **Replies to Preconference Submissions**. No later than ten days prior to the date set for the neutral evaluation conference to begin, any party may, but is not required to, send additional information to the neutral in writing, not exceeding three pages in length, responding to a question from an opposing party. The response shall be served on all other parties, and the party sending the response shall certify such service to the neutral, but the response need not be filed with the court.

(e) **Neutral Evaluation Conference Procedure**. Prior to a neutral evaluation conference, the neutral may request additional information in writing from any party. At the conference, the neutral may address questions to the parties and give the parties an opportunity to complete their summaries with a brief oral statement.

(f) **Modification of Procedure**. Subject to the approval of the neutral, the parties may agree to modify the procedures required by these rules for neutral evaluation.

(g) **Neutral's Duties**.

(1) **Neutral's Opening Statement**. At the beginning of the neutral evaluation conference, in addition to the matters set out in Rule 10(c)(2)(b), the neutral shall define and describe for the parties:

a. the fact that the neutral evaluation conference is not a trial, that the neutral is not a judge, that the neutral's opinions are not binding on any party, and that the parties retain the right to a trial if they do not reach a settlement; and

b. the fact that any settlement reached will be only by mutual consent of the parties.

(2) **Oral Report to Parties by Neutra**l. In addition to the written report to the court required under these rules, at the conclusion of the neutral evaluation conference, the neutral shall issue an oral report to the parties advising

them of the neutral's opinion about the case. The opinion shall include a candid assessment of liability, an estimated settlement value, and the strengths and weaknesses of each party's claims in the event that the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reason for the neutral's suggestion. The neutral shall neither reduce his or her oral report to writing nor inform the court of the oral report.

(3) **Report of Neutral to Court**. Within ten days after the completion of the neutral evaluation conference, the neutral shall file a written report with the court using a Report of Neutral Conducting Settlement Procedure Other Than Mediated Settlement Conference or Arbitration in Superior Court Civil Action, Form AOC-CV-817. The neutral's report shall inform the court when and where the conference was held, the names of those who attended, and the name of any party, attorney, or representative of an insurance carrier known to the neutral to have been absent from the conference without permission. The report shall also inform the court whether an agreement upon all issues was reached by the parties and, if so, state the name of the person designated to file the consent judgment or voluntary dismissal with the court. If a partial agreement was reached at the conference, then the report shall state the claims for relief that were resolved and the names of any parties that have no claims remaining for trial. Local rules shall not require the neutral to send a copy of any agreement reached by the parties to the court.

(h) **Neutral's Authority to Assist Negotiations**. If all parties to the neutral evaluation conference request and agree, then a neutral may assist the parties in settlement discussions.

* * *

These amendments to the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions become effective on 1 May 2023.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 4th day of April 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of April 2023.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

ORDER AMENDING THE RULES OF MEDIATION FOR MATTERS BEFORE THE CLERK OF SUPERIOR COURT

Pursuant to subsection 7A-38.3B(b) of the General Statutes of North Carolina, the Court hereby amends the Rules of Mediation for Matters Before the Clerk of Superior Court. This order affects Rules 2, 4, and 6.

* * *

Rule 2. Designation of the Mediator

(a) **Designation of a Mediator by Agreement of the Parties**. By agreement, the parties may designate a mediator certified by the Commission within the time period set out in the clerk's order. However, in estate and guardianship matters, the parties may designate only those mediators who are certified under these rules for estate and guardianship matters.

A Designation of Mediator in Matter Before Clerk of Superior Court, Form AOC-G-302 (Designation Form), must be filed within the time period set out in the clerk's order. The petitioner should file the Designation Form; however, any party may file the Designation Form. The party filing the Designation Form shall serve a copy on all parties and the mediator designated to conduct the mediation. The Designation Form shall state: (i) the name, address, and telephone number of the mediator designated; (ii) the rate of compensation of the mediator; (iii) that the mediator and the persons ordered to attend the mediation have agreed on the designation and the rate of compensation; and (iv) under which rules the mediator is certified.

