378 N.C.—No. 2 Pages 100-376

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

OCTOBER 11, 2021

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OF
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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

Filed 13 August 2021

Carolina Mulching Co. v. Raleigh-Wilmington Invs. II, LLC 100
Est. of Long v. Fowler 138
In re Harris Teeter, LLC 108
Mucha v. Wagner 167
N.C. Farm Bureau Mut. Ins. Co. v. Lunsford 181
S. Env't Law Ctr. v. N.C. Railroad Co. 202
State v. Allen 286
State v. Austin 272
State v. Chavez 265
State v. Johnson 236
State v. Shuler 337
Wells Fargo Bank, N.A. v. Stocks 342

ORDERS

Anderson Creek Partners, L.P. v. Cnty. of Harnett 352
In re C.H. 353
In re Custodial Law Enforcement Recording 354
PF Dev. Grp., LLC v. Cnty. of Harnett 355
State v. Hargrove 356

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

Abdullah-Malik v. State of N.C. 369
Anderson Creek Partners, L.P. v. Cnty. of Harnett 360
Bartley v. City of High Point 372
Buttacavoli v. Buttacavoli 365
Cheek-Tarouilly v. Stanhiser 368
Crazie Overstock Promotions, LLC v. State of N.C. 372
Cummings v. Carroll 366
Dep't of Transp. v. Bloomsbury Ests., LLC 369
Dewalt v. Hooks 364
DiCesare v. Charlotte-Mecklenburg Hosp. Auth. 363
Evans v. State of N.C. 359
Falice v. State of N.C. 358
George v. Lowe's Cos., Inc. 372
Grodner v. Grodner 371
Hatcher v. Montgomery 368
Hutchins v. CVS Pharmacy, Inc. 365
In re Adoption of C.H.M. 371
In re B.M.P. 362
In re C.C.G. 359
In re C.H. 364
In re E.M.D.Y. 370
In re E.W.P. 373
In re J.D. 364
In re J.N. 362
In re J.U. 370
In re K.M. 361
In re K.Q. 365
In re M.R.J. 358
In re Noori 375
In re O.L. 368
In re Salehi 368
In re T.H. 366
Inhold, LLC v. PureShield, Inc. 364
Jernigan v. Bray 361
K2 Asia Ventures v. Krispy Kreme Doughnut Corp. 374
Maurras d/b/a Shackleford v. Stephens 369
Mayes v. Wayne Cnty. Dist. Ct. 367
McCauley v. Dep't of Soc. Servs. 370
Meris v. Guilford Cnty. Sheriffs 371
Meyers v. Ishee 368
Millsaps v. N.C. Dep't of Pub. Safety 366
Murphy-Brown, LLC v. ACE Am. Ins. Co. 363
Murray v. Deerfield Mobile Home Park 366

N. State Deli, LLC v. Cincinnati Ins. Co. . . . 367
New Hanover Cnty. Bd. of Educ. v. Stein . . . 371
PF Dev. Grp., LLC v. Cnty. of Harnett . . . 360
Privette v. N.C. State Bd. of Dental Exam'rs . . . 370
Providence Volunteer Fire Dep't, Inc. v. Town of Weddington . . . 359
Radiator Specialty Co. v. Arrowood Indem. Co. . . . 357
Reynolds Am. Inc. v. Third Motion Equities Master Fund Ltd. . . . 373
Sampson v. Hooks . . . 374
State v. Allen . . . 361
State v. Alvarez . . . 370
State v. Arnold . . . 367
State v. Atkins . . . 371
State v. Barrett . . . 369
State v. Beasley . . . 375
State v. Beck . . . 370
State v. Bell . . . 358
State v. Best . . . 358
State v. Bolton . . . 374
State v. Boyd . . . 362
State v. Bullock . . . 375
State v. Butler . . . 374
State v. Butler . . . 376
State v. Byrd . . . 368
State v. Coffey . . . 358
State v. Davis . . . 363
State v. Edwards . . . 361
State v. Edwards . . . 364
State v. Elder . . . 370
State v. Fancher . . . 369
State v. Garrett . . . 365
State v. Geter . . . 365
State v. Gonzalez . . . 369
State v. Green . . . 362
State v. Hargrove . . . 366
State v. Harris . . . 363
State v. Holland . . . 364
State v. Hunt . . . 370
State v. Johnson . . . 369
State v. Jones . . . 361
State v. Kearney . . . 370
State v. Lancaster . . . 363
State v. Lancaster . . . 366
State v. Lewis . . . 365
State v. Lovett . . . 364
State v. Medlin . . . 369
State v. Melton . . . 375
State v. Mitchell . . . 367
State v. Moore . . . 361
State v. Muhammad . . . 375
State v. Noonsab . . . 362
State v. Oldroyd . . . 369
State v. Parker . . . 360
State v. Parker . . . 366
State v. Peay . . . 359
State v. Rahman . . . 375
State v. Reich . . . 374
State v. Richmond . . . 365
State v. Shane-Hill . . . 374
State v. Sherrill . . . 369
State v. Sistler . . . 361
State v. Stephen . . . 364
State v. Tripp . . . 358
State v. Tunstall . . . 371
State v. Tyler . . . 357
State v. Waterfield . . . 374
State v. Watson . . . 368
State v. Wilder . . . 368
State v. Woods . . . 375
State v. Wynn . . . 362
TD Bank USA, N.A. v. Corpening . . . 365
Umstead Coal. v. RDU Airport Auth. . . . 358
Wilmington Sav. Fund Soc'y, FSB v. Hall . . . 361

HEADNOTE INDEX

CONSPIRACY

Jury instructions—conspirators—plain error analysis—no prejudice shown—In a trial for conspiracy to commit first-degree murder, where the trial court erred by instructing the jury that defendant could be found guilty if he conspired with "at least one other person" without naming the only co-conspirator listed in the conspiracy indictment, there was no plain error because there was no reasonable probability the jury would have reached a different result absent the error given the overwhelming evidence of defendant's guilt. The decision of the Court of Appeals

reaching the opposite conclusion, without a prejudice analysis being conducted, was reversed. **State v. Chavez, 265.**

CONSTITUTIONAL LAW

Brady violation—materiality—additional prior convictions of prosecution witness—Defendant was not entitled to post-conviction relief (after being convicted and sentenced to death for first-degree murder) on his claim that the State committed a *Brady* violation by failing to turn over a complete criminal record of a prosecution witness prior to trial, because the omitted prior convictions were not material. The jury was already informed of the witness's prior convictions for more serious crimes, and, for the murder being prosecuted, that the witness had initially provided false statements to law enforcement and had been charged as an accessory after the fact. **State v. Allen, 286.**

Courtroom restraints—issue raised in MAR—record insufficient—evidentiary hearing required—On defendant's post-conviction claim that his constitutional rights were violated when he was shackled during his trial for first-degree murder (for which he was convicted and sentenced to death), the trial court erred by summarily dismissing the issue as procedurally barred. Since the record was devoid of information establishing that defendant was actually restrained in the courtroom, that the shackles were visible to the jury, and that defense counsel was aware that the restraints were visible to the jury, an evidentiary hearing was required to develop the necessary factual foundation before the claim could be resolved. **State v. Allen, 286.**

Effective assistance of counsel—murder trial—sentencing phase—The trial court properly dismissed defendant's post-conviction ineffective assistance of counsel claims pertaining to the sentencing phase of his first-degree murder trial where, after the trial court conducted an evidentiary hearing, its findings were supported by evidence and in turn supported its conclusion that defense counsel's performance was not deficient and, even if it was, defendant could not demonstrate he suffered prejudice. **State v. Allen, 286.**

Effective assistance of counsel—summary dismissal of claims—factual disputes—evidentiary hearing required—Where defendant's post-conviction claims that he received ineffective assistance of counsel in his trial for first-degree murder, for which defendant was convicted and sentenced to death, raised factual disputes, the trial court erred by summarily dismissing those claims because defendant presented facts that, if true, would entitle him to relief. Defendant presented evidence that his counsel's decision not to investigate the crime scene evidence, from which different interpretations could be drawn, was not a reasonable strategic choice, and that he was prejudiced by being deprived of the opportunity to rebut the main witness's account of how the victim was killed. The matter was remanded for an evidentiary hearing with instructions for the trial court, if it concluded counsel's performance was deficient, to consider how any deficiencies prejudiced defendant when considered both individually and cumulatively. **State v. Allen, 286.**

False and misleading testimony—State's witness—MAR claim—Defendant was not entitled to post-conviction relief (after being convicted and sentenced to death for first-degree murder) on his claim that the State violated his constitutional rights by knowingly presenting false testimony through the main prosecution witness, because even assuming the claim was not procedurally barred for having been

raised on direct appeal, there was nothing in the record to show the State knew the witness's testimony was false. **State v. Allen, 286.**

Right to silence—notice of intent to raise affirmative defense—preemptive impeachment by State—unconstitutional—Defendant's pretrial notice of intent to raise the affirmative defense of duress, given in a methamphetamine trafficking prosecution to comply with N.C.G.S. § 15A-905(c)(1), did not cause the forfeiture of her Fifth Amendment right to silence, and the State should not have been permitted to preemptively impeach her—by asking a police detective whether defendant made any statements about another man who had just been arrested when she handed over the drugs—during its case-in-chief when she had not testified at that point in the trial. **State v. Shuler, 337.**

CONTRACTS

Breach—conflicts in evidence—additional findings of fact required—remand appropriate—In an action for breach of contract (involving a tree company that had been contracted to mulch trees up to six to eight inches in diameter), the Court of Appeals appropriately remanded the matter to the trial court for additional findings of fact where the lower court's findings, upon which rested its conclusion that there was no breach of contract, did not resolve conflicts in the evidence regarding which of two methods the tree company used to measure the size of the trees. **Carolina Mulching Co. v. Raleigh-Wilmington Invs. II, LLC, 100.**

CRIMINAL LAW

Post-conviction relief—access to medical records—limited evidentiary hearing—dismissal of claim—The trial court properly dismissed defendant's post-conviction claim seeking relief (after being convicted of first-degree murder) for his counsel being denied access to certain prior treatment records of the main prosecution witness. The trial court's conclusion, made after a limited evidentiary hearing, that defendant could not demonstrate prejudice—because the records did not indicate the witness had a relevant mental health condition and they did not include evidence of substance abuse not already disclosed by the witness at trial—was supported by its findings of fact, which were in turn supported by evidence. **State v. Allen, 286.**

Post-conviction relief—short-form indictment—first-degree murder—issue procedurally barred—Defendant's post-conviction claim that a short-form indictment was insufficient to confer jurisdiction on the trial court for his first-degree murder trial was procedurally barred where he raised the issue on direct appeal. **State v. Allen, 286.**

DAMAGES AND REMEDIES

Punitive—sufficiency of pleading—willful or wanton conduct—In a wrongful death action filed against individual employees of a state university, the complaint contained sufficient allegations to put defendants on notice for punitive damages, based on willful and wanton conduct (N.C.G.S. § 1D-15(a)), where the allegations stated that defendants' negligent acts or omissions in failing to properly drain a chiller and refill it with antifreeze, particularly given warning signs posted on the chiller, could cause injury in the event the pipe froze and became pressurized, and that their conduct demonstrated a conscious disregard of the safety of others. **Est. of Long v. Fowler, 138.**

IMMUNITY

Sovereign—individual versus official capacity—dismissal improper—In a wrongful death action filed against individual employees of a state university, the trial court erred by dismissing the action after determining that the employees were entitled to sovereign immunity based on their status as state employees, since the employees were sued in their individual capacities, even if their alleged negligent acts were performed in the scope of their employment. **Est. of Long v. Fowler, 138.**

JUDGES

Impermissible expression of opinion—in presence of jury—prejudice analysis—jury instructions and evidence—In a trial for assault on a female, even assuming that the trial court violated N.C.G.S. §§ 15A-1222 and 15A-1232 by improperly expressing its opinion during jury instructions that defendant assaulted the victim, defendant could not show prejudice where the trial court's instructions as a whole made clear that only the jury could make the factual determination of whether defendant assaulted the victim and where the State's evidence satisfied the elements of the crime. **State v. Austin, 272.**

Impermissible expression of opinion—in presence of jury—preservation—standard of review—Defendant's argument that the trial court improperly expressed an opinion on the evidence in violation of N.C.G.S. §§ 15A-1222 and 15A-1232 while instructing the jury was preserved by operation of law due to the mandatory nature of the statutory prohibitions, and thus the alleged error was subject to review for prejudicial error pursuant to N.C.G.S. § 15A-1443(a). **State v. Austin, 272.**

JURISDICTION

Personal—minimum contacts—cell phone calls—no knowledge recipient in N.C.—Defendant lacked the requisite minimum contacts with the state of North Carolina to be subject to the exercise of personal jurisdiction in a domestic violence protection order (DVPO) proceeding where defendant, who had previously been in a romantic relationship with plaintiff outside of North Carolina, called plaintiff's cell phone many times on the evening that plaintiff had moved from South Carolina to North Carolina—when there was no evidence that defendant knew or had reason to know that plaintiff was in North Carolina. Because he did not know plaintiff was in North Carolina, defendant's phone calls did not constitute purposeful availment of the benefits and protections of the laws of North Carolina. In addition, plaintiff's argument that the "status exception" doctrine allowed exercise of personal jurisdiction was rejected. **Mucha v. Wagner, 167.**

MOTOR VEHICLES

Insurance—underinsured motorist coverage—applicable limit—interpolicy stacking—A North Carolina resident injured in an out-of-state car accident as a passenger in a car owned and operated by a Tennessee resident and insured by a Tennessee insurer, where that driver's negligence caused the accident, was entitled to collect underinsured motor vehicle (UIM) coverage benefits from her North Carolina insurer. Based on North Carolina law allowing interpolicy stacking when calculating applicable policy limits (pursuant to N.C.G.S. § 20-279.21(b)(4)), the Tennessee policy's UIM coverage limit constituted an "applicable limit" and, because the stacked UIM coverage limits exceeded the sum of the applicable bodily injury

coverage limits, the car owned by the Tennessee resident was an underinsured motor vehicle as defined in North Carolina. **N.C. Farm Bureau Mut. Ins. Co. v. Lunsford, 181.**

NEGLIGENCE

Sufficiency of pleading—proximate cause—burst pipes—In a wrongful death action filed against individual employees of a state university, the complaint adequately pled proximate cause through allegations that the employees knew or should have known, given warning signs posted outside a chiller, that their negligent acts in failing to properly drain the chiller and refill it with antifreeze could cause injury in the event the pipe froze and became pressurized. Therefore, the trial court improperly dismissed the action for failure to state a claim. **Est. of Long v. Fowler, 138.**

PUBLIC RECORDS

North Carolina Railroad Company—private company—State sole shareholder—not subject to Public Records Act—The North Carolina Railroad Company—a private company whose sole shareholder was the State of North Carolina and which was organized and operated for the benefit of the public—was not an agency or subdivision of the North Carolina government subject to the Public Records Act. Although, among other things, the State was the company's sole shareholder, the State selected the company's board members, and the State would receive the company's assets in the event of the company's dissolution, nonetheless the General Assembly indicated its intent in relevant legislation that the company should not be considered an entity of the State, and decisions of other State entities also supported this conclusion. Furthermore, the company consistently maintained its separate corporate identity and made decisions independently, demonstrating that the State's exercise of authority over the company was in its capacity as shareholder rather than as sovereign. **S. Env't Law Ctr. v. N.C. Railroad Co., 202.**

REFORMATION OF INSTRUMENTS

Admissions—attempt to contradict by affidavit—summary judgment—In an action by plaintiff bank for reformation of a deed based on mutual mistake, defendant property owner could not use her affidavit to contradict her binding admissions and thereby create an issue of material fact as to the parties' intent for the deed of trust to secure repayment of the promissory note executed during a refinance. **Wells Fargo Bank, N.A. v. Stocks, 342.**

SEARCH AND SEIZURE

Traffic stop—Terry search for weapons in vehicle—totality of circumstances—history of violent crime—A police officer who initiated a traffic stop of defendant for a fictitious license plate had reasonable suspicion to justify a *Terry* search for weapons in the areas of the vehicle that were under defendant's immediate control where the traffic stop occurred at night in a high-crime area, defendant appeared very nervous, defendant bladed his body when he accessed his center console to look for registration papers, and defendant's criminal history indicated a trend in violent crime. Further, the traffic stop was not unconstitutionally prolonged where the officer stopped defendant's vehicle, spoke with defendant, performed a routine records check that showed defendant's violent criminal history, and then performed the *Terry* search of the vehicle for weapons. **State v. Johnson, 236.**

STATUTES OF LIMITATION AND REPOSE

Three years—N.C.G.S. § 1-52(9)—mutual mistake—deed reformation—In an action for reformation of a deed of trust brought by a bank, the cause of action accrued when the bank should have discovered the drafting error (listing the wrong family member as the borrower), and its first opportunity to do so was after the borrower defaulted, even though the document was drafted with the error years earlier. Therefore, the three-year statute of limitations in N.C.G.S. § 1-52(9) applied because the action was to reform the instrument due to mutual mistake, and the bank's action was timely filed within three years of the default and the bank's subsequent investigation of the loan instruments to prepare for foreclosure. **Wells Fargo Bank, N.A. v. Stocks, 342.**

TAXATION

Ad valorem taxes—true value—appraisal methodology—functional and economic obsolescence—The Property Tax Commission properly accepted a county's valuation method to determine the true value of business personal property (used grocery store equipment) for purposes of an ad valorem tax assessment. The Commission's factual determinations regarding whether the appraisal properly accounted for functional and economic obsolescence were supported by substantial evidence in the form of an appraiser's testimony, and the Commission was justified in declining to adopt the business's approach of relying on market sales to determine the extent of depreciation adjustments. **In re Harris Teeter, LLC, 108.**

SCHEDULE FOR HEARING APPEALS DURING 2021

NORTH CAROLINA SUPREME COURT

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

January 11, 12, 13, 14
February 15, 16, 17, 18
March 22, 23, 24, 25
May 3, 4, 5, 6
August 30, 31
September 1, 2
October 4, 5, 6, 7
November 8, 9, 10

CAROLINA MULCHING CO.
v.
RALEIGH-WILMINGTON INVESTORS II, LLC AND SHALIMAR CONSTRUCTION, INC.

No. 348A20

Filed 13 August 2021

Contracts—breach—conflicts in evidence—additional findings of fact required—remand appropriate

In an action for breach of contract (involving a tree company that had been contracted to mulch trees up to six to eight inches in diameter), the Court of Appeals appropriately remanded the matter to the trial court for additional findings of fact where the lower court's findings, upon which rested its conclusion that there was no breach of contract, did not resolve conflicts in the evidence regarding which of two methods the tree company used to measure the size of the trees.

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. 240 (2020), reversing a judgment entered on 21 May 2019 by Judge C. Ashley Gore in District Court, Brunswick County, and remanding for the trial court to make additional findings of facts and conclusions of law. Heard in the Supreme Court on 28 April 2021.

Law Offices of Timothy Dugan, by Timothy Dugan, for plaintiff-appellee.

Hodges Coxe & Potter LLP, by Bradley A. Coxe, for defendant-appellant.

BARRINGER, Justice.

¶ 1 In this case, we must decide whether the Court of Appeals erred as a matter of law when addressing a judgment for breach of contract entered after a bench trial. Given the record and procedural posture of this case, we conclude that the Court of Appeals did not err by reversing and remanding the judgment of the trial court back to the trial court to make "findings of fact based on the evidence and to enter clear and specific conclusions of law based on the findings of fact" after holding that the trial court failed to make findings of fact necessary to resolve conflicts

in the evidence and support the conclusions of law. *Carolina Mulching Co. v. Raleigh-Wilmington Invs. II, LLC*, 272 N.C. App. 240, 248 (2020). Thus, we affirm the Court of Appeal's decision.

I. Background

¶ 2 Carolina Mulching Co., LLC (Carolina Mulching) commenced this action against Raleigh-Wilmington Investors II, LLC and Shalimar Construction, Inc. (Shalimar) in District Court, Brunswick County, on 26 September 2018. Carolina Mulching asserted a claim for breach of contract, and in the alternative, a claim for unjust enrichment, and sought enforcement of a lien pursuant to Chapter 44A of the General Statutes of North Carolina against property owned by Raleigh-Wilmington Investors II, LLC. Shalimar, in response, filed an answer and counterclaim for breach of contract. Subsequently, Carolina Mulching voluntarily dismissed all claims against Raleigh-Wilmington Investors II, LLC. The remaining parties, Carolina Mulching and Shalimar, waived their right to a jury trial.

¶ 3 During the bench trial on 2 May 2019, both parties presented testimony from witnesses and introduced exhibits into evidence. After taking the matter under advisement, the trial court entered a judgment on 21 May 2019 in favor of Carolina Mulching. Following the trial court's statement that "by [the] greater weight of the evidence, THE COURT HEREBY FINDS THE FACTS AS FOLLOWS," the judgment contained twenty paragraphs. Then, following the trial court's statement that "BASED ON the Foregoing Findings of Fact, the [trial] court concludes as a MATTER OF LAW," the following five paragraphs are set forth in the judgment:

1. This Court has jurisdiction over the parties and the subject matter of this action.

2. [Carolina Mulching] and [Shalimar] entered into a written contract for [Carolina Mulching]'s tree mulching services. There was a meeting of the minds between the two parties when they entered into the essential terms of the written contract. [Shalimar] even included [Carolina Mulching]'s proposal in the body of the contract.

3. Both parties signed the written contract, and the terms of the contract were clear and unambiguous; [Carolina Mulching] would provide the mulching services for the Lena Springs Project

and [Shalimar] would pay [Carolina Mulching] $15,000.00. [Carolina Mulching]'s services included mulching trees [six to eight inches] in diameter and [Carolina Mulching] satisfied those terms of the contract.

4. [Carolina Mulching] worked with [Shalimar] on the job site for approximately 10 days and [Carolina Mulching] satisfactorily complied with the terms of the contract. [Carolina Mulching] mulched the [eight and one-half] acres of land specified in the contract, and therefore should be paid for the completed work. There was no material breach of the contract by [Carolina Mulching].

5. [Shalimar] did not suffer any damages from [Carolina Mulching]'s performance of services rendered under their written contract. [Shalimar] planned on hiring a logging company to remove the larger trees on the job site before [Carolina Mulching] finished the job, and therefore did not incur any unreasonable expenses by hiring D&L Logging months after [Carolina Mulching] left the job site.

¶ 4 Shalimar subsequently filed a notice of appeal to the North Carolina Court of Appeals.

¶ 5 On appeal to the Court of Appeals, Shalimar made three arguments: (1) "[t]here is no finding of fact by the trial court to support conclusions of law [three] and [four] that [Carolina Mulching] mulched all trees [six to eight inches] in diameter and therefore satisfied the terms of the contract"; (2) "[t]he only competent evidence at trial leads to the conclusion that [Carolina Mulching] did not satisfy the terms of their contract by failing to mulch all trees [six to eight inches] in diameter"; and (3) "[t]here is no finding of fact by the trial court to support . . . conclusion of law [five] that [Shalimar] did not suffer any damages and did not incur unreasonable expenses from [Carolina Mulching]'s performance of services and the only competent evidence presented at trial leads to the conclusion that [Shalimar] was damaged by the failure of [Carolina Mulching] to abide by the terms of the contract."

¶ 6 A divided panel of the Court of Appeals agreed with Shalimar as to its first argument, ultimately holding that "the trial court failed to make

ultimate findings of fact necessary to resolve conflicts in the evidence, and that therefore the findings do not support the conclusions of law." *Carolina Mulching Co.*, 272 N.C. App. at 248. As a result, the Court of Appeals "reverse[d] and remand[ed] the judgment of the trial court with instructions to make ultimate findings of fact based on the evidence and to enter clear and specific conclusions of law based on the findings of fact." *Id.* (cleaned up). The Court of Appeals rejected Carolina Mulching's argument that certain statements in the paragraphs labeled conclusions of law constituted factual findings sufficient to support the trial court's ultimate legal conclusion. *Id.* at 247.

¶ 7 In contrast, the dissent concluded that the trial court had made a finding of fact resolving the conflicts in the evidence. *Id.* at 249 (Dillon, J., dissenting). The dissent stated that the contract required Carolina Mulching to mulch all trees up to six to eight inches in diameter and that the trial court's judgment under the conclusions of law section stated that Carolina Mulching "satisfied those terms of the contract." *Id.* While acknowledging that this statement was within the conclusions of law section, the dissent judged that "this statement is clearly a 'finding' that resolves any conflict in the evidence, no matter how it is labeled in the [judgment]." *Id.* The dissent gathered

> that *the evidence* was insufficient to submit the issue to the fact-finder. Carolina Mulching failed to meet its burden to reach the fact-finder (the trial judge in this case) to put on evidence that it mulched the trees up to [eight inches] in *diameter*. Accordingly, the trial court's [judgment] should be 'reversed[,]' and judgment should be entered for Shalimar.

Id. at 249–50.

¶ 8 While the dissent admitted that it is not appropriate to reweigh the evidence on appeal, that Carolina Mulching's witnesses testified that they mulched the trees that were up to six to eight inches in diameter, and that on rebuttal Carolina Mulching's witness testified that he was cutting down eight-inch diameter trees, the dissent found "the evidence [was] uncontradicted that Carolina Mulching's witnesses thought 'diameter' meant 'circumference' " because the Carolina Mulching witness "never demonstrated during his rebuttal testimony that he now understood what the term 'diameter' actually meant or the process by which he calculated the diameter." *Id.* at 250–51. The dissent concluded that Carolina Mulching "failed to meet its burden of showing that it cut down all of the trees under [eight inches] in diameter, the basis of the trial

court's judgment," *id.* at 250–51, and as a result, he would reverse and have judgment entered for Shalimar, *id.* at 250.

¶ 9 In addressing the dissent, the Court of Appeals stated that

> [t]he dissent characterizes the trial court's shortcoming not as a failure to show how it arrived at its conclusion but instead as arriving at an untenable conclusion, thus requiring a straight reversal instead of a reverse and remand with instructions. The dissent is certainly right that there is evidence that [Carolina Mulching] measured by circumference, not diameter. And it is certainly possible that the trial court might not be able to marshal sufficient evidentiary support to justify ruling for [Carolina Mulching] on remand. But, in the dissent's efforts to argue that it is clear that [Carolina Mulching] measured by circumference, no such clarity emerges. The dissent instead merely highlights the contradictory nature of the testimony. It is not our place to resolve these conflicts. The trial court, having heard the evidence and seen the witnesses, is much better situated to do so.

Id. at 247 n.1.

¶ 10 Shalimar filed a notice of appeal based on the dissent pursuant to N.C.G.S. § 7A-30(2) and N.C. R. App. P. 14.

II. Analysis

¶ 11 On appeal to this Court, Shalimar asks this Court to reverse the trial court's judgment and "render a judgment that, as a matter of law, Carolina Mulching failed to satisfy the terms of the contract and Shalimar . . . did not breach the contract." Shalimar argues that there was no competent evidence to support the trial court's finding that Carolina Mulching cut down all of the trees up to six to eight inches in diameter and the only competent evidence "leads inescapably to a conclusion of law that [Carolina Mulching] failed to abide by the essential terms of the Contract."

¶ 12 On this record and in this procedural posture, we conclude the Court of Appeals did not err as a matter of law in its disposition of Shalimar's appeal. As Carolina Mulching points out, this case addresses an appeal of a final judgment entered after a bench trial where the Court of Appeals agreed with Shalimar's first argument that the trial court's judgment lacked findings of fact to support the trial court's judgment in

favor of Carolina Mulching. Shalimar also argued in the alternative the argument it now makes to this Court. Specifically, Shalimar contended that "[e]ven if the Trial Court had made a Finding of Fact that the Plaintiff had mulched all trees up to [six to eight inches] in diameter, such a finding would be in error [as] [t]here is no competent evidence in the record supporting any such *potential* Finding of Fact." (Emphasis added.)[1] As Shalimar prevailed on its first argument—that the trial court's judgment lacked findings of fact to support the trial court's judgment in favor of Carolina Mulching—Carolina Mulching asserts that the Court of Appeals did not err. Carolina Mulching further asserts that consideration of Shalimar's alternative argument has been waived and is premature for this Court's ruling. We agree that the Court of Appeals did not err and that a ruling on Shalimar's alternative argument by this Court would be premature in this instance.

¶ 13 "In all actions tried upon the facts without a jury or with an advisory jury, the [trial] court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C.G.S. § 1A-1, Rule 52(a)(1) (2019). As to the facts, the trial court need not find all facts that support the conclusion of law but must specially find the facts necessary to establish the plaintiff's cause of action, the converse—the facts necessary to establish that plaintiff's cause of action fails—or the facts necessary to establish the defendant's affirmative defense. *Woodard v. Mordecai*, 234 N.C. 463, 470 (1951) (addressing predecessor statute, N.C.G.S. § 1-185 (repealed 1967)). Compliance with N.C. R. Civ. P. 52(a)(1) is not a mere formality but generally necessary for appellate courts "to perform their proper function in the judicial system" of reviewing a judgment entered after a bench trial to determine whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law. *Coble v. Coble*, 300 N.C. 708, 712 (1980) (quoting *Montgomery v. Montgomery*, 32 N.C. App. 154, 158 (1977)).

¶ 14 In this case, the Court of Appeals rejected Carolina Mulching's argument that some statements in the paragraphs under the conclusions of law section in the trial court's judgment were findings of fact that resolved the conflicts in the evidence. *Carolina Mulching Co.*, 272 N.C. App. at 247. The Court of Appeals held in favor of Shalimar's argument that "the trial court's findings do not support its conclusion that [Carolina

1. As summarized in the background section, the Court of Appeals did not address Shalimar's alternative argument other than commenting on the dissent in a footnote. *Carolina Mulching Co. v. Raleigh-Wilmington Invs. II, LLC*, 272 N.C. App. 240, 247 n.1 (2020).

Mulching] fully performed under the contract." *Id.* at 245. While the dissent disagreed and concluded that such statements were findings of fact resolving the conflicts, *id.* at 249 (Dillon, J., dissenting), this issue is not presented in this appeal since Carolina Mulching has not sought review of this aspect of the Court of Appeals' decision. Shalimar's new brief accordingly did not identify this specific issue on appeal. Thus, we express no opinion about this aspect of the Court of Appeals' holding but consider it the final decision on this issue and respect it as such. *See* N.C. R. App. P. 16(b).

¶ 15 Carolina Mulching asserted, and Shalimar did not dispute, that Shalimar did not challenge any of the trial court's findings of fact in their initial appeal. Shalimar's alternative argument only challenged a *potential* finding of fact. Without an actual—as opposed to hypothetical—challenged finding of fact, we conclude that the Court of Appeals committed no error of law in its decision to reverse and remand the case back to the trial court for resolution of the conflicts in the evidence on remand.

¶ 16 Further, we find that neither the dissent nor Shalimar's argument or analysis convinces us to reverse the trial court's judgment and that judgment should be entered in favor of Shalimar. Neither cites authority in support of their conclusion, and a holding in their favor would seem to require us to muddle the standard of review applicable to actions tried by the trial court without a jury as set forth below.

¶ 17 Shalimar argues for reversal and judgment in its favor because in its opinion, there is no competent evidence that Carolina Mulching mulched all trees up to six to eight inches in diameter. Yet, Shalimar concedes its challenge to the judgment is pursuant to N.C. R. Civ. P. 52(c). Rule 52(c) allows parties to an action tried without a jury to challenge the sufficiency of the evidence supporting the trial court's findings of fact. N.C.G.S. § 1A-1, Rule 52(c). However, the finding that Carolina Mulching mulched all trees up to six to eight inches in diameter is not in the trial court's judgment but is instead a potential finding of fact identified by Shalimar and a fact inferred by the dissent from statements in the judgment. *Carolina Mulching Co.*, 272 N.C. App. at 249 (Dillon, J., dissenting). Thus, consideration of Shalimar's argument regarding a potential finding lacks support in the plain language of Rule 52(c) and reversing and remanding to the trial court as the Court of Appeals held respects the division of authority between the trial courts and appellate courts and the standard of review.

¶ 18 Both the dissent and Shalimar also couch their argument in terms of Carolina Mulching failing to meet its burden, and the dissent characterizes the evidence as insufficient to submit the issue to the fact-finder. *Carolina Mulching Co.*, 272 N.C. App. at 249 (Dillon, J., dissenting). This terminology is generally associated with a motion for a directed verdict, which is not before us. *See* N.C.G.S. § 1A-1, Rule 50. As Shalimar acknowledges, a motion for a directed verdict pursuant to N.C. R. Civ. P. 50 is not appropriate in an action tried by the trial court without a jury. *See Bryant v. Kelly*, 279 N.C. 123, 129 (1971) ("Directed verdicts are appropriate only in jury cases."). Rather, the appropriate motion by which a defendant tests the sufficiency of a plaintiff's evidence to show a right to relief in an action tried by the trial court without a jury is a motion pursuant to N.C. R. Civ. P. 41(b) for an involuntary dismissal. N.C.G.S. § 1A-1, Rule 41(b); *see also Dealers Specialties, Inc. v. Neighborhood Hous. Servs., Inc.*, 305 N.C. 633, 637 (1982) (determining "the standard which the [trial court] judge must apply in testing the sufficiency of the evidence, if he elects to so do, when ruling upon a motion to dismiss under Rule 41(b)"). Notably, a motion for involuntary dismissal pursuant to N.C. R. Civ. P. 41(b) requires the defendant to show that the plaintiff had "no right to relief" upon the facts and law. N.C.G.S. § 1A-1, Rule 41(b). In this case, the dissent did not conclude that Carolina Mulching had no right to relief, and Shalimar has not argued to this effect.

¶ 19 Therefore, we are not persuaded that Shalimar's arguments are consistent with our precedent, and we decline to assess the sufficiency of the evidence for a potential finding of fact by the trial court, especially when presented and sought without citation to precedent or persuasive authority for this Court's review.

III. Conclusion

¶ 20 On this record and in this procedural posture, the Court of Appeals did not err by reversing and remanding the case back to the trial court with instructions to make findings of fact and to enter clear and specific conclusions of law based on the findings of fact. Thus, we affirm the Court of Appeal's decision.

AFFIRMED.

IN RE HARRIS TEETER, LLC

[378 N.C. 108, 2021-NCSC-80]

IN THE MATTER OF THE APPEAL OF HARRIS TEETER, LLC
FROM THE DECISION OF THE MECKLENBURG COUNTY BOARD OF EQUALIZATION AND REVIEW

No. 311A20

Filed 13 August 2021

Taxation—ad valorem taxes—true value—appraisal methodology—functional and economic obsolescence

The Property Tax Commission properly accepted a county's valuation method to determine the true value of business personal property (used grocery store equipment) for purposes of an ad valorem tax assessment. The Commission's factual determinations regarding whether the appraisal properly accounted for functional and economic obsolescence were supported by substantial evidence in the form of an appraiser's testimony, and the Commission was justified in declining to adopt the business's approach of relying on market sales to determine the extent of depreciation adjustments.

Justice BERGER dissenting.

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

Justice BARRINGER dissenting.

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

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 271 N.C. App. 589 (2020), affirming a Final Decision entered on 30 May 2019 by the North Carolina Property Tax Commission. Heard in the Supreme Court on 27 April 2021.

John A. Cocklereece, Justin M. Hardy, and Kyle F. Heuser for appellant-taxpayer Harris Teeter, LLC.

Ruff Bond Cobb Wade & Bethune, LLP, by Ronald L. Gibson and Robert S. Adden, Jr., for appellee Mecklenburg County.

ERVIN, Justice.