(b) **Appointment of a Mediator by the Clerk**. In the event that a Designation Form is not filed with the clerk within the time period for filing stated in the clerk's order, the clerk shall appoint a mediator certified by the Commission. The clerk shall appoint only those mediators certified under these rules for estate and guardianship matters to those matters. The clerk may appoint any certified mediator who has expressed a desire to be appointed to mediate all other matters within the jurisdiction of the clerk.

Except for good cause, mediators shall be appointed by the clerk by rotation from a list of those certified mediators who wish to be appointed for matters within the clerk's jurisdiction, without regard to occupation, race, gender, religion, national origin, disability, or whether the mediator is an attorney.

As part of the application or annual certification renewal process, all mediators shall designate those counties for which they are willing

to accept court appointments. Each designation shall be deemed to be a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated county and will not charge for travel time and expenses incurred in carrying out his or her duties associated with those appointments. A mediator's refusal to accept an appointment in a county designated by the mediator may be grounds for removal from that county's court-appointment list by the Commission or by the clerk of that county.

The Commission shall provide to the clerk of each county a list of superior court mediators requesting appointments in that county who are certified in estate and guardianship proceedings, and those certified in other matters before the clerk. The list shall contain each mediator's name, address, and telephone number. The list shall be provided to the clerks electronically on the Commission's website at https://www.ncdrc.gov. The Commission shall promptly notify the clerk of any disciplinary action taken with respect to a mediator on the list of certified mediators for the county.

(c) **Mediator Information Directory**. ~~The Commission shall maintain for~~For the consideration of the clerks~~,~~ and those designating mediators for matters within the clerk's jurisdiction, ~~a directory~~the Commission shall post a list of certified mediators who request appointments in those matters and ~~a directory of mediators who~~ are certified under these rules on its website at https://www.ncdrc.gov. If a mediator has supplied it to the Commission, the list shall also provide the mediator's designated attendance method and the mediator's biographical information, including information about the mediator's education, professional experience, and mediation training and experience.~~The directory shall be provided to the clerks on the Commission's website at https://www.ncdrc.gov.~~

~~(d) **Disqualification of the Mediator**. Any person ordered to attend a mediation under these rules may move the clerk of the county in which the matter is pending for an order disqualifying the mediator. For good cause, an order disqualifying the mediator shall be entered. If the mediator is disqualified, a replacement mediator shall be designated or appointed under this rule. Nothing in this subsection shall preclude a mediator from disqualifying himself or herself.~~

(d) **Withdrawal or Disqualification of the Mediator.**

(1) Any person ordered to attend a mediation under these rules may move the clerk of the county in which the matter is pending for an order disqualifying the mediator using

a Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, Form AOC-DRC-20. For good cause, an order disqualifying the mediator shall be entered.

(2) A mediator who wishes to withdraw from a case may file a Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, Form AOC-DRC-20, with the clerk.

(3) If a mediator withdraws or is disqualified, then a substitute mediator shall be designated or appointed under this rule. A mediator who has withdrawn or been disqualified shall not be entitled to receive an administrative fee, unless the mediation has been commenced.

* * *

Rule 4. Duties of Parties, Attorneys, and Other Participants in Mediations

(a) **Attendance**.

~~(1) All persons ordered by the clerk to attend a mediation conducted under these rules shall attend the mediation using remote technology; for example, by telephone, videoconference, or other electronic means. The mediation shall conclude when an agreement is reduced to writing and signed, as provided in subsection (b) of this rule, or when an impasse is declared. Notwithstanding this remote attendance requirement, the mediation may be conducted in person if:~~

~~a. the mediator and all persons required to attend the mediation agree to conduct the mediation in person and to comply with all federal, state, and local safety guidelines that have been issued; or~~

~~b. the clerk, upon motion of a person required to attend the mediation and notice to the mediator and to all other persons required to attend the mediation, so orders.~~

~~(2) Any nongovernmental entity ordered to attend a mediation conducted under these rules shall be represented at the mediation by an officer, employee, or agent who is not the entity's outside counsel and who has authority to decide on behalf of the entity whether, and on what terms, to settle the matter.~~

~~(3) Any governmental entity ordered to attend a mediation conducted under these rules shall be represented at the mediation by an employee or agent who is not the entity's outside counsel and who has authority to decide on behalf of the entity whether, and on what terms, to settle the matter; provided, however, that if proposed settlement terms can be approved only by a governing board, the employee or agent shall have authority to negotiate on behalf of the governing board.~~