¶ 1 This case requires consideration of the extent to which the Court of Appeals erred by holding that an assessment that Mecklenburg County made of the business personal property owned by Harris Teeter, LLC, at six grocery stores reflected the "true value" of that property as required by N.C.G.S. § 105-283, which defines "true value" as the price "at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used." After careful consideration of the record in light of the applicable law, we conclude that the Court of Appeals' decision should be affirmed.

¶ 2 In 2015, Mecklenburg County completed an ad valorem tax assessment of Harris Teeter's business personal property, with the property in question having included shelving, coolers, freezers, point-of-sale systems, computers and computer equipment, forklifts, trash compactors, and other items used in the operation of six of the Harris Teeter grocery stores located in Mecklenburg County.[1] Although the County assessed the value of the business personal property utilized at the six stores at $21,434,313.00, Harris Teeter contended that the "true value" of the property in question was only $13,663,000.00. As a result, Harris Teeter noted an appeal from the County's tax assessment to the North Carolina Property Tax Commission. On 5 March 2019, the Commission, sitting as the State Board of Equalization and Review, conducted a hearing concerning Harris Teeter's appeal.

¶ 3 At the hearing, Kenneth Joyner, a tax assessor employed by Mecklenburg County who had worked on the initial assessment of the value of the relevant property, testified that, in order to generate this initial valuation, the County had identified the appropriate cost indices and depreciation schedules and utilized computer software to apply those indices and schedules to the original cost of Harris Teeter's property. Mr. Joyner testified that, in performing this analysis, the County adhered to North Carolina Department of Revenue schedules and did not include any depreciation-related allowances for obsolescence or consider any other market value-related information. Mr. Joyner acknowledged that the North Carolina Department of Revenue advised that the relevant schedules had "been prepared [ ] as a general guide to be used in the valuation of business personal property" and that there "may be situa-

1. In advance of the hearing that was held before the Commission, the parties stipulated that they would limit their evidentiary presentations to property located at the six stores that the County had previously assessed given that the stores in question were representative of the other stores that Harris Teeter operated in Mecklenburg County.

tions where the appraiser will need to make adjustments for additional or less functional or economic obsolescence or for other factors."

¶ 4 Mitchell Rolnick, a machinery and equipment appraiser, testified on behalf of Harris Teeter. Mr. Rolnick stated that he had completed a separate appraisal of the subject property at Harris Teeter's request using market value-based depreciation schedules developed by Landmapp, a private appraisal company, in order to determine the true value of the property in question. The depreciation schedules developed by Landmapp rested upon information concerning sales of used equipment that were primarily made on eBay or other similar e-commerce websites. Mr. Rolnick testified that he took the original cost of the equipment, "index[ed] it to today's dollar," and applied Landmapp's depreciation schedules "to come to the fair market value installed." Mr. Rolnick refrained from including additional depreciation based upon considerations relating to functional or economic obsolescence on the theory that such factors were captured in the prices reflected in the underlying market transactions. Although Mr. Rolnick agreed that the Department of Revenue's schedules would capture physical deterioration, he believed that the marketplace was "the only place you're going to find" functional and economic obsolescence, which explained why Landmapp had used the prices resulting from market transactions in developing its depreciation schedules. Mr Rolnick acknowledged that, in general, used grocery store equipment either went "to liquidation or [ ] in the dumpster" at the end of its useful life.

¶ 5 According to Mr. Rolnick, in completing his appraisal, he and his colleagues had conducted a physical inventory of the property located at the six stores that were at issue in this case and then searched the Landmapp database, along with information available in other publications and on the internet, for the purpose of identifying sales of comparable property. Mr. Rolnick stated that he did not utilize a "sales comparison" approach given that "significant amounts of adjustments would need to be made" in order to make it viable, but that he used a "market-derived cost approach," in which he compared the price obtained for the property in question in the marketplace to the price of the same piece of equipment when purchased new, given that this approach "took less adjustments to be credible."

¶ 6 James Turner, the president of a business appraisal company, provided rebuttal testimony for the County. After conducting an appraisal of the relevant property, Mr. Turner concluded that the property had a "true value" of $22,100,000.00. In order to reach this result, Mr. Turner went to the relevant grocery stores, photographed the equipment that

was located at those facilities, and collected information about the equipment from the store managers. Mr. Turner used depreciation tables developed by Marshall & Swift to account for the physical deterioration of the equipment, indexed the cost of the equipment using the Producer Price Index, and developed values for the equipment using (1) the cost approach; (2) the market, or "comparable sales," approach; and (3) the income approach.

¶ 7 Mr. Turner testified that he had been able to use the market, or "comparable sales," approach to appraise the value of some of the equipment, such as shopping carts and forklifts, given that such items were relatively mobile, self-contained, and occasionally re-sold on an individual basis. Mr. Turner testified that, on the other hand, larger items of equipment, such as refrigerated cases, coolers, and shelving, were "tethered to the rack compressor system" and had to operate using the same refrigerant, resulting in the existence of higher installation costs and fewer incidences of re-sale that served to make the market approach "less reliable" in valuing these items.

¶ 8 In describing his use of the cost approach, Mr. Turner testified that he used Marshall & Swift valuation tables to account for physical deterioration and for functional obsolescence relating to certain computers, point-of-sale systems, and other computing equipment. Mr. Turner used the income approach to determine whether an additional adjustment needed to be made as the result of economic obsolescence and found that "the subject stores return[ed] a rate of return on their assets and on equity that [we]re above industry standards" and that the available information concerning the Harris Teeter stores "reflected a robust return on invested capital." In view of the fact that the return that Harris Teeter earned on the subject property was "above industry norms," Mr. Turner concluded that the "equipment didn't suffer any external obsolescence," i.e. economic obsolescence.[2] After stating that he had not "consider[ed] [Harris Teeter's] earnings when [he] was valuing the equipment independently," Mr. Turner acknowledged that he "did use [Harris Teeter's] earnings to determine whether or not there was economic obsolescence within the cost approach."

¶ 9 On 12 March 2019, the Commission entered an order in which it requested that both parties provide written answers to several questions,

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2. In explaining the concept of economic obsolescence, Mr. Turner stated that, when NAFTA was adopted, the textile industry had experienced economic obsolescence because many companies moved offshore and income in the industry was much lower than had been expected.

including the extent to which delivery and installation costs "are or are not an appropriate component of true value" and the "degree [to which] obsolescence is reflected in your opinion of value, and the dollar value attributed to any such obsolescence." In responding to the Commission's question regarding delivery and installation costs, Harris Teeter cited to a manual concerning "Personal Property Appraisal and Assessment" that had been published by the North Carolina Department of Revenue in 2007.

¶ 10 On 30 May 2019, the Commission entered a Final Decision affirming the County's initial assessed valuation. The Commission noted that both parties had used the cost approach to generate values for the subject property by determining the "original installed costs for each item of the subject property" and adjusting those costs "to reach an estimate of true value as of January 1, 2015." According to the Commission, the principal explanation for the varying valuation amounts provided by the parties stemmed from differing cost adjustment and depreciation methodologies. In addressing these methodological issues, the Commission found that Mr. Rolnick "had relied upon the sales of used equipment, without making any adjustments," to calculate depreciation, despite the fact that he had "abandoned the sales comparison approach" for the purpose of valuing the relevant property in light of the significant adjustments that would be necessary in order to utilize such an approach. The Commission described Mr. Rolnick's approach as "illogical" given that, on the one hand, he "determine[d] that sales [were] too unreliable to be useful in developing value using the sales comparison approach" while, on the other hand, he used "the same or similar" sales values "under the cost approach to determine the appropriate level of depreciation to apply." In addition, the Commission determined that Harris Teeter's proposed valuation method did not adequately account for delivery and installation costs on the theory that, "[i]f the basis for determining true value under the cost approach is the total cost required to put equipment to its intended use, then a resale of used equipment must also include installation and other necessary costs."

¶ 11 The Commission rejected Harris Teeter's argument that the County's valuation methodology inappropriately failed to account for functional and economic obsolescence on the grounds that the County had adequately addressed this subject. After noting that there were three types of depreciation, including (1) physical depreciation; (2) functional obsolescence, which consisted of "the decline in an object's value due to outdated or flawed design"; and (3) economic obsolescence, which consisted of "the decline in an object's value due to external economic

forces," the Commission found that the County had adequately accounted for physical deterioration, with "all or nearly all of the depreciation affecting the subject property [having been] the result of physical deterioration." In addition, the Commission found that, while "some assets exhibit[ed] functional obsolescence," the County had accounted for this sort of obsolescence in its valuation methodology and that Harris Teeter had "effectively limited the impact of functional obsolescence on its equipment through a program of regularly replacing it." Finally, with respect to the issue of economic obsolescence, the Commission found that the "evidence [did not tend to show] that [Harris Teeter] is itself closing stores as a result of economic conditions." In addressing both functional and economic obsolescence, the Commission stated that:

> 15. Mr. Turner testified that he identified additional functional obsolescence in computer-based equipment and further depreciated the value of those assets in order to account for the additional loss in value. He testified that he accelerated the depreciation on certain types of equipment as a result of information he received from the Appellant's staff—that some equipment was replaced before the end of its normal useful life because of severe use of that equipment. . . . Mr. Turner testified further that he had personally developed income-based values in order to determine for himself whether the subject property was producing an appropriate return for the Appellant, and determined that the subject property produced income greater than standard for the industry. His conclusion, therefore, is that the subject property does not exhibit economic obsolescence, and we agree. The property's apparent capacity to generate income greater than the industry standard is not an indication of economic obsolescence.

After finding that the County had correctly refrained from adjusting the value of the relevant property to account for economic obsolescence and that the County had properly accounted for physical depreciation and functional obsolescence in its assessment, the Commission concluded that the County's tax valuation was "a reasonable estimate of true value" for the subject property and that, even though Harris Teeter had successfully rebutted the County's initial showing of correctness

by offering evidence tending to show that the County's initial valuation exceeded the "true value" of the relevant property, the County had satisfied its ultimate burden of proving that its appraisal reflected the "true value" of the property. Harris Teeter noted an appeal from the Commission's Final Decision to the Court of Appeals.

¶ 12 In seeking relief from the Commission's Final Decision before the Court of Appeals, Harris Teeter argued that: (1) the Commission had erred by failing to find that the market for used grocery store equipment could be used to identify obsolescence given that market results "necessarily provide[ ] valuable evidence of economic and functional obsolescence"; (2) the Commission had erred by affirming the County's valuation of the relevant property based upon the value of its use by the taxpayer rather than its "fair market value," which is the "price at which the property would likely change hands between a willing buyer and a willing seller," citing *In re Parkdale Mills*, 225 N.C. App. 713, 720 (2013); and (3) the Commission had erred by concluding that the County had demonstrated that its assessment reflected the "true value" of the relevant property. In rejecting Harris Teeter's challenge to the Commission's order, the Court of Appeals began by holding that Harris Teeter had successfully rebutted the presumption of validity to which the County's initial appraisal was entitled by presenting competent evidence that the methodology used to develop the County's initial appraisal methods did not result in the "true value" of the relevant property. *In re Harris Teeter, LLC*, 271 N.C. App. 589, 601 (2020). In addition, the Court of Appeals held that the Commission's findings had sufficient evidentiary support and that those findings established that the County had satisfied its obligation to prove that the methods that it had employed in valuing Harris Teeter's property produced the "true value" of that property. *Id.* In reaching this result, the Court of Appeals noted that, while both the County and Harris Teeter had used the cost approach to determine the value of the relevant property, "the parties disagree[d] concerning the degree to which functional and economic obsolescence should be considered and used to further adjust appraisal values for additional depreciation" of the property. *Id.* at 602.

¶ 13 The Court of Appeals determined that the cost approach could properly be utilized to determine the value of business personal property based upon a determination of the initial cost of that property reduced by an allowance for depreciation. *Id.* at 601–02. According to the Court of Appeals, "[d]epreciation may be caused by deterioration, which is a physical impairment, such as structural defects, or by obsolescence, which is an impairment of desirability or usefulness brought about by

changes in design standards (*functional obsolescence*) or factors external to the property (*economic obsolescence*)." *Id.* at 602 (citing *In re Stroh Brewery*, 116 N.C. App. 178, 186 (1994)). In addition, the Court of Appeals defined "functional obsolescence" as "a loss in value due to impairment of functional capacity inherent in the property itself including factors such as overcapacity, inadequacy or changes in state of the art, or poor design." *Id.* at 603 (citing *In re Westmoreland-LG & E Partners*, 174 N.C. App. 692, 699 (2005)). In evaluating whether the Commission had correctly found that the County appropriately considered the issue of functional obsolescence, the Court of Appeals noted that Mr. Turner had "identified additional functional obsolescence in computer-based equipment" and made an appropriate adjustment in light of the degree of functional obsolescence that he had observed and that he had also "accelerated the depreciation on certain types of equipment as a result of information he received . . . that some equipment was replaced before the end of its normal useful life because of severe use of that equipment." *Id.* In addition, the Court of Appeals pointed out that the Commission had "f[ou]nd no evidence in the record to suggest that the equipment in question (collectively) is failing to perform adequately the job for which it was intended due to design or economic factors." As a result, the Court of Appeals held that the Commission did not err in determining that the County had properly accounted for functional obsolescence. *Id.* at 604.

¶ 14 Similarly, the Court of Appeals held that the "Commission's findings [relating to economic obsolescence] were supported by competent evidence and adequately address[ed] why consideration of the market for used grocery store equipment was inappropriate and did not warrant [the making of an] additional downward adjustment" in determining the "true value" of the relevant property. *Id.* at 605. The Court of Appeals held that the Commission had appropriately determined that the market prices paid for used grocery store equipment were not adequate indicators of economic obsolescence given that, "due to the prevailing industry trend of store closures flooding the supply in the secondary market for used equipment, the prices fetched by such sales do not represent transactions from 'willing sellers' of the equipment as mandated by N.C.[G.S.] § 105-283." *Id.* at 606. In addition, the Court of Appeals held that Harris Teeter's approach of "assum[ing] that each piece of equipment is due for replacement and headed to either the landfill or the glutted secondary market at the moment it is valuated" was erroneous and that the adoption of this assumption "would result in its equipment experiencing a drastic reduction in value the moment they are purchased new and

installed in its stores." *Id.* As a result, the Court of Appeals affirmed the Commission's order.

¶ 15 In a separate opinion concurring in the result, in part, and dissenting, in part, Judge Tyson expressed disagreement with the Court of Appeals' determination that the County had successfully established that the appraisal methodologies that it had used established the "true value" of the relevant property as required by N.C.G.S. § 105-283. *Id.* at 609. According to Judge Tyson, the valuation adopted by the County's valuation was "substantially greater" than that proposed by Harris Teeter and "substantially exceed[ed] true value." *Id.* at 613–14. In support of this assertion, Judge Tyson pointed to Mr. Rolnick's testimony that "low market prices for used grocery store equipment necessitated downward adjustment of any values estimated by depreciation schedules to reflect additional economic and functional obsolescence" and asserted that this portion of the evidence had not been "disputed nor rebutted by the County." *Id.* at 616. As a result, Judge Tyson concluded that, since neither the County nor Mr. Turner had properly accounted for economic and functional obsolescence, the Commission's conclusions were "arbitrary, unlawful, and . . . wholly inconsistent with long-established definitions, precedents, and attributes governing personal property." *Id.*

¶ 16 In seeking to persuade us to overturn the Court of Appeals' decision, Harris Teeter argues that, after it had demonstrated that the County's valuation was unreasonably high and shifted the burden of proof with respect to the "true value" issue to the County, the County had failed to prove that its appraisal methods resulted in the establishment of the "true value" of the relevant property and had not, for that reason, satisfied the applicable burden of proof. More specifically, Harris Teeter argues that the valuation procedures utilized by the County failed to establish the "true value" of the relevant property because those methods did not properly account for functional and economic obsolescence. Harris Teeter claims to have elicited substantial evidence concerning "economic conditions that put significant downward pressure on the fair market value of used grocery store equipment" and that this evidence indicated that the relevant property was subject to both functional and economic obsolescence. In support of this proposition, Harris Teeter notes that, "in 2013 and 2014, there were 5,500 mergers and acquisitions of grocery stores in the United States and 869 bankruptcies and closures" and points out that Harris Teeter "and its competitors remodel their stores — on average, every six to seven years — as they compete for consumers," with both of these developments having flooded the market for used grocery store equipment. In Harris Teeter's view, "[t]his

glut of used grocery store equipment *inevitably* affects the fair market value of the Property," with the County having failed to assess the property at issue in this case at its "true value" given its failure to account for this functional and economic obsolescence.

¶ 17 In addition, Harris Teeter directs our attention to *In re IBM Credit Corp.*, 201 N.C. App. 343, 350–51 (2009) (*IMB II*), in which the Court of Appeals reversed a Commission order upholding the manner in which Durham County had assessed the value of business personal property owned by IBM, in part, on the grounds that the Commission's finding that the County had properly considered obsolescence by relying upon a government depreciation schedule was erroneous given the absence of sufficient record support for that finding. According to the Court of Appeals, the County's "failure to make additional depreciation deductions due to functional and economic obsolescence due to market conditions result[ed] in an appraisal which [did] not reflect 'true value.' " *Id.* At 354. Harris Teeter contends that, in this case, as in *IBM II*, the County simply failed to "produce a valid explanation for its failure to make the required adjustments, only producing appraisals that do not rebut [Harris Teeter]'s evidence of significant economic and functional obsolescence affecting the Property."

¶ 18 Secondly, Harris Teeter argues that the Court of Appeals incorrectly interpreted the relevant statutory language, which provides that:

> All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. When used in this Subchapter, the words "true value" shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

N.C.G.S. § 105-283 (2019). In Harris Teeter's view, the value of the relevant property for property tax valuation purposes should rest upon the price of used grocery store equipment, which is, quite literally, the price which a willing buyer would pay for the equipment to a willing seller, with the Court of Appeals' determination that the use of market prices was "inappropriate" for the purpose of determining the "true value" of used grocery store equipment being fundamentally flawed.

¶ 19 In addition, Harris Teeter takes issue with the Court of Appeals' determination that the Commission appropriately considered its favorable economic performance vis-à-vis that of its competitors in determining whether the value of the relevant property should be reduced to account for functional or economic obsolescence. In Harris Teeter's view, the Commission's belief that the property in question "must have a higher value than other used grocery store equipment because [Harris Teeter] uses it well in its business operations" rests upon its "subjective worth" to the taxpayer, an approach that the Court of Appeals disavowed in *Parkdale Mills*, 225 N.C. App. at 720, by stating that the "Commission's findings implicitly allow the County to measure the value of the properties as their subjective worth to" the taxpayer, a standard of valuation that was "obviously not the same as adequately determining the objective value of these properties to another willing buyer." *Id.* (citing *In re AMP, Inc.*, 287 N.C. 547, 568 (1975)).

¶ 20 The County, on the other hand, argues that the Court of Appeals correctly held that the Commission's findings of fact had sufficient record support and provided ample justification for the Commission's conclusions of law. The County claims to have presented evidence tending to show that its initial valuation captured the "true value" of the relevant property, with this evidence including the appraisal completed by Mr. Turner, who reduced his estimate of the value of some of Harris Teeter's computer-related property based upon a finding of functional obsolescence and failed to find any evidence that any of the relevant property was economically obsolete given that Harris Teeter achieved above-average income using the relevant property.

¶ 21 According to the County, the Court of Appeals correctly upheld the Commission's decision to reject the arguments advanced on Harris Teeter's behalf in Mr. Rolnick's testimony. The County contends that the Court of Appeals was not entitled to "re-weigh the evidence presented and substitute its evaluation for the Commission's," which is what, in the County's view, Harris Teeter was seeking to have it do. Instead, the County asserts that the issue for the Court of Appeals and this Court on appellate review is "whether an administrative decision has a rational basis in the evidence," citing *In re McElwee*, 304 N.C. 68, 87 (1981). In arguing that the Commission had a rational basis in the evidence for its decision, the County directs our attention to Mr. Turner's use of the cost approach, the manner in which he depreciated certain items of property, and the income-based values that Mr. Turner used in determining whether a further deduction for economic obsolescence would be appropriate. As a result, for all of these reasons, the County urges us to affirm the Court of Appeals' decision.

¶ 22 In evaluating whether the Commission "properly accepted [the] County's method of valuing [a taxpayer's property] rather than the method offered by [the] taxpayer, we use the whole-record test to evaluate the conflicting evidence." *In re Greens of Pine Glen Ltd.*, 356 N.C. 642, 647 (2003). As we have consistently noted,

> it is the function of the administrative agency to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. We cannot substitute our judgment for that of the agency when the evidence is conflicting. However, when evidence is conflicting, as here, the standard for judicial review of administrative decisions in North Carolina is that of the "whole record" test. . . . The whole record test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence.

In re McElwee, 304 N.C. at 87 (cleaned up). In conducting "whole record" review, we are required to "evaluate the conflicting evidence" and determine "whether the Commission properly accepted [the] County's method of valuing" the property rather than that proffered by the taxpayer. *In re Greens of Pine Glen Ltd.*, 356 N.C. at 647. The "whole record" test does not, of course, allow a reviewing court to "replace the Commission's judgment with its own judgment even if there are two reasonably conflicting views; rather, [the reviewing court] merely determine[s] whether an administrative decision has a rational basis in evidence." *In re Westmoreland*, 174 N.C. App. at 697 (citing *In re Perry-Griffin Found.*, 108 N.C. App. 383, 393 (1993)). For that reason, the reviewing court simply "evaluate[s] whether the Commission's decision is supported by substantial evidence," which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citing *Comr. of Ins. v. Rating Bureau*, 292 N.C. 70, 80 (1977)) (cleaned up).

¶ 23 According to N.C.G.S. § 105-283, business personal property must be appraised for property taxation purposes at its "true value in money," defined, as has already been noted, as the property's "market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller." According to well-established North Carolina law, when interpreting a statute, "undefined words are accorded their plain meaning so long as it is reasonable to do so." *Polaroid Corp. v. Offerman*, 349 N.C.

290, 297 (1998). As a result, the statutory description of "true value" and the manner in which it is defined should be interpreted in accordance with the ordinary meaning of the relevant terms, a fact that clearly suggests the appropriateness of ordinary valuation methods in determining the "true value" of the relevant property.

¶ 24 "[A]d valorem tax assessments are presumed to be correct"; when "such assessments are attacked or challenged, the burden of proof is on the taxpayer to show that the assessment was erroneous." *In re AMP, Inc.*, 287 N.C. at 562. In order to rebut this presumption of correctness, the taxpayer must "produce 'competent, material and substantial' evidence that tends to show that: (1) Either the county tax supervisor used an arbitrary method of valuation; or (2) the county tax supervisor used an illegal method of valuation; AND (3) the assessment substantially exceeded the true value in money of the property." *Id.* at 563. "An illegal appraisal method is one which will not result in 'true value' as that term is used in [N.C.G.S.] § [105-]283." *In re S. Ry. Co.*, 313 N.C. 177, 181 (1985). In order to show that the County's initial assessment "substantially exceeded the true value in money of the property," the taxpayer must show that "the valuation was unreasonably high." *In re AMP*, 287 N.C. at 563. In the event that the taxpayer satisfies its initial burden of proving that the County's valuation was unreasonably high, the County is then required to "demonstrate [ ] that the values determined in the revaluation process were not substantially higher than that called for by the statutory formula" and "demonstrate the reasonableness of its valuation 'by competent, material and substantial evidence.' " *In re McElwee*, 304 N.C. at 86–87 (citation omitted); *see also In re Parkdale Mills*, 225 N.C. App. at 717 (holding that, "[o]nce the taxpayer rebuts the initial presumption, the burden shifts back to the County which must then demonstrate that its methods produce true values").

¶ 25 The record reflects that both Harris Teeter and the County utilized the cost approach in order to appraise the relevant property.[3] The cost approach "is the most effective methodology for the appraisal of personal property." North Carolina Dept. of Revenue Ad Valorem Tax Division, *2007 Personal Property Appraisal and Assessment Manual Section VIII: The Appraisal of Business Personal Property*, 14 (2007) [here-

3. As the record clearly reflects, neither party argued before the Commission or before this Court that the Commission was required to value the relevant business personal property on the exclusive basis of the prices charged for such property in the secondary market. Instead, the only purpose for which Harris Teeter proposed the use of secondary market prices was to determine the extent, if any, to which the original cost of the property should be reduced for economic obsolescence.

inafter *NCDOR Manual Section VIII*].[4] Given that business personal property, such as machinery and equipment, is "not traded regularly in the market" and that it is rare for "business taxpayers [to] purchase new equipment merely to update to the latest model available," "the cost (accounting method) approach is the recommended method for the valuation of business personal property." *Id.* An analyst should account for depreciation in utilizing the cost approach by

> estimating the current cost of a new asset, then deducting for various elements of depreciation, including physical deterioration and functional and external obsolescence to arrive at "depreciated cost new." The "cost" may be either reproduction or replacement cost. The logic behind this method is that an indication of value of the asset is its cost (reproduction or replacement) less a charge against various forms of obsolescence such as functional, technological and economic as well as physical deterioration if any.

IBM II, 201 N.C. App. at 351. "Depreciation may be caused by deterioration, which is a physical impairment such as structural defects, or by obsolescence, which is an impairment of desirability or usefulness brought about by changes in design standards (*functional obsolescence*) or factors external to the property (*economic obsolescence*)." *In re Stroh Brewery*, 116 N.C. App. at 186 (cleaned up). In view of the fact that Harris Teeter does not appear to contend that the Commission failed to properly address the issue of physical impairment, we will focus the remainder of our analysis upon issues surrounding functional and economic obsolescence.

¶ 26 As a definitional matter, functional obsolescence is "a loss in value due to impairment of functional capacity . . . inherent in the property itself" stemming from factors such as "overcapacity, inadequacy or changes in state of the art, or poor design." *In re Westmoreland*, 174 N.C. App. at 699 (citing North Carolina Dept. of Revenue Ad Valorem Tax

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4. A portion of this manual was included in Harris Teeter's response to an Order of the Commission and in the record developed before the Court of Appeals. The manual can be found at: https://www.ncdor.gov/documents/2007-personal-property-appraisal-and-assessment-manual-section-viii-appraisal-business-personal. In view of the fact that this manual reflects the ordinary meaning of the statutory definition of "true value" set out in N.C.G.S. §105-283, it is appropriate for this Court to consider that document, upon which Harris Teeter relied before the Commission and the Court of Appeals, in evaluating the validity of the order that is before us in this case.

Division, *Business Personal Property Appraisal Manual*, 7–17 (1995)). In *Westmoreland*, the Court of Appeals found that the property under consideration in that case did not exhibit any signs of functional obsolescence in light of the fact that, at least in part, the relevant electric generating facilities had "outstanding performance records, operate[d] above industry standards in production, ha[d] no environmental problems, and ha[d] been consistently profitable" for the taxpayer. *Id.* at 699–700.

¶ 27 Similarly, economic obsolescence accounts for the change in the value of the relevant property that "results from economic forces, such as legislative enactments or changes in supply and demand relationships," *NCDOR Manual Section VIII*, 17, with such obsolescence being caused by "adverse influences arising from causes external to the machinery and equipment" such as social and legislative changes, general economic changes, considerations of supply and demand, and changes in prices and profitability. *Id.* at 19–20. "The most common causes of economic obsolescence in machinery and equipment are the changes in market demand for products being manufactured by the equipment and also the general economic conditions that are present." *Id.* at 30. Ordinarily, economic depreciation is estimated using either the "comparable sales" method, in which the analyst examines market sales of similar equipment, or by capitalizing income losses, *id.*, with the Commission having essentially adopted the second of these two approaches in this case. As the Department of Revenue has stated:

> The shortage of current market data in comparable sales has caused appraisers to search for other ways to quantify economic obsolescence in machinery and equipment. Market data often does not represent true value transactions . . . . Most equipment in the used equipment market is there because of liquidation, bankruptcy or other causes which could very well influence the sales price of the equipment. . . . It should be noted that many of the sales transactions on used equipment will not reflect true market value and as such, are not appropriate for ad valorem tax valuations.
>
> As has been stated, machinery and equipment derives its value from its ability to generate a normal, profitable income to its owners during the expected useful life of the equipment. When the market demand for

> a product drops, causing income to be less than normal, the value of the equipment is affected.
>
> If market demand for a product drops, the degree to which the lack of product demand affects the value of the equipment (or the economic obsolescence), can be calculated by analyzing the current operating statements of the business and comparing them to expected statements at normal demand levels.

Id. As a result, the generally accepted methods for determining whether an adjustment for economic obsolescence should be made include an evaluation of the relative profitability of the specific business whose property is being valued, a fact that justifies a focus upon the profitability of that business. However, in spite of this admonition to avoid using the "comparable sales" method in instances in which it fails to reflect "true market value" of the relevant property and the Commission's apparent decision to accept this logic in its order, Harris Teeter argues that the Court of Appeals erred by taking its favorable economic performance into consideration in upholding the Commission's "true value" determination and contends that the evidence concerning the prices for used grocery store equipment in the secondary market necessitates an additional depreciation-related adjustment for economic obsolescence.[5]

¶ 28 The issue before the Court in this case is not a new one. In *AMP*, this Court examined the lawfulness of the Commission's decision to uphold the manner in which Guilford County valued the portion of an electronics manufacturer's business personal property that consisted of in-process inventory and raw materials. 287 N.C. at 555, 559. Although the taxpayer offered evidence tending to show that its raw materials were "so unique" that it got "nothing but scrap [metal] for them," so that the "raw materials and in-process inventories had a true value in money equivalent to their scrap value," which was "how much cash could be derived from the sale of the subjects, that is the underlying materials, that are available for sale if they should be sold at that date in their present state," *id.* at 556–57, we rejected that argument, stating that the taxpayer's

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5. Although Harris Teeter mentions the issue of functional obsolescence in its brief, its legal attack upon the Commission's order focuses upon the issue of economic obsolescence and fails to explicitly explain how the Commission erred in the course of addressing the issue of functional obsolescence. As a result, the discussion contained in the remainder of this opinion will focus upon the Commission's treatment of the issue of economic obsolescence.

> theory that the only value its inventories had was scrap value . . . [was] based on the assumption, obviously fictional, that on 1 January of each year it is required to sell all of its inventory, whether such inventory is in raw material or in an in-process state, to the only possible buyers of such materials, the scrap mills.

Id. at 567–68. As a result, we held that (1) the true value of "true scrap metal," which consisted of materials that could not be used to create electronics and simply had to be discarded, equaled the prices for which such items could be sold in the scrap metal market; (2) the true value of "non-defective in-process inventory," which consisted of incomplete, in-process electronics that would, upon completion, be sold to consumers, equaled "the cost of replacing the inventory, plus labor and overhead"; and (3) the true value of "non-damaged, raw material inventory," which consisted of undamaged brass and copper coils that could be converted into electronics for subsequent sale to consumers, equaled "the cost of replacing such inventory on the critical date." *Id.* at 569–75.

¶ 29 In affirming the Commission's determination that non-defective in-process inventory should not be appraised using the market price of scrap metal, we pointed out that "the record is totally devoid of any evidence that AMP 'usually' and 'freely' sold such materials back to its suppliers for scrap prices" and that "the evidence is that AMP NEVER made such sales." *Id.* at 570. In addition, we noted that "it would be ridiculous" to sell in-process inventory for scrap and that "no on-going business entity would adopt such a sales plan," which would result in the receipt of substantially less money for such property than the property would bring as a finished product. *Id.* After acknowledging that the record tended to show that there was no direct market for in-process inventories or raw materials, we stated that "the mere fact that there is no market for a particular property does not deprive it of 'market value,' [or] 'true value,' " and that "[m]arket value can be constructed of elements other than sales in the market place." *Id.* at 571. For that reason, we concluded that it would be appropriate to utilize valuation principles derived from cases involving damaged personal property and the valuation of stock in order to determine the "true value" of in-process inventory and raw materials. *Id.* at 572–73.

¶ 30 After reaching this conclusion, the Court went on to compare the value of the taxpayer's in-process inventory to the measure of damages associated with the loss of personal property for which there was no market, stating that:

> Cost of replacement or repair, with suitable adjustments for the fact that the damaged or destroyed property was old and had depreciated in value, is perhaps, as previously noted, the most commonly considered factor in fixing value of personal property that has no market. The usual formula employed for determining the value of the destroyed property in such cases deducts the accrued depreciation on the damaged property from the replacement costs.

Id. at 572 (citations omitted). As a result, the Court essentially approved the use of "replacement cost less depreciation" in order to value the taxpayer's in-process inventory rather than requiring the use of the market prices available for the relevant materials in the scrap metal market.

¶ 31 On the other hand, in *IBM II*, the Court of Appeals reviewed the Commission's decision to uphold the manner in which Durham County assessed the taxpayer's business personal property, including certain computers and computer equipment, and held that the county's initial assessment did not produce "true value." 201 N.C. App. 343. In order to determine the "true value" of the relevant property, Durham County had determined the original cost of the property in question and then adjusted it using a schedule that had been prepared by the Department of Revenue. *Id.* at 344. In spite of the fact that the Department of Revenue had cautioned that "the schedules [were] only a guide" and that appraisers might "need to make adjustments for additional functional or economic obsolescence," Durham County simply applied the numbers derived from the schedule to the original cost of the relevant items of property without doing anything more. *Id.* at 344–45. In upholding the validity of the taxpayer's assertion that the appraisal method that Durham County utilized in the instance before it in that case did "not produce a 'true value' or 'fair market value' for its equipment, because the schedule [did] not properly account for functional or economic obsolescence present in the 2001 computer and computer equipment market," *id.* at 347, the Court of Appeals concluded that the Commission had failed to "adequately track[ ] the detailed burden-shifting analysis required by" the relevant case law or to "adequately address key issues necessary to arrive at the ultimate decision" that it was required to make, which was "[w]hat is the market value of the property being appraised," resulting "in conclusions which lack evidentiary support and are therefore arbitrary and capricious." *Id.* at 349 (citing N.C.G.S. § 105-283).

¶ 32 A careful examination of the logic adopted by this Court in *AMP* and by the Court of Appeals in *IBM II* suggests that, on the one hand, the

Commission does not err by rejecting a method for determining "true value" that places exclusive, or even principal, reliance upon market sales and is, instead, entitled to consider the extent to which prices revealed by sales in particular markets are abnormally low or high as the result of external factors. For that reason, Harris Teeter's implicit argument that market sales should be deemed controlling in the context of determining "true value" was squarely rejected by this Court in *AMP*. On the other hand, the Court of Appeals correctly held in *IBM II* that "true value" cannot be properly determined by mechanically applying generic schedules without making sure that those schedules fairly and accurately reflect the conditions that the taxpayer actually faces. As a result, the ultimate lesson to be learned from *AMP* and *IBM II* is that there is no single required method for determining "true value" and that a proper "true value" determination must rest upon a careful analysis of all relevant factors. In our opinion, the Commission did exactly that in this instance.