~~(4) An attorney ordered to attend a mediation under these rules has satisfied the attendance requirement when at least one counsel of record for any person ordered to attend has attended the mediation.~~

~~(5) Other persons may participate in a mediation at the discretion of the mediator.~~

~~(6) Persons ordered to attend a mediation shall promptly notify the mediator, after selection or appointment, of any significant problems they have with the dates for mediation sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated mediation session is scheduled by the mediator.~~

~~(7) Any person may be excused from the requirement to attend a mediation with the consent of all persons required to attend the mediation and the mediator.~~

(1) **Persons Required to Attend**. The following persons shall attend a mediation:

a. Any person ordered by the clerk to attend.

b. Any nongovernmental entity ordered to attend a mediation conducted under these rules shall be represented at the mediation by an officer, employee, or agent who is not the entity's outside counsel and who has authority to decide on behalf of the entity whether, and on what terms, to settle the matter.

c. Any governmental entity ordered to attend a mediation conducted under these rules shall be represented at the mediation by an employee or agent who is not the entity's outside counsel and who has authority to decide on behalf of the entity whether, and on what terms, to settle the matter; provided,

however, that if proposed settlement terms can be approved only by a governing board, the employee or agent shall have authority to negotiate on behalf of the governing board.

d. An attorney ordered to attend a mediation under these rules has satisfied the attendance requirement when at least one counsel of record for any person ordered to attend has attended the mediation.

e. Other persons may participate in a mediation at the discretion of the mediator.

(2) **Attendance Method**.

a. **Determination**.

1. All parties and persons required to attend a mediation may agree to conduct the mediation in person, using remote technology, or using a hybrid of in-person attendance and remote technology.

2. If all parties and persons required to attend the mediation do not agree on an attendance method and the mediator has designated in the Mediator Information Directory that he or she will conduct mediations only using remote technology, then the mediation shall be conducted using remote technology.

3. If all parties and persons required to attend the mediation do not agree on an attendance method and the mediator has not selected remote technology as his or her designated attendance method in the Mediator Information Directory, then the mediation shall be conducted in person.

b. **Order by Clerk; Mediator Withdrawal**. The clerk, upon motion of a party and notice to the mediator and to all other parties and persons required to attend the mediation, may order that the mediation be conducted in person, using remote technology, or using a hybrid of in-person attendance and remote technology.

If the method of attendance ordered by the clerk is contrary to the attendance method the

mediator has designated in the Mediator Information Directory, then the mediator may withdraw from the case under Rule 2(d).

(3) **Scheduling**. Persons ordered to attend a mediation shall promptly notify the mediator, after selection or appointment, of any significant problems that they may have with the dates for mediation sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated mediation session is scheduled by the mediator.

(4) **Excusing the Attendance Requirement**. Any person may be excused from the requirement to attend a mediation with the consent of all persons required to attend the mediation and the mediator.

(5) **Safety Compliance**. The mediator and all parties and persons required to attend a mediation shall comply with all federal, state, and local safety guidelines that are in place for trial court proceedings at the time of the mediation.

(b) **Finalizing Agreement**.

(1) If an agreement is reached at the mediation, in matters that, as a matter of law, may be resolved by the parties by agreement, then the parties to the agreement shall reduce the terms of the agreement to writing and sign the writing along with their counsel. The parties shall designate a person who will file a consent judgment or a voluntary dismissal with the clerk, and that person shall sign the mediator's report. If an agreement is reached prior to or during a recess of the mediation, then the parties shall inform the mediator and the clerk that the matter has been settled and, within ten calendar days of the agreement, file a consent judgment or voluntary dismissal with the court.

A designee may sign the agreement on behalf of a party only if the party does not attend the mediation and the party provides the mediator with a written verification that the designee is authorized to sign the agreement on the party's behalf.

(2) In all other matters, including guardianship and estate matters, if an agreement is reached upon some or all of

the issues at the mediation, then the persons ordered to attend the mediation shall reduce the terms of the agreement to writing and sign the writing along with their counsel, if any. Such agreements are not binding upon the clerk, but may be offered into evidence at the hearing of the matter and may be considered by the clerk for a just and fair resolution of the matter. Evidence of statements made and conduct occurring in a mediation where an agreement is reached is admissible under N.C.G.S. § 7A-38.3B(g)(3).