¶ 33 The ultimate issue that confronts us in this case is whether the Commission's findings and conclusions have a "rational basis in the evidence," *In re McElwee*, 304 N.C. at 87, or whether they are "supported by substantial evidence," *In re Westmoreland*, 174 N.C. App. at 697, and whether those findings support the Commission's ultimate determination with respect to the issue of true value. In concluding that the County had made the necessary evidentiary showing, the Commission placed principal reliance upon the testimony provided by Mr. Turner, who stated that he had utilized the cost approach, the market, or "comparable sales," approach, and the income approach in valuing the relevant used grocery store equipment; that he had been able to use the market approach to value some of the more mobile and self-contained items, such as shopping carts and forklifts; that most of the larger items, such as refrigerated cases and coolers, had high delivery and installation costs and utilized the same refrigerant system; that these factors made the use of the market approach to value these items of property unreliable; and that he had used the "cost method" to value the remaining items. As we have already noted, the Commission also found that

> 15. Mr. Turner testified that he identified additional functional obsolescence in computer-based equipment and further depreciated the value of those assets in order to account for the additional loss in value. He testified that he accelerated the depreciation on certain types of equipment as a result of information he received

> from the Appellant's staff—that some equipment was replaced before the end of its normal useful life because of severe use of that equipment. . . . Mr. Turner testified further that he had personally developed income-based values in order to determine for himself whether the subject property was producing an appropriate return for the Appellant, and determined that the subject property produced income greater than standard for the industry. His conclusion, therefore, is that the subject property does not exhibit economic obsolescence, and we agree. The property's apparent capacity to generate income greater than the industry standard is not an indication of economic obsolescence.

Based upon these findings, the Commission concluded that "the county's value of $21,434,313 is not only supported by Mr. Turner's appraisal, but also is a reasonable estimate of true value." In other words, the Commission treated the issue of the extent to which an adjustment should be made to the original cost of Harris Teeter's property for economic obsolescence as a question of fact to be determined on the basis of the record evidence and reached a result that even our dissenting colleagues appear to concede has sufficient support in the record evidence. As a result, after carefully examining the record, we hold that the Commission's findings with respect to the issue of functional and economic obsolescence, which rely upon Mr. Turner's testimony that, with certain limited exceptions, he did not detect the presence of functional obsolescence and that his evaluation of Harris Teeter's economic performance precluded the need for an adjustment for economic obsolescence, have sufficient evidentiary support and support the Commission's conclusion that the County satisfied its obligation to rebut Harris Teeter's challenge to the validity of its appraisal methodologies.

¶ 34 We do not find Harris Teeter's contentions that the low prices of used grocery store equipment in the secondary market require the making of a further adjustment for economic obsolescence and that the Commission erred by relying upon Harris Teeter's favorable economic performance in concluding that such economic obsolescence did not exist to be persuasive. Such an argument assumes that, as a matter of law, there is one, and only one, way to calculate economic obsolescence in spite of the fact that the relevant statutory language contemplates the use of generally accepted valuation principles and the fact that

the approach that the Commission adopted for use in this case is fully consistent with both generally accepted valuation principles and the accounting and economic evidence in the record. For that reason, we believe that acceptance of Harris Teeter's argument would be inconsistent with the relevant statutory language and require us to engage in an impermissible exercise of appellate factfinding.

¶ 35 In addition, we believe that Harris Teeter's arguments rest upon an erroneous understanding of the nature of economic obsolescence. As we have previously demonstrated, economic obsolescence stems from the effects of economic conditions external to the property under consideration, such as social and legislative changes, current economic conditions, the taxpayer's ability to use the property to make a profit, and similar factors. According to the Department of Revenue, market prices "often do[ ] not represent true value transactions" given that "[m]ost equipment in the used equipment market is there because of liquidation, bankruptcy or other causes," which drastically reduces the equipment's market price. *NCDOR Manual Section VIII*, 30. In such instances, "sales transactions on used equipment will not reflect true market value and as such, are not appropriate for ad valorem tax valuations." *Id.*

¶ 36 As Mr. Rolnick admitted in his testimony before the Commission, Harris Teeter's used grocery store equipment goes "to liquidation or . . . the dumpster" at the end of its useful life. Our review of the record does not provide any basis for believing that the used grocery store equipment at issue in this case had reached the end of its useful life. In addition, Mr. Rolnick acknowledged that the market for used grocery store equipment had been flooded with such property, a fact that greatly reduced the prices that were being received in that market. In light of this set of facts, which appear to be undisputed, the record clearly supports the Commission's determination that the prices received for the sales of comparable items of used grocery store equipment in the secondary marketplace upon which Mr. Rolnick relied did not provide reliable evidence of economic obsolescence and certainly does not compel a conclusion to the contrary. As in *AMP*, the record here "is totally devoid of any evidence that [the taxpayer] 'usually' and 'freely' [bought or] sold such" used equipment in the marketplace and did not require the Commission to value the used equipment at its secondary market price. 287 N.C. at 570.

¶ 37 Moreover, the Department of Revenue has determined that "analyzing the current operating statements of the business and comparing them to expected statements at normal demand levels" is an appropriate way to determine if the business' property is economically obsolescent, with

an additional depreciation adjustment for economic obsolescence being appropriate in the event that the return that the business is earning is lower than one would otherwise expect. *NCDOR Manual Section VIII*, 30. The testimony provided by Mr. Turner tends to show that the equipment used in Harris Teeter's grocery stores generated "a rate of return on their assets and on equity" that was "above industry standards," with this being the sort of evidence that is ordinarily considered in determining whether an adjustment of economic obsolescence needs to be made. As a result, the record contains ample justification for the Commission's decision to consider the profitability of Harris Teeter's stores in determining whether an additional adjustment for economic obsolescence would be appropriate, given that the value of business personal property "derives its value from its ability to generate a normal, profitable income to its owners during [its] useful life," *NCDOR Manual Section VIII*, 30, and that no such adjustment needed to be made in this instance.

¶ 38 Although Harris Teeter argues that, in this case, "[a]s in *IBM II*, the County failed to produce a valid explanation for its failure to make the required adjustments" for depreciation due to functional and economic obsolescence and that, as was the case in *IBM II*, "[t]he failure to make additional depreciation deductions due to functional and economic obsolescence due to market conditions results in an appraisal which does not reflect 'true value,' " 201 N.C. App. at 354 (2009), we have no hesitation in concluding that the record in this case appears to be markedly different from the one that was before the Court of Appeals in *IBM II*. As we understand *IBM II*, the County applied a governmentally developed schedule to the original cost of the relevant property without making any additional adjustments despite the fact that the schedule upon which the County relied stated that the analyst might "need to make adjustments for additional functional or economic obsolescence" and that the Commission, rather than engaging in the burden-shifting analysis required by *AMP*, simply asserted that the County had met its "burden." In this case, on the other hand, the testimony of Mr. Turner, which tended to show that he made significant adjustments to the cost of certain items of Harris Teeter's property and that he had fully considered the extent to which additional adjustments needed to be made to appropriately account for functional and economic obsolescence, constituted substantial evidence that he appropriately considered both functional and economic obsolescence in his appraisal, an analysis which is fully reflected in the Commission's findings and conclusions. Although the record does, of course, contain evidence that would have supported a contrary conclusion, the Commission, rather than this Court, has the fact-finding responsibility in this case. In other words, rather than being

an issue of law, we conclude that the issue before the Commission in this case was one of fact, which the Commission resolved in a manner that had ample record support. As a result, for all of these reasons, we hold that none of Harris Teeter's challenges to the Commission's order have any merit and that the Court of Appeals' decision to uphold its lawfulness should be affirmed.[6]

AFFIRMED.

Justice BERGER dissenting.

¶ 39 I fully join in Justice Barringer's dissent but write separately because "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35.

> The admonition of the Constitution requiring frequent recurrence to fundamental principles is politically sound. . . . We violate no precedent in referring to the important function these guaranties of personal liberty perform in determining the form and character of our Government. . . . If those whose duty it is to uphold tradition falter in the task, these guaranties may be defeated temporarily, or permanently lost through obsolescence.

State v. Harris, 216 N.C. 746, 762–63, 6 S.E.2d 854, 865–66 (1940).

¶ 40 The non-uniform valuation method employed by the government and sanctioned by the majority is constitutionally suspect and detrimental to economic liberty. *See* N.C. Const. article V, § 2(2) ("No class of property shall be taxed *except by uniform rule*, and every classification shall be made by general law *uniformly* applicable[.]" (emphasis added)); article I, § 1 ("We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable

6. Harris Teeter did not argue before this Court that the Commission used a non-uniform method for valuing its property, N.C. Const. art. V, §2(2) (2(2), or violated any other tax-related constitutional provision, *see Harris v. Harris*, 307 N.C. 684, 690 (1983) (stating that, "[w]hen a party fails to raise an appealable issue, the appellate court will generally not raise it for that party") (citing *Henderson v. Matthews*, 290 N.C. 87 (1976)); *Crockett v. First Fed. Sav. & Loan Ass'n of Charlotte*, 289 N.C. 620, 632 (1976) (stating that, in accordance with N.C.R. App. P. 28, "appellate review is limited to the arguments upon which the parties rely in their briefs"), and there does not appear to be any evidence that the Commission failed to apply the valuation principles used in this case to other taxpayers or to utilize the same justification for refusing to make an adjustment for economic obsolescence in other cases.

rights; that among these are life, liberty, *the enjoyment of the fruits of their own labor*, and the pursuit of happiness." (emphasis added)); and article I, § 19 ("No person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws[.]").

¶ 41 As noted in Justice Barringer's dissent, imposition of a "success tax" is problematic. The "uniform appraisal" of the subject property's "true value" should be based on fair market value, i.e., "the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller[.]" N.C.G.S. § 105-283 (2019). The valuation method employed by Harris Teeter's expert relied on information derived from sales of used equipment on eBay and other existing markets – exactly the circumstances contemplated by the statute. This statutorily acceptable valuation method produced an appraised "true value" of $13,663,000.00.

¶ 42 In contrast, the valuation method employed by the government bore little resemblance to the statutorily prescribed method. The government's expert testified that, rather than consulting prices derived from sales of similar equipment in existing markets, he "use[d] [Harris Teeter's] earnings to determine whether or not there was economic obsolescence[.]" The government's expert determined that Harris Teeter's "rate of return on the assets[,]" which was "above industry norms," supported his conclusion that the "equipment didn't suffer any external obsolescence[.]" In other words, because the government deemed Harris Teeter to be a successful company, the government determined they must be treated differently.

¶ 43 Here, the government created an artificial valuation of the subject property. As a result, this non-uniform, statutorily unacceptable valuation method produced an appraised value of $22,100,000.00 – more than $8,000,000.00 higher than the value produced by Harris Teeter's expert. The valuation method employed by the government ignores existing markets for used business equipment, creates an artificial market for said equipment to exact additional monies from taxpayers, and treats taxpayers differently based solely on profitability. The fact that a practice may be widespread does not make it constitutionally permissible. Here, the government deprives Harris Teeter of property in the form of profits through use of a valuation method that appears inconsistent with our State Constitution.

¶ 44 " 'All taxes on property in this State for the purpose of raising revenue are imposed under the rule of uniformity.' " *Hajoca Corp. v. Clayton*,

277 N.C. 560, 567–68, 178 S.E.2d 481, 486 (1971) (quoting *Roach v. Durham*, 204 N.C. 587, 591, 169 S.E. 149, 151 (1933)); *see also* N.C. Const. article V, § 2(2). "The fundamental right to property is as old as our state. . . . From the very beginnings of our republic we have jealously guarded against the governmental taking of property." *Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 852–53, 786 S.E.2d 919, 923–24 (2016) (citing John Locke, *Two Treatises of Government* 295 (London, Whitmore & Fenn et al. 1821) (1689) ("The great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property.").

¶ 45 "This Court's duty to protect fundamental rights includes preventing arbitrary government actions that interfere with the right to the fruits of one's own labor." *King v. Town of Chapel Hill*, 367 N.C. 400, 408, 758 S.E.2d 364, 371 (2014) (citing N.C. Const. art. I, § 1). The "fundamental guaranties" of Article I, section 1, which include the guarantee to the fruits of one's own labor, are "very broad in scope." *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949).

> The fundamental purpose for [the Declaration of Rights'] adoption was to provide citizens with protection from the State's encroachment upon these rights. Encroachment by the State is, of course, accomplished by the acts of individuals who are clothed with the authority of the State. . . . We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property.

Corum v. University of North Carolina, 330 N.C. 761, 782–83, 413 S.E.2d 276, 290 (1992) (citations omitted).

¶ 46 The case sub judice presents an even more compelling argument for a violation of Article I, section 1 than in the recently decided case of *Tully v. City of Wilmington*, 370 N.C. 527, 810 S.E.2d 208 (2018). In *Tully*, this Court held that to state a proper claim grounded in Article I, section 1, a public employee must establish: "(1) a clear, established rule or policy existed regarding the employment promotional process that furthered a legitimate governmental interest; (2) the employer violated that policy; and (3) the plaintiff was injured a result of that violation." *Id.* at 537, 810 S.E.2d at 216.

¶ 47 We are concerned here, not with an "established rule or policy[,]" but rather with fundamental rights guaranteed by our Constitution and

a plainly worded statutory provision. *See* N.C. Const. article V, § 2(2); article I, § 19; and N.C.G.S. § 105-283 (setting forth the "*[u]niform appraisal standards*" of "*[a]ll* property, real and personal." (emphasis added)). The violation of these fundamental rights by the government has deprived Harris Teeter of their profits, i.e., the fruits of their labor.

¶ 48 Beyond the immediate impact on Harris Teeter, this valuation method will curtail economic liberty and produce inconsistent and undesirable results for businesses in this State. Any business that earns a "rate of return on the[ir] assets" which is "above industry norms" risks the government effectuating an extra-statutory taking of the fruits of their labor, and this Court should decline to sanction such action. *See King*, 367 N.C. at 408, 758 S.E.2d at 371 ("This Court's duty to protect fundamental rights includes preventing arbitrary government actions that interfere with the right to the fruits of one's own labor.").

¶ 49 I respectfully dissent.

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

Justice BARRINGER, dissenting.

¶ 50 I join Justice Berger's dissent, but nonetheless write separately to specifically address the errors of the North Carolina Property Tax Commission.

I. Prologue

"A tax is a fine for doing well, a fine is a tax for doing wrong ."

Mark Twain

¶ 51 In this matter, the North Carolina Property Tax Commission without any statutory or pertinent legal authority, and perhaps inadvertently but nonetheless inexorably, effectively imposes a "success tax" under which the taxpayer's economic success relative to applicable industry standards subjects it to higher business personal property valuations and thus higher property tax liabilities. This is not sound tax policy nor law. It conflicts with the uniform appraisal standard established by our constitution and by statute requiring that all personal property "shall as far as practicable be appraised or valued at its true value in money." N.C.G.S. § 105-283 (2019). The profitability or revenue production of a successful taxpayer should not and, under constitutional and statutory principles, cannot impose higher valuation and property tax payments vis-à-vis a less successful taxpayer.

II. Background

¶ 52 In this matter, the Commission concluded that the taxpayer had "offered competent, material, and substantial evidence that the County's value of the subject property substantially exceeded the true value of the subject properties, when the [taxpayer] produced evidence tending to show that the true value of the subject properties was actually about one-third (1/3) less than the County's value, according to an appraisal developed by its expert witness." Nevertheless, the Commission ultimately though circuitously concluded that "[t]he County demonstrated that its methods in appraising the subject property produced true values when it provided evidence that the true values of the subject property, considering all forms of depreciation, was consistent with the County's values for the subject property." Not surprisingly, the County's evidence—its expert's appraised valuation—are consistent with the County's previously assessed values.

¶ 53 Both parties generated value opinions for the subject property based on the cost approach, beginning with the original installed costs for each item of the subject property, and then made adjustments to the cost. Where the value opinions diverge occurs in the consideration of "[t]he effect of obsolescence on the property," N.C.G.S. § 105-317.1(a). The taxpayer's appraisal apparently found obsolescence for all the subject property due to the current rampant and competitive nature of the grocery store industry's need to upfit every six to seven years.

¶ 54 The taxpayer's expert relied on depreciation tables compiled from data concerning sales of used equipment and concluded that the difference between the equipment new and used as reflected in the table calculations is the amount of physical depreciation and obsolescence for the property. Essentially, the taxpayer's position and testimony of its expert were that true value in money is the actual market value for the used property and pointed to the economic factors of high supply from store closures, mergers, and remodeling and minimal demand due to fewer store openings.

¶ 55 On the other hand, the County's expert deducted physical depreciation and tested for obsolescence. He employed the income approach to test for economic obsolescence. Because he found that the rate of return for the subject property exceeded the standard for the industry, he concluded that the subject property did not exhibit economic obsolescence. The County's expert also testified that from his research, most companies in the industry with the ability to buy do not buy in the secondary market. Thus, in his opinion, the market for used equipment is for a buyer who buys everything at once as a continuing operation.

Based on any layman's definition of supply and demand, fewer buyers in a used equipment market buying in large quantities should produce LOWER prices and thus LOWER "true values." The Commission agreed with the County's expert, concluding that "[t]he property's apparent capacity to generate income greater than the industry standard is not an indication of economic obsolescence."

III. Analysis

¶ 56 While the Commission's finding appears to be in accord with the tax and accounting standards for identifying economic obsolescence, see Connor J. Thurman & Robert F. Reilly, *What Tax Lawyers Need to Know about the Measurement of Functional and Economic Obsolescence in the Industrial or Commercial Property Valuation (Part 1)*, 35 Prac. Tax Law. 11, 16–18 (2020), allowing or disallowing an adjustment to a cost approach valuation on account of the rate of return for personal property conflicts with the design of a uniform appraisal standard requiring that all personal property "shall as far as practicable be appraised or valued at its true value in money." N.C.G.S. § 105-283.

¶ 57 Decisions of the Commission are reviewed by this Court pursuant to N.C.G.S. § 105-345.2. N.C.G.S. § 105-345.2 (2019). "Questions of law receive *de novo* review, while issues such as sufficiency of the evidence to support the Commission's decision are reviewed under the whole-record test." *In re Greens of Pine Glen Ltd.*, 356 N.C. 642, 647 (2003) (citing N.C.G.S. § 105-345.2(b)). The issue here—whether a taxpayer's relative economic success is determinative of economic obsolescence for a valuation of business personal property—is a question of law.

¶ 58 Section 105-283 of the General Statutes of North Carolina requires uniformity in appraisals for property taxation. N.C.G.S. § 105-283. Specifically,

> [a]ll property, real and personal, shall as far as practicable be appraised or valued at its true value in money. When used in this Subchapter, the words "true value" shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

N.C.G.S. § 105-283.

¶ 59 Thus, a valuation of property at true value in money does not consider who owns the property. *See* N.C.G.S. § 105-283. Rather, it is the valuation in money from a hypothetical transaction in a perfect market—the exchange "between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used." N.C.G.S. § 105-283.

¶ 60 Economic obsolescence "is a reduction in the value of the property due to the effects, events, or conditions that are external to—and not controlled by—the current operation or condition of the taxpayer's property." Connor J. Thurman & Robert F. Reilly, *What Tax Lawyers Need to Know about the Measurement of Functional and Economic Obsolescence in the Industrial or Commercial Property Valuation (Part 1)*, 35 Prac. Tax Law. 11, 13 (2020); *see also Obsolescence*, *Black's Law Dictionary* (11th ed. 2019) (defining "economic obsolescence" as "[o]bsolescence that results from external economic factors, such as decreased demand or changed governmental regulations"). Given the definitive requirement of an external cause, economic obsolescence is unrelated to who owns the property, and logically, the amount of revenue or net profits generated by the owner of that property is not determinative of economic obsolescence.

¶ 61 Therefore, the fact that a specific taxpayer's rate of return on the subject property *exceeds industry standards* does not refute the existence of economic obsolescence, and certainly does not justify per se higher "true values." Economic obsolescence has an external cause and an immutable internal impact, but it will not necessarily result in underperformance relative to industry peers. *Cf. In re Colonial Pipeline Co.*, 318 N.C. 224, 229, 233–235 (1986) (finding no error in Commission's approval of the Department of Revenue's refusal to deduct from valuation opinion for true value an amount attributable to economic obsolescence where taxpayer's expert adjusted valuation by 25.36% on the grounds that investors were demanding a rate of return in the market of 14% for similar investments but taxpayer's rate of return was limited to 10.45% by Federal Energy Regulatory Commission).

¶ 62 Accordingly, the Commission's conclusion to this effect, while supported by the County's expert's testimony, reflects an error of law, necessitating remand to the Commission for further proceedings pursuant to N.C.G.S. § 105-345.2(b)(4). *See* N.C.G.S. § 105-345.2(b)(4) (providing reversal, remand, or modification of a Commission's order when the "Commission's findings, inferences, conclusions or decisions are . . . [a]ffected by other errors of law"). The Commission ignored the statuto-

ry mandate for true value in money required by N.C.G.S. § 105-283 when assessing the existence and arguable impact of economic obsolescence.

¶ 63 The majority overlooks this fundamental error of law. They raise that the County's expert did consider obsolescence, did make some adjustments for obsolescence, and did testify as to his assessment. They riddle their opinion with quotes from the North Carolina Department of Revenue 2007 Personal Property Appraisal and Assessment Manual. Yet, neither a manual issued by the North Carolina Department of Revenue nor the County's expert's testimony is law. *Cf. Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 260 (2016) (giving only "due consideration" to the manner in which the Secretary of Revenue has interpreted the statutory language at issue in a published bulletin because the construction adopted by those who execute and administer the law is only persuasive); *In re IBM Credit Corp.*, 201 N.C. App. 343, 353 (2009) (rejecting county's argument that the schedule employed is legal and used by all 100 counties because to do so would render tax appeals limited to "determining whether or not the proper government schedule was employed" rather than applying the burden shifting analysis required by our precedent). Thus, when the testimony or publications conflict with N.C.G.S. § 105-283, it is this Court's duty to remand due to a fundamental error in law.

IV. Epilogue

¶ 64 As Judge Learned Hand of our Federal Second Circuit opined many decades ago: "Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes." *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935) (quoted in *United States v. Carlton*, 512 U.S. 26, 36 (1994) (O'Connor, J. concurring)).

¶ 65 Later, Judge Hand expanded this principle in his dissent in *Commissioner of Internal Revenue v. Newman*, 159 F.2d 848 (1947) by observing: "Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant." *Id.* at 850–51 (Hand, J., dissenting).

¶ 66 I respectfully dissent.

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

[378 N.C. 138, 2021-NCSC-81]

ESTATE OF MELVIN JOSEPH LONG, by and through
MARLA HUDSON LONG, Administratrix
v.
JAMES D. FOWLER, Individually, DAVID A. MATTHEWS, Individually,
DENNIS F. KINSLER, Individually, ROBERT J. BURNS, Individually,
MICHAEL T. VANCOUR, Individually, and MICHAEL S. SCARBOROUGH, Individually

No. 303A20

Filed 13 August 2021

1. Immunity—sovereign—individual versus official capacity—dismissal improper

In a wrongful death action filed against individual employees of a state university, the trial court erred by dismissing the action after determining that the employees were entitled to sovereign immunity based on their status as state employees, since the employees were sued in their individual capacities, even if their alleged negligent acts were performed in the scope of their employment.

2. Negligence—sufficiency of pleading—proximate cause—burst pipes

In a wrongful death action filed against individual employees of a state university, the complaint adequately pled proximate cause through allegations that the employees knew or should have known, given warning signs posted outside a chiller, that their negligent acts in failing to properly drain the chiller and refill it with antifreeze could cause injury in the event the pipe froze and became pressurized. Therefore, the trial court improperly dismissed the action for failure to state a claim.

3. Damages and Remedies—punitive—sufficiency of pleading—willful or wanton conduct

In a wrongful death action filed against individual employees of a state university, the complaint contained sufficient allegations to put defendants on notice for punitive damages, based on willful and wanton conduct (N.C.G.S. § 1D-15(a)), where the allegations stated that defendants' negligent acts or omissions in failing to properly drain a chiller and refill it with antifreeze, particularly given warning signs posted on the chiller, could cause injury in the event the pipe froze and became pressurized, and that their conduct demonstrated a conscious disregard of the safety of others.

Justice BERGER dissenting.

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

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 270 N.C. App. 241 (2020), reversing an order entered on 3 May 2019 by Judge Josephine K. Davis in Superior Court, Person County, and remanding to the trial court. Heard in the Supreme Court on 18 May 2021.

Hardison & Cochran, PLLC, by John Paul Godwin; and Sanford Thompson, PLLC, by Sanford Thompson IV, for plaintiff-appellee.

Parker Poe Adams & Bernstein LLP, by Jonathan E. Hall and Patrick M. Meacham; and Joshua H. Stein, Attorney General, by Melissa K. Walker, Assistant Attorney General, Shannon Cassell, Civil Bureau Chief, and Sarah G. Boyce, Deputy Solicitor General, for defendant-appellants.

EARLS, Justice.

¶ 1 This case raises the question of whether the estate of an individual killed by the allegedly negligent acts of State employees can proceed in state court to assert wrongful death claims against those employees in their individual capacities or whether such a suit is barred by the doctrine of sovereign immunity. Following our precedent, sovereign immunity does not apply to suits against state employees in their individual capacities. We therefore hold that the trial court erred in dismissing the complaint on those grounds.

¶ 2 The tragic event giving rise to plaintiff's claims occurred on the morning of 20 January 2017, when Melvin Joseph Long was working to reconnect a trailer-mounted chiller on the campus of North Carolina State University (NCSU). To do so, he needed to remove metal flanges that capped two water pipes on the chiller. However, unbeknownst to Mr. Long, the pipes had become filled with pressurized gas after water in the pipes froze and the pipes cracked. As he began to loosen one of the metal flanges, it shot off the water pipe and hit him in the face with great force. Mr. Long died from his injuries five days later, on 25 January 2017.

¶ 3 Following his death, Mr. Long's estate brought the present action against James D. Fowler, David A. Matthews, Dennis F. Kinsler, Robert J. Burns, Michael T. Vancour, and Michael S. Scarborough (defendants), NCSU employees who had worked on the chiller during the months

before Mr. Long's injury and, according to plaintiff's allegations, caused his injury. In addition to arguing that the complaint failed to allege substantive elements of Mr. Long's claims, defendants have asked us to hold that Mr. Long's claims are brought against defendants in their official capacities or, in the alternative, that claims such as those brought by Mr. Long are necessarily claims against the State that cannot be brought against defendants in their individual capacities. Doing so would require us to overturn several decades of this Court's precedent establishing that claims brought against State employees in their individual capacities are not subject to the doctrine of sovereign immunity. However, we are constrained to promote the "stability in the law and uniformity in its application" which may only be achieved through "respect for the opinions of our predecessors." *Wiles v. Welparnel Constr. Co.*, 295 N.C. 81, 85 (1978).

¶ 4 The tie between injury and remedy is so fundamental to our law that it is enshrined in the first article of our state constitution—"every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law." N.C. Const. art. I, § 18. Hewing close to our precedent in this case maintains the general principle that the law provides remedies to injured persons. *Cf. Wirth v. Bracey*, 258 N.C. 505, 508 (1963) ("The obvious intention of the General Assembly in enacting the Tort Claims Act was to enlarge the rights and remedies of a person injured by the actionable negligence of an employee of a State agency while acting in the course of his employment."). By preserving remedies in tort, we "deter certain kinds of conduct by imposing liability when that conduct causes harm." *Haarhuis v. Cheek*, 255 N.C. App. 471, 480 (2017) (quoting Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, *The Law of Torts* § 14 (2d ed. 2011)). As we have previously stated, "[t]here can be little doubt that immunity fosters neglect and breeds irresponsibility, while liability promotes care and caution." *Rabon v. Rowan Mem'l Hosp., Inc.*, 269 N.C. 1, 13 (1967). Defendants in this case were sued in their individual capacities, and the complaint adequately stated claims for the tort relief sought by Mr. Long's estate. As a result, the trial court erroneously granted defendant's motion to dismiss, and we affirm the decision of the Court of Appeals reversing that order.

I. Background

¶ 5 Since this case comes to us on the trial court's order granting a motion to dismiss pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure, we accept the allegations in the complaint as true. *Corwin v. British Am. Tobacco PLC*, 371 N.C. 605, 611 (2018) (Rule 12(b)(1)); *Parker v. Town of Erwin*, 243 N.C. App. 84,

96 (2015) (Rule 12(b)(2)); *Bridges v. Parrish*, 366 N.C. 539, 541 (2013) (Rule 12(b)(6)).

¶ 6 The Complaint alleges that in December 2016, NCSU owned, operated, and used a large, trailer-mounted chiller. Around 21 December 2016, one or more of defendants, pursuant to a work order completed during the course of their employment, shut the chiller down, disconnecting its power and water sources. At that time, they drained water from the chiller. However, two signs on the chiller contained a warning indicating that it was "not possible to drain all water" from the chiller and that the chiller "must be drained and refilled with" antifreeze solution "[f]or freeze protection during shut-down." Similarly, the chiller's operating manual instructed that the chiller should be filled with antifreeze to "prevent freeze-up damage to the cooler tubes." Defendants did not put antifreeze into the chiller.

¶ 7 Almost two weeks later, on 3 January 2017, one or more defendants tightly secured heavy metal flanges, weighing approximately 13.1 pounds, to the ends of the chiller's water pipes to cap the pipes. A few days after that, the area experienced a hard freeze, with temperatures falling as low as nine degrees Fahrenheit. Water remaining in the pipes froze and ruptured the pipes, which caused the pipes to fill with a pressurized refrigerant gas. The gas built up in the pipes behind the metal flanges, and the pipes became pressurized.

¶ 8 On 20 January 2017, Mr. Long attempted to loosen the flanges on the chiller pipes so that the chiller could be reconnected. As he began doing so, one of the flanges flew off the end of the pipe, propelled by the pressurized refrigerant gas, and struck him in the face. The flange knocked off part of Mr. Long's skull, and he died five days later.

¶ 9 Marla Hudson Long, Mr. Long's wife and the personal representative of Mr. Long's estate, filed the instant action in Superior Court, Person County, on 13 November 2018. On 19 February 2019, defendants filed a motion to dismiss pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure, arguing that the trial court lacked jurisdiction over the subject matter and over the person of defendants and that the complaint failed to state a claim upon which relief could be granted. On 21 February 2019, defendants filed their answer and defenses. Following a hearing on 8 April 2019, the trial court granted defendants' motion to dismiss in an order filed 3 May 2019.

¶ 10 Following the trial court's order granting defendants' motion to dismiss, the estate appealed to the Court of Appeals. The Court of Appeals reversed the trial court's order in a divided decision, holding that

defendants, employees of NCSU, had been sued in their individual capacities and were therefore not entitled to the defense of sovereign immunity and that the complaint had adequately stated claims for negligence and gross negligence. *Estate of Long v. Fowler*, 270 N.C. App. 241, 250, 252–53 (2020). The dissent, on the other hand, would have held that the complaint failed to adequately plead negligence or gross negligence and that defendants were entitled to sovereign immunity because the allegedly negligent actions occurred within the scope of their employment as public employees. *Id.* at 254–55, 257 (Tyson, J., dissenting).

¶ 11 Before this Court, defendants assert that they are being sued in their official capacities and that the suit is actually one against NCSU, which is entitled to sovereign immunity. They also argue that the complaint fails to state claims for negligence and gross negligence because it does not allege facts establishing proximate cause, and that the complaint fails to adequately allege claims for punitive damages. We reject these arguments and affirm the Court of Appeals. A suit against State employees is not subject to the doctrine of sovereign immunity when brought against the employees in their individual capacities. The complaint in this case indicates that it is brought against defendants in their individual capacities. Moreover, the complaint adequately alleges that Mr. Long's injury was proximately caused by defendants' conduct and adequately alleges that defendants acted with the requisite willful or wanton conduct to support a claim for punitive damages.

II. Analysis

A. Sovereign immunity

¶ 12 **[1]** When reviewing a trial court's order granting a motion to dismiss pursuant to Rule 12(b)(1), "we apply de novo review, accepting the allegations in the complaint as true and viewing them in the light most favorable to the non-moving party." *Corwin*, 371 N.C. at 611.[1] We review de novo "[q]uestions of law regarding the applicability of sovereign or governmental immunity." *Wray v. City of Greensboro*, 370 N.C. 41, 47

1. As was the case in *Teachy v. Coble Dairies, Inc.*, we need not decide whether a motion to dismiss on the basis of sovereign immunity is properly designated as a Rule 12(b)(1) motion or a Rule 12(b)(2) motion. *See Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 328 (1982) (stating that "the distinction becomes crucial in North Carolina because" a denial of a Rule 12(b)(2) motion is immediately appealable by statute while a denial of a Rule 12(b)(1) motion is not). Here, the motion to dismiss was granted, and neither Ms. Long's appeal to the Court of Appeals nor defendants' appeal to this Court was an interlocutory appeal.

(2017) (alteration in original) (quoting *Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611 (2016)).

¶ 13 Defendants are not entitled to the defense of sovereign immunity merely because they are State employees, even when the tortious conduct is alleged to have occurred during the scope of their employment. *Miller v. Jones*, 224 N.C. 783, 787 (1945) ("The mere fact that a person charged with negligence is an employee of others to whom immunity from liability is extended on grounds of public policy does not thereby excuse him from liability for negligence in the manner in which his duties are performed, or for performing a lawful act in an unlawful manner."); *see also Isenhour v. Hutto*, 350 N.C. 601, 609 (1999) (stating that it is irrelevant whether allegations of tortious conduct relate to a public employee defendant's official duties "[b]ecause public employees are individually liable for negligence in the performance of their duties"); *Meyer v. Walls*, 347 N.C. 97, 108 (1997) ("Therefore, the fact that defendants may have been acting as agents of the State does not preclude a claim against defendants.").[2] However, as defendants correctly note, a suit against a State employee in that employee's official capacity is a suit against the State and therefore subject to the doctrine of sovereign immunity. *See Isenhour*, 350 N.C. at 608 ("A suit against a defendant in his individual capacity means that the plaintiff seeks recovery from the defendant directly; a suit against a defendant in his official capacity means that the plaintiff seeks recovery from the entity of which the public servant defendant is an agent." (quoting *Meyer*, 347 N.C. at 110)). As a result, as defendants acknowledge, the threshold question in this case is whether defendants are being sued in their individual or in their official capacities.[3]

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2. It is inconsistent with a fair reading of any of our precedents establishing that sovereign immunity is unavailable to a State employee sued in his or her individual capacity to suggest that the law is "less than clear," on this point. *See, e.g.*, *Mullis v. Sechrest*, 347 N.C. 548, 551 (1998) ("[T]he threshold issue to be determined" when evaluating what immunity defense are available "is whether [the] defendant [ ] is being sued in his official capacity, individual capacity, or both"); *see also* Trey Allen, *Local Government Immunity to Lawsuits in North Carolina*, (Inst. of Gov't, Univ. of N.C. at Chapel Hill, Oct. 2018, at 5–6) ("Under current case law, governmental immunity is not a defense to tort claims alleged against officers or employees in their individual capacities.").

3. The dissent wrongly posits that "the distinction between official and individual capacity conflicts with the concept of waiver of the State's sovereign immunity." In fact, the distinction between an "official" and "individual capacity" suit has been recognized as determinative when examining assertions of sovereign immunity by both the State of North Carolina under State law, as detailed above, and in claims arising under federal law. As we explained in *Corum*,

B. Individual or official capacity

¶ 14 It is abundantly clear from the complaint that defendants are being sued in their individual capacities. "It is a simple matter for attorneys to clarify the capacity in which a defendant is being sued. Pleadings should indicate in the caption the capacity in which a plaintiff intends to hold a defendant liable." *Mullis v. Sechrest*, 347 N.C. 548, 554 (1998). Here, the caption of the complaint lists each named defendant followed by "Individually" after each name. Moreover, the first line of the complaint indicates that the plaintiff is "complaining of the defendants in their individual capacities, jointly and severally." The prayer for relief seeks relief against defendants "jointly and/or severally" after "having stated claims against the defendants, individually and jointly." This is further indication that the complaint states claims against defendants in their individual capacities. *See id.* ("Finally, in the prayer for relief, plaintiffs should indicate whether they seek to recover damages from the defendant individually or as an agent of the governmental entity.").