All written agreements reached in such matters shall include the following language in a prominent location in the document: "This agreement is not binding on the clerk but will be presented to the clerk as an aid to reaching a just resolution of the matter."

(c) **Payment of the Mediator's Fee**. The persons ordered to attend the mediation shall pay the mediator's fee as provided by Rule 7.

(d) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

Comment

Comment to Rule 4(a)(2). The rule describes the attendance methods used for mediations. If a mediation is conducted using remote technology, then the mediator should ensure that the parties are able to fully communicate with all other participants and videoconferencing is encouraged.

* * *

Rule 6. Authority and Duties of the Mediator

(a) **Authority of the Mediator**.

(1) **Control of the Mediation**. The mediator shall at all times be in control of the mediation and the procedures to be followed. The mediator's conduct shall be governed by the Standards of Professional Conduct for Mediators.

(2) **Private Consultation**. The mediator may communicate privately with any participant or counsel prior to, during, and after the mediation. The fact that private communications have occurred with a participant before the conference shall be disclosed to all other participants at the beginning of the mediation.

(b) **Duties of the Mediator**.

(1) **Informing the Parties**. At the beginning of the mediation, the mediator shall define and describe for the parties:

a. the process of mediation;

b. the costs of mediation and the circumstances in which participants will not be assessed the costs of mediation;

c. the fact that the mediation is not a trial, that the mediator is not a judge, and that the parties retain the right to a hearing if they do not reach a settlement;

d. the circumstances under which the mediator may meet and communicate privately with the parties or with any other person;

e. whether, and under what conditions, communications with the mediator will be held in confidence during the conference;

f. the inadmissibility of conduct and statements under N.C.G.S. § 7A-38.3B;

g. the duties and responsibilities of the mediator and the participants; ~~and~~

h. the fact that any agreement reached will be reached by mutual consent and reported to the clerk under subsection (b)(4) of this rule.~~;~~

i. the fact that Rule 4(d) prohibits any recording of the mediation; and

j. the fact that the parties may be subject to sanctions for violating these rules.

(2) **Disclosure**. The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice, or partiality.

(3) **Declaring Impasse**. It is the duty of the mediator to determine in a timely manner when an impasse exists and when the mediation should end. The mediator shall inquire of and consider the desires of the parties to cease or continue the mediation.

(4) **Reporting Results of the Mediation**.

a. The mediator shall report to the court in writing on a form prescribed by the North Carolina Administrative Office of the Courts (NCAOC) within five days of completing the mediation whether the mediation resulted in settlement or whether an impasse was declared. If settlement occurred prior to or during a recess of the mediation, then the mediator shall file the report of settlement within five days of receiving notice of the settlement and, in addition to the other information required, report on who informed the mediator of the settlement.

b. The mediator's report shall identify those persons attending the mediation, the time spent conducting the mediation and fees charged for the mediation, and the names and contact information of the persons designated by the parties to file a consent judgment or dismissal with the clerk, as required by Rule 4(b). Mediators shall provide statistical data for evaluation of the mediation program as required from time to time by the Commission or the NCAOC. Mediators shall not be required to send agreements reached in mediation to the clerk, except in estate and guardianship matters and other matters which may be resolved only by order of the clerk.

c. Mediators who fail to report as required under this rule shall be subject to the contempt power of the court and sanctions.

(5) **Scheduling and Holding the Mediation**. It is the duty of the mediator to schedule and conduct the mediation prior to the mediation completion deadline set out in the clerk's order. The mediator shall make an effort to schedule the mediation at a time that is convenient to all participants. In the absence of agreement, the mediator shall select a date and time for the mediation. The deadline for completion of the mediation shall be strictly observed by the mediator, unless the deadline is changed by a written order of the clerk.

* * *

RULES OF MEDIATION FOR MATTERS BEFORE THE CLERK OF SUPERIOR COURT

These amendments to the Rules of Mediation for Matters Before the Clerk of Superior Court become effective on 1 May 2023.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 4th day of April 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of April 2023.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

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