¶ 15 Importantly, the prayer for relief does not seek injunctive relief implicating the exercise of governmental power—it instead seeks only compensatory and punitive damages against the individual defendants. *See id.* at 552 (discussing the distinction between official and individual capacity claims and noting that "seek[ing] an injunction requiring the defendant to take an action involving the exercise of a governmental power" is indicative of an official capacity suit (quoting *Meyer*, 347 N.C. at 110)). When, as in the instant case, the complaint seeks monetary damages, the claim "is an individual-capacity claim" if "the complaint

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> [S]tate governmental officials can be sued in their individual capacities for damages under [42 U.S.C. §] 1983. . . . [U]nlike a suit against a state official in his official capacity, which is basically a suit against the official office and therefore against the State itself, a suit against an individual who happens to be a governmental official but is not acting in his official capacity is not imputed to the State. Such individuals are sued as individuals, not as governmental employees. Presumably, they are personally liable for payment of any damages awarded.

Corum v. Univ. of N. Carolina Through Bd. of Governors, 330 N.C. 761, 772 (1992); *cf. Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017) ("The identity of the real party in interest dictates what immunities may be available. Defendants in an official-capacity action may assert sovereign immunity. . . . But sovereign immunity does not erect a barrier against suits to impose individual and personal liability.") (internal quotation marks omitted). Recognizing the distinction between official and individual capacity claims in no way "conflicts with the concept of waiver of the State's sovereign immunity" because there is no sovereign immunity to assert when the defendant is sued in his or her individual capacity.

indicates that the damages are sought . . . from the pocket of the individual defendant." *Meyer*, 347 N.C. at 110 (quoting Anita R. Brown-Graham & Jeffrey S. Koeze, *Immunity from Personal Liability under State Law for Public Officials and Employees: An Update*, Loc. Gov't L. Bull. 67 (Inst. of Gov't, Univ. of N.C. at Chapel Hill), Apr. 1995, at 7).

¶ 16 Defendants have argued that they are being sued in their official capacities, and not in their individual capacities, because their allegedly tortious conduct was performed in the scope and course of their employment. However,

> [w]hether the allegations relate to actions outside the scope of defendant's official duties is not relevant in determining whether the defendant is being sued in his or her official or individual capacity. To hold otherwise would contradict North Carolina Supreme Court cases that have held or stated that public employees may be held individually liable for mere negligence in the performance of their duties.

Meyer, 347 N.C. at 111.

¶ 17 Defendants have also argued that "the course of proceedings" indicates that the suit is brought against defendants in their official capacities, not in their individual capacities. However, we need not look to "the course of proceedings" when "the complaint . . . clearly specif[ies] whether the defendants are being sued in their individual or official capacities." *Mullis*, 347 N.C. at 552 (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)). As indicated above, the complaint in this case clearly indicates that defendants are being sued in their individual capacities. There is no ambiguity in the complaint which would require us to look to the course of proceedings to determine in what capacity defendants are being sued.

¶ 18 Essentially, defendants assert that this suit is one against the State because Ms. Long has also sued NCSU in the Industrial Commission. However, "the fact that the Tort Claims Act provides for subject matter jurisdiction in the Industrial Commission over a negligence claim against the State does not preclude a claim against defendants in Superior Court." *Meyer*, 347 N.C. at 108. "A plaintiff may maintain both a suit against a state agency in the Industrial Commission under the Tort Claims Act and a suit against the negligent agent or employee in the General Court of Justice for common-law negligence." *Id.* (citing *Wirth*, 258 N.C. at 507–08).

¶ 19 Finally, defendants asserted at oral argument that regardless of whether the complaint attempts to state claims against defendants in their individual capacities, the General Assembly has "taken off the table" suits against individual employees for conduct within the scope of their employment. Defendants assert that the suit is actually brought against them in their official capacities because the General Assembly has passed a law of general applicability which causes the State to pay judgments in actions brought against State employees. In defendants' view, any other conclusion would "subvert the General Assembly's efforts to route these kinds of tort claims to the Industrial Commission." We can divine no such intent from the statutes that defendants cite.

¶ 20 By statute, the General Assembly has provided that "upon request of an employee or former employee, the State may provide for the defense of any civil or criminal action or proceeding brought against him in his official or individual capacity, or both, on account of an act done or omission made in the scope and course of his employment as a State employee." N.C.G.S. § 143-300.3 (2019). In such a case, the State has set out its intention to "pay (i) a final judgment awarded in a court of competent jurisdiction against a State employee or (ii) the amount due under a settlement of the action under this section." N.C.G.S. § 143-300.6(a) (2019). Defendants argue that these two statutes indicate that an action against a State employee which the State chooses to defend is in actuality an action against the State entitled to sovereign immunity and required to be brought in the Industrial Commission pursuant to the State Tort Claims Act. *See* N.C.G.S. § 143-291(a) (2019) ("The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State.").

¶ 21 The interpretation urged by defendants is belied by the text of the statutes themselves. The provision permitting the payment of judgments and settlements against State employees expressly provides that "[t]his section does not waive the sovereign immunity of the State with respect to any claim." N.C.G.S. § 143-300.6(a). If, as defendants claim, actions against State employees which the State has elected to defend are entitled to sovereign immunity protections and may only proceed in the Industrial Commission, there would have been no need for the General Assembly to specify that judgments or settlements paid in that context are not a waiver of the State's sovereign immunity. If defendants were correct, there would be no danger that the payment of a judgment or settlement in such an action could constitute a waiver of the State's sovereign immunity—the payment would have been made in an Industrial

Commission action pursuant to the State's limited waiver of immunity in the State Tort Claims Act. The General Assembly would have had no reason to specify that the payment of a judgment or settlement on behalf of a State employee "does not waive the sovereign immunity of the State with respect to any claim." *See* N.C.G.S. § 143-300.6(a). Adopting defendants' argument would necessitate the conclusion that section 143-300.6 contains superfluous language—this conclusion is fatal to their claim. *See State v. Morgan*, 372 N.C. 609, 614 (2019) ("[A] statute may not be interpreted 'in a manner which would render any of its words superfluous.' " (quoting *State v. Coffey*, 336 N.C. 412, 417 (1994))).

¶ 22 More broadly, the statutory scheme referenced by defendants would not exist if actions against State employees in their individual capacities were subject to the doctrine of sovereign immunity. "[T]he Tort Claims Act applies only to actions against state departments, institutions, and agencies and does not apply to claims against officers, employees, involuntary servants, and agents of the State." *Meyer*, 347 N.C. at 107. As a result, no action could be maintained in the Industrial Commission against the individual defendants being sued in the instant action. However, section 143-300.6 of our General Statutes contemplates the payment by the State of "a final judgment awarded in a court of competent jurisdiction against a State employee." N.C.G.S. § 143-300.6(a). If these actions could only be brought in the Industrial Commission, which has no jurisdiction over the individual defendants, there would have been no need for the General Assembly to provide for the payment of judgments against State employees in any "court of competent jurisdiction"—no such judgments would exist. *Id.* If the General Assembly had intended that tort claims against State employees be decided in the Industrial Commission, it would not have written a statute that specifically allowed for the State to pay "a final judgment awarded in a court of competent jurisdiction against a State employee." *Id.*

¶ 23 Two more considerations guide our decision on this point. First, adopting defendants' argument would require overruling our prior decisions holding that actions against public employees are not subject to the doctrine of sovereign immunity—decisions issued both before and after the enactment of statutory provisions providing for defense by the State of actions against State employees and the payment by the State of judgments against State employees. *See Wirth*, 258 N.C. at 508 (stating in 1963 that the Tort Claims Act permits a suit against a state agency in the Industrial Commission without abrogating a plaintiff's right to bring an action against the employee of such an agency, who remains "personally liable for his own actionable negligence"); *Meyer*, 347 N.C. at

108 ("Furthermore, the fact that the Tort Claims Act provides for subject matter jurisdiction in the Industrial Commission over a negligence claim against the State does not preclude a claim against defendants in Superior Court.").

¶ 24 Second, we note that the State's decision to defend a State employee for actions in the scope and course of employment is discretionary. *See* N.C.G.S. § 143-300.3. We decline to adopt an interpretation of our statutes which would create serious notice problems for plaintiffs who cannot know whether the State will choose to defend an action against a particular employee, which defendants assert would trigger sovereign immunity and preclude a remedy in superior court. Even assuming that defendants' interpretation was reasonable, we would avoid it. *See In re Arthur*, 291 N.C. 640, 642 (1977) ("Where one of two reasonable constructions will raise a serious constitutional question, the construction which avoids this question should be adopted."). For all of these reasons, we conclude that the trial court erred by granting defendants' motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(2) on the basis of defendants' arguments pertaining to sovereign immunity.

C. Failure to state a claim

¶ 25 "Our review of the grant of a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is de novo." *Bridges*, 366 N.C. at 541. Our task is to determine "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Id.* (quoting *Coley v. State*, 360 N.C. 493, 494–95 (2006)). Defendants argue that Mr. Long failed to allege that his injury was a reasonably foreseeable result of their conduct and that the complaint therefore did not sufficiently establish the element of proximate cause. Defendants also argue that the complaint did not adequately allege the willful or wanton conduct needed to support a claim for punitive damages. We reject both arguments and hold that the trial court erred in granting defendants' motion to dismiss pursuant to Rule 12(b)(6).

1. Proximate cause

¶ 26 **[2]** Defendants argue that the complaint fails to allege that Mr. Long's injury was a reasonably foreseeable consequence of defendants' actions. At oral argument, defendants asserted that there is nothing in the complaint suggesting that they should have known that their conduct could possibly result in the chiller freezing up and pressurizing, thereby causing injury. We conclude that the complaint sufficiently alleges that defendants' actions proximately caused Mr. Long's injury.

¶ 27 In a common law negligence claim, "[i]t is sufficient if by the exercise of reasonable care the defendant might have foreseen that some injury would result from his conduct or that consequences of a generally injurious nature might have been expected. Usually the question of foreseeability is one for the jury." *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 226 (2010) (alteration in original) (quoting *Slaughter v. Slaughter*, 264 N.C. 732, 735 (1965)).

¶ 28 Defendants argue that the complaint "failed to include requisite allegations of fact that a reasonably foreseeable consequence of defendants' alleged failure to properly drain water from the chiller unit's pipes would be a chemical reaction that could lead to a pressurized explosion of sufficient force to propel a 13-pound metal flange at a person's head." However, there is nothing surprising about the fact that water left in pipes that are subjected to freezing temperatures may freeze and cause the pipes to burst. Defendants' description of this phenomenon as "a chemical reaction" does not make the result any less foreseeable. This unsurprising fact is underscored by two signs on the outside of the chiller that read

> **FREEZE WARNING!**
> It is not possible to drain all water from this heat exchanger! For freeze protection during shutdown, exchanger must be drained and refilled with 5 gals Glycol min.
> 80GX504736
> **TRAPPED WATER!**

¶ 29 By comparison, the work order attached to the complaint indicates that defendants were instructed to "drain and secure carrier chiller for relocation." Given that the work order instructed defendants to "drain" the chiller, and that the notice on the chiller specified that it could not be completely drained and it "must be drained and refilled" with antifreeze, defendants were on notice that a necessary part of the task they were instructed to complete was ensuring that antifreeze was added to the chiller. As a result, it is irrelevant that the work order did not specifically instruct defendants to "winterize" the chiller—the complaint alleges sufficient facts that, if true, indicate defendants were on notice that they must refill the chiller with antifreeze after draining it. The work order did not need to set out every step required to execute the task properly and safely.

¶ 30 The complaint alleges that each defendant improperly drained water from the chiller, leaving water inside. It alleges that notices on the chiller warned that it was not possible to drain all water from the chiller and that the chiller must be filled with antifreeze to prevent freezing. The complaint alleges that defendants failed to fill the chiller with antifreeze. The complaint alleges that as a result of this failure, the pipes froze and ruptured. The complaint further alleges that each defendant knew or should have known that this could happen and that the pipes would become pressurized as a result. Finally, the complaint alleges that the pressure in the pipes caused one of the 13-pound metal flanges that defendants allegedly placed on the ends of the pipes to fly off, resulting in injuries that caused Mr. Long's death.

¶ 31 The complaint adequately alleged that defendants either knew or should have known that their conduct would cause damage to the chiller that might leave it in a dangerous state, that defendants in fact caused the damage through their actions, and that injury in fact resulted. This was sufficient, under principles of notice pleading, to "give the substantive elements of a legally recognized claim." *Estate of Savino v. Charlotte-Mecklenburg Hosp. Auth.*, 375 N.C. 288, 297 (2020) (quoting *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 205 (1988)). "[P]roximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case." *McAllister v. Khie Sem Ha*, 347 N.C. 638, 645 (1998) (alteration in original) (quoting *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 403 (1979)). At this stage of the trial, dismissal is not warranted and plaintiff is entitled to proceed in the litigation which will determine whether the evidence bears out the allegations of proximate cause contained in the complaint.

2. Punitive damages

¶ 32 **[3]** As an initial matter, we need to be clear about the statutory standards for recovery of punitive damages applicable here. *See* N.C.G.S. § 1D-15 (2019). There is some suggestion in the briefs that for purposes of punitive damages, gross negligence is equivalent to willful or wanton conduct. However, our law now provides that "[p]unitive damages may be awarded only if the claimant proves" that either fraud, malice, or "[w]illful or wanton conduct" occurred and related to the injury. N.C.G.S. § 1D-15(a). As used here, " '[w]illful or wanton conduct' means more than gross negligence" and is defined as "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in

injury, damage, or other harm." N.C.G.S. § 1D-5 (2019). The complaint alleges that each defendant is liable in negligence and gross negligence for compensatory damages and separately that punitive damages should be awarded. As to the punitive damages claims, we consider whether the complaint "gives sufficient notice of events or transactions to allow the adverse party to understand the nature and basis for the claim[s] [of punitive damages for willful or wanton conduct], to allow him to prepare for trial, and to allow for the application of *res judicata.*" *Henry v. Deen*, 310 N.C. 75, 85 (1984). We conclude that it does. Because willful or wanton conduct is a higher standard than gross negligence, this inquiry obviates any need to separately determine whether the complaint adequately states a claim for gross negligence. *See Estate of Savino*, 375 N.C. at 300 ("[W]illful and wanton and reckless conduct is still a higher degree of negligence or a greater degree of negligence than the negligence of gross negligence . . . ." (quoting *Crow v. Ballard*, 263 N.C. 475, 477 (1965)).

¶ 33 In their brief, defendants argue that the allegations in the complaint do not rise to the level of "willful or wanton conduct" necessary to sustain a claim for punitive damages in the absence of fraud or malice. *See* N.C.G.S. § 1D-15(a). They argue that the complaint contains no allegations creating a factual basis for the "inference that NCSU's employees knew or should have known about the risk of pressurized gas build-up in the chiller's water pipes." In defendants' view, the allegations of the complaint fail to state a claim for punitive damages because they do not establish that defendants were on notice that their actions might cause injury.

¶ 34 Defendants went further at oral argument, contending that because the allegations in the complaint "at most" support the inference that defendants should have known that their conduct could cause injury, the complaint is insufficient to state a claim for punitive damages. Defendants argued that the "willful or wanton conduct" necessary to establish gross negligence requires actual knowledge of the possibility of injury.

¶ 35 As noted above, a claim for punitive damages may be based on allegations of fraud, malice, or "[w]illful or wanton conduct." N.C.G.S. § 1D-15(a). Here, where there are no allegations of fraud or malice, the punitive damages claims are based on the aggravating factor of willful or wanton conduct. Notice pleading principles are applicable to claims for punitive damages. *Shugar v. Guill*, 304 N.C. 332, 337–38 (1981). Under those principles, there must be "sufficient information in the complaint from which defendant [can] take notice and be apprised of 'the events and transactions which produce the claim to enable [him] to understand

the nature of it and the basis for it.' " *Id.* at 338 (second alteration in original) (quoting *Sutton v. Duke*, 277 N.C. 94, 104 (1970)). The complaint need not lay out the "detailed and specific facts giving rise to punitive damages." *Henry*, 310 N.C. at 85 (citing *Sutton*, 277 N.C. at 102).

¶ 36 As to each of the six defendants, the complaint alleges that the defendant's "acts and/or omissions . . . demonstrated a conscious or intentional disregard or indifference to the rights and safety of others, including Joe Long, which [that defendant] knew, or should have known, would be reasonably likely to result in injury or death and as such constituted willful or wanton conduct." The "acts and/or omissions" of each defendant are described as follows:

> a. He improperly drained water from the Carrier chiller;
>
> b. He did not fill the Carrier chiller with glycol, ethylene glycol or some other anti-freeze after draining water from it;
>
> c. He left the Carrier chiller outside when he knew or should have known there was still water in the cooler tubes;
>
> d. He left the Carrier chiller outside when there was water in the cooler tubes when the temperature dropped below freezing;
>
> e. He capped the inlet water pipe and the outlet water pipe of the Carrier chiller with metal flanges when he knew or should have known the cooler tubes could be damaged and the water tubes and pipes could become pressurized;
>
> f. He allowed the inlet water pipe and the outlet water pipe of the Carrier chiller to remain capped when he knew, or should have known, pressure could build up inside the chiller;
>
> g. He did not consult the labels on the Carrier chiller . . . when he shut-down, disconnected, drained, or capped the Carrier chiller;
>
> h. He did not follow the labels . . . when he shut-down, disconnected, drained, or capped the Carrier chiller;

i. He did not consult the Winter Shutdown instructions of the Operating Manual of the Carrier chiller . . . when he shut-down, disconnected, drained, or capped the Carrier chiller;

j. He did not follow the Winter Shutdown instructions of the Operating Manual . . . when he shut-down, disconnected, drained, or capped the Carrier chiller;

k. He ordered shut-down, disconnection, draining, and capping of the Carrier chiller in the wintertime without following the instructions on the labels, the Operating Instruction Manual, or otherwise exercising reasonable care;

l. He directed shut-down, disconnection, draining, and capping of the Carrier chiller in the wintertime without following the instructions on the labels, the Operating Instruction Manual, or otherwise exercising reasonable care;

m. He supervised one or more of the other defendants in the shut-down, disconnection, draining, or capping of the Carrier chiller in the wintertime without following the instructions on the labels, the Operating Instruction Manual, or otherwise exercising reasonable care;

n. He did not warn Joe Long that the Carrier chiller had been shut down in the winter contrary to reasonable safe procedures and that there was high pressure gas behind the metal flanges;

o. He did not warn anyone with Joe Long's employer, Quate Industrial Service, Inc., that the Carrier chiller had been shut down in the winter contrary to reasonable safe procedures and that there was high pressure gas behind the metal flanges;

p. He failed to exercise reasonable care during winter shut-down of the Carrier chiller in such a way that the chill water tubes were damaged by freezing and allowed to become pressurized

and then capped the inlet water pipe and the outlet water pipe so that the Carrier chiller became ultra-hazardous;

q. He did not exercise reasonable care to prevent the metal flange from becoming exposed to pressure from the inside of the chiller;

r. He was otherwise negligent as will be shown through discovery and proven at the trial of this action.

¶ 37 As to each defendant, the complaint alleges that the defendant, either knowingly or with reckless disregard of the consequences of his actions, left the chiller in such a condition that it was likely to seriously injure the next person who came along to work on it. The complaint specifically alleges that each defendant knew or should have known that the chiller's tubes would become damaged in cold weather (knowledge underscored by notices attached to the chiller), and thereby become pressurized. The complaint further alleges that each defendant capped the pipes when each defendant knew or should have known that the pipes would become pressurized. Moreover, the complaint alleges that each defendant's actions "demonstrated a conscious or intentional disregard or indifference to the rights and safety of others, including Joe Long, which [that defendant] knew, or should have known, would be reasonably likely to result in injury or death and as such constituted willful or wanton conduct." These allegations were sufficient to put defendants on notice of the events that the complaint asserts give rise to the claims for punitive damages and are sufficient to allow defendants "to understand the nature and basis for the claim." *See Henry*, 310 N.C. at 85 (citing *Sutton*, 277 N.C. at 102). As a result, the complaint states claims for punitive damages sufficient to survive a motion to dismiss pursuant to Rule 12(b)(6).

III. Conclusion

¶ 38 The complaint in this case makes clear that it is a suit brought against State employees in their individual capacities. Under our prior decisions, it is not subject to the doctrine of sovereign immunity. The State's voluntary election to defend State employees for conduct performed in the course of their employment does not change this analysis, nor does the State's payment of judgments entered against such employees. The complaint adequately alleges facts from which, if true, a jury could find that Mr. Long's injury was proximately caused by defendants' conduct and further alleges facts sufficient to state claims for punitive

damages against defendants. As a result, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice BERGER dissenting.

¶ 39 The State can only act through its officers and employees. The question presented is whether defendants were acting in their official capacity or individually. The statute waiving sovereign immunity grants the Industrial Commission exclusive jurisdiction to make this determination. The majority's holding removes this responsibility from the Industrial Commission and places it in the hands of a plaintiff, which could lead to double recovery by allowing plaintiff to pursue the same claim, for the same conduct, and the same injury, in both the Industrial Commission and superior court. Because the complaint in this case, when fully considered, indicates that plaintiff is suing defendants in their official capacities – the only capacity in which they performed their task – the Industrial Commission has exclusive jurisdiction over this case. Furthermore, the majority's holding constitutes a drastic departure from our requirements to plead facts sufficient to establish both proximate cause and willful or wanton conduct. Therefore, I respectfully dissent.

¶ 40 "Sovereign immunity is a legal principle which states in its broadest terms that the sovereign will not be subject to any form of judicial action without its express consent." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 535, 299 S.E.2d 618, 625 (1983) (quoting 12 Wake Forest L. Rev. 1082, 1083 (1976)). "It has long been established that an action cannot be maintained against the State of North Carolina *or an agency thereof* unless it consents to be sued or upon its waiver of immunity, and that *this immunity is absolute and unqualified*." *Guthrie*, 307 N.C. at 534, 299 S.E.2d at 625 (citations omitted) (emphasis in original) ("The State has absolute immunity in tort actions . . . except insofar as it has consented to be sued or otherwise expressly waived its immunity."). Since the State can only act through individuals, its officers and employees enjoy the protection of the State's sovereign immunity as they perform their official duties.

¶ 41 In N.C.G.S. § 143-291, the General Assembly enacted the State Tort Claims Act (STCA) which partially waived the State's sovereign immunity in tort actions "to enlarge the rights and remedies of a person injured by the actionable negligence of an employee of a State agency while acting in the course of his employment." *Meyer v. Walls*, 347 N.C. 97,

109, 489 S.E.2d 880, 887 (1997) (quoting *Wirth v. Bracey*, 258 N.C. 505, 507–08, 128 S.E.2d 810, 813 (1963)). Subsection 143-291(a) states in relevant part:

> The North Carolina Industrial Commission is hereby *constituted a court for the purpose of hearing and passing upon tort claims* against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State. *The Industrial Commission shall determine whether* or not each individual claim arose as a result of the *negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority*, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

N.C.G.S. § 143-291(a) (2019) (emphases added).

¶ 42 A plain reading of N.C.G.S. § 143-291(a) makes it clear that the Industrial Commission maintains exclusive jurisdiction over tort claims against "the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State." *Id.*; *see Meyer*, 347 N.C. at 105, 489 S.E.2d at 884 ("The only claim authorized by the Tort Claims Act is a claim against the State agency. True, recovery, if any, must be based upon the actionable negligence of an employee of such agency while acting within the scope of his employment." (quoting *Wirth*, 258 N.C. at 507–08, 128 S.E.2d at 813)).

¶ 43 Here, plaintiff sued defendants as employees of North Carolina State University (NCSU). According to the majority, a plaintiff may sue a defendant in their individual capacity in superior court for ordinary negligence that arose during the course and scope of their employment. However, the distinction between official capacity and individual capacity conflicts with both the concept of waiver of sovereign immunity and the plain language of N.C.G.S. § 143-291(a).[1]

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1. We readily acknowledge that our precedent in this area is less than clear and that there has been little discussion on the purpose of the STCA, the plain language of N.C.G.S. § 143-291(a), or the exclusive jurisdiction of the Industrial Commission to make course and scope determinations. The approach taken by the majority, however, is inconsistent with the jurisdiction vested in the Industrial Commission, the limited waiver of the State's sovereign immunity, and the plain language of N.C.G.S. § 143-291(a).

¶ 44 First, N.C.G.S. § 143-291(a) states that the Industrial Commission "shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority[.]" N.C.G.S. § 143-291(a). The plain language of N.C.G.S. § 143-291(a) makes it clear that the Industrial Commission is vested with the power to determine whether the negligence of employees of the State occurred during the course and scope of their employment. However, under the majority's reasoning, a plaintiff is allowed to make this determination simply by including the words "in their individual capacity" in the complaint. In effect, this allows a plaintiff to take away the Industrial Commission's jurisdiction, while at the same time creating jurisdiction in superior court.[2]

¶ 45 Second, because the State can only act through officers and employees, the distinction between official capacity and individual capacity conflicts with the concept of waiver of the State's sovereign immunity. The STCA narrowly waived the State's sovereign immunity for ordinary negligence of a State employee that occurred *within the course and scope of their employment*. In this limited waiver of sovereign immunity, the STCA gave the Industrial Commission exclusive jurisdiction over these types of cases. *See* N.C.G.S. § 143-291(a) ("The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State."). To allow a plaintiff to bring suit in superior court against an employee of the State for ordinary negligence that arose during the course and scope of their employment contravenes the purpose of the STCA.

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2. Allowing plaintiffs to create jurisdiction in superior court by simply using the words "in their individual capacity" in the complaint implicates N.C.G.S. § 143-300.3. N.C.G.S. § 143-300.3 states in relevant part, "upon request of an employee or former employee, the State may provide for the defense of any civil or criminal action or proceeding brought against him in his official or individual capacity, or both, on account of an act done or omission made in the scope and course of his employment as a State employee." N.C.G.S. § 143-300.3 (2019). While the majority is correct that the State's decision to pay is discretionary, this discretionary determination has far reaching consequences. If the State chooses not to provide for the defense of a State employee acting within the course and scope of their employment, State employees could potentially lose their homes and other assets simply because a plaintiff included the words "in their individual capacity" in the complaint. On the other hand, if the State chooses to defend an employee, a plaintiff who uses the words "in their individual capacity" has, in essence, circumvented the Industrial Commission's jurisdiction, and is now bringing a suit against the State in superior court, creating the potential of a double recovery for the same injury.

¶ 46 This situation is similar to cases arising in the workers' compensation context. This Court has stated that

> [t]he North Carolina Industrial Commission has a special or limited jurisdiction created by statute, and confined to its terms. Viewed as a court, it is one of limited jurisdiction, and it is a universal rule of law that parties cannot, by consent, give a court, as such, jurisdiction over subject matter of which it would otherwise not have jurisdiction. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver, or estoppel.

Hart v. Thomasville Motors, Inc., 244 N.C. 84, 88, 92 S.E.2d 673, 676 (1956) (citations omitted). "The Workmen's Compensation Act, in [N.C.] G.S. [§] 97-9, provides that the sole remedy for a covered employee against his employer or those conducting the employer's business is to seek compensation under the Act. Thus, an employee subject to the Act whose *injuries arise out of and in the course of his employment* may not maintain" an action for negligence. *Strickland v. King*, 293 N.C. 731, 733, 239 S.E.2d 243, 244 (1977) (citation omitted) (emphasis added). However, in *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985), we held that "the Workers' Compensation Act does not shield a co-employee from common law liability for willful, wanton and reckless negligence." *Id.* at 716, 325 S.E.2d at 249.

¶ 47 Thus, in the realm of workers' compensation, a plaintiff cannot create jurisdiction and bring a common law negligence action in superior court unless they can show that a defendant's actions rose to the level of willful and wanton conduct. Turning to this case, because N.C.G.S. § 143-291(a) gives the Industrial Commission exclusive jurisdiction over claims against the State and vests the power to determine whether alleged negligence occurred during the course and scope of a defendant's employment, a plaintiff should not be allowed to create jurisdiction in superior court merely by claiming they are suing a defendant "in their individual capacity."

¶ 48 Nevertheless, even assuming that plaintiff can bring this action in superior court, plaintiff's complaint shows that she is suing defendants in their official capacities.

> In ruling on the individual defendants' motions to dismiss, the first step is to determine whether the complaint seeks recovery from the individuals in their official or individual capacities, or both. . . . A suit

> against a defendant in his individual capacity means that the plaintiff seeks recovery from the defendant directly; a suit against a defendant in his official capacity means that the plaintiff seeks recovery from the entity of which the public servant defendant is an agent.

Meyer, 347 N.C. at 110, 489 S.E.2d at 887; *see also White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013) ("A suit against a public official in his official capacity 'is a suit against the State.' " (quoting *Harwood v. Johnson*, 326 N.C. 231, 238, 388 S.E.2d 439, 443 (1990))).

¶ 49 When determining whether a defendant is being sued in their official or individual capacity

> [t]he crucial question . . . is the nature of the relief sought, not the nature of the act or omission alleged. If the plaintiff seeks an injunction requiring the defendant to take an action involving the exercise of a governmental power, the defendant is named in an official capacity. *If money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the government or from the pocket of the individual defendant.* If the former, it is an official-capacity claim; if the latter, it is an individual-capacity claim; and if it is both, then the claims proceed in both capacities.

Mullis v. Sechrest, 347 N.C. 548, 552, 495 S.E.2d 721, 723 (1998) (emphasis added) (quoting *Meyer*, 347 N.C. at 110, 489 S.E.2d at 887).

¶ 50 The majority contends that it is "abundantly clear from the complaint that defendants are being sued in their individual capacities" because the caption and prayer for relief state that plaintiff is suing defendants in their individual capacities. While it is true that "including the words . . . 'in his individual capacity' after a defendant's name obviously clarifies the defendant's status[,]" *Mullis* makes clear that "the allegations as to the extent of liability claimed should provide further evidence of capacity." *Mullis*, 347 N.C. at 554, 495 S.E.2d at 724–25. Therefore, the allegations in the complaint itself must provide further evidence that plaintiff is suing defendants in their individual capacities.

¶ 51 By the majority's reasoning, plaintiffs who simply assert that they are suing defendants in their individual capacity can always bring suit in superior court. As illustrated above, this reasoning would allow

plaintiffs to circumvent the Industrial Commission's jurisdiction to "determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority[.]" N.C.G.S. § 143-291(a). If the majority is correct, any plaintiff may strip the Industrial Commission of its jurisdiction and create jurisdiction in superior court by simply adding "in their individual capacity" to their complaint. This reasoning discards the " 'crucial question' " outlined in *Mullis*: whether monetary damages are being " 'sought from the government or from the pocket of the individual defendant.' " *Mullis*, 347 N.C. at 552, 495 S.E.2d at 723 (quoting *Meyer*, 347 N.C. at 110, 489 S.E.2d at 887). Simply put, the capacity listed by a plaintiff in their complaint is not dispositive.

¶ 52 Further, the majority relies on *Mullis* for the proposition that this Court can only examine the course of proceedings when "the complaint does not clearly specify whether the defendants are being sued in their individual or official capacities." However, nowhere in *Mullis* did this Court claim that when a complaint clearly states the capacity in which the defendant is being sued, we are barred from looking to the "course of proceedings."

¶ 53 Rather, this Court stated "[t]he 'course of proceedings' . . . typically will indicate the nature of the liability sought to be imposed." *Mullis*, 347 N.C. at 552, 495 S.E.2d at 723 (alterations in original) (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)). If this Court is barred from looking to the course of proceedings, any plaintiff can circumvent the Industrial Commission by merely listing the defendants as being sued in their individual capacities in the complaint. Thus, the course of proceedings is helpful in determining the capacity in which a defendant is being sued, regardless of the capacity alleged in a complaint by an interested party.

¶ 54 Lastly, *Mullis* makes it clear that,

> it is often not clear in which capacity the plaintiff seeks to sue the defendant. In such cases it is appropriate for the court to either look to the allegations contained in the complaint to determine plaintiff's intentions or assume that the plaintiff meant to bring the action against the defendant in his or her official capacity.

Mullis, 347 N.C. at 552, 495 S.E.2d at 723 (quoting Anita R. Brown-Graham & Jeffrey S. Koeze, *Immunity from Personal Liability under State Law for Public Officials and Employees: An Update*, Loc. Gov't

L. Bull. 67, at 7 (Inst. Of Gov't, Univ. of N.C. at Chapel Hill), Apr. 1995). Because the capacity listed in a complaint is not dispositive, this Court should consider the allegations in the complaint when making a capacity determination.

¶ 55 Therefore, "our analysis begins with answering the 'crucial question' of what type of relief is sought." *Mullis*, 347 N.C. at 552, 495 S.E.2d at 723. Here, plaintiff is seeking to recover monetary damages. As illustrated above, "[i]f money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the government or from the pocket of the individual defendant." *Id.* (quoting *Meyer*, 347 N.C. at 110, 489 S.E.2d at 887). To make this determination, it is appropriate for us to consider the allegations contained in the complaint and the course of proceedings to determine whether defendants are being sued in their official or individual capacities.

¶ 56 Here, the allegations in the complaint and the course of the proceedings indicate that plaintiff is suing defendants in their official capacities.

¶ 57 First, plaintiff alleges that "[a]t all times pertinent to this action, each defendant was employed by NCSU." This establishes that defendants are agents of NCSU. *See Mullis*, 347 N.C. at 553, 495 S.E.2d at 724 (finding that because the plaintiffs alleged that the defendant was an employee of the Charlotte-Mecklenburg Board of Education "[t]his allegation establishes that defendant . . . is an agent of defendant Board"). Next, plaintiff alleges that the tasks to drain and maintenance the water pipes on the chiller "were done pursuant to NCSU Facilities Operations Work Order # 17-037848." Specifically, the work order states, "Please Drain and Secure Carrier Chiller For Relocation." Nowhere in the work order is it stated that defendants were required to refill the chiller with antifreeze upon completion of their maintenance. Therefore, the substance of plaintiff's allegations show that the alleged negligence arose from defendants carrying out a work order directed by NCSU.

¶ 58 This situation is similar to this Court's analysis in *Mullis*. In *Mullis* this Court stated

> plaintiffs set forth only one claim for relief in their complaint. In the beginning of their claim for relief, plaintiffs allege that "the Defendant Charlotte[–] Mecklenburg School System provided, permitted and directed the operation of a Rockwell tilting arbor saw, model # 34–399 in its industrial arts class." Later in the complaint, plaintiffs specifically allege that defendant Sechrest negligently failed to give reasonable

> or adequate instructions or warnings concerning the dangers inherent in the use of the saw and provided a machine that was unsafe. However, we note that it was necessary to allege defendant Sechrest's negligence in the complaint because he was acting as an agent of defendant Board in performing his duties. The fact that there is only one claim for relief is also indicative of plaintiffs' intention to sue defendant Sechrest in his official capacity, as an agent of defendant Board.

Mullis, 347 N.C. at 553, 495 S.E.2d at 724 (alteration in original) (citation omitted). Here, plaintiff's only real claim for relief is that defendants were negligent in carrying out a work order issued by NCSU. While plaintiff alleged defendants' negligence in failing to properly refill the chiller and warn Mr. Long, this was necessary to allege defendants' negligence in the complaint because these employees were acting as agents of NCSU. *See id.* ("[I]t [is] necessary to allege defendant['s] . . . negligence in the complaint because he was acting as an agent of defendant Board in performing his duties."). In essence, there is only one claim for relief because it is readily apparent that plaintiff was suing defendants in their official capacities for the work performed pursuant to the work order.

¶ 59 Further, the fact that plaintiff's complaints in the Industrial Commission and superior court are largely duplicative is indicative that plaintiff is suing defendants in their official capacities. In both complaints, plaintiff alleges that defendants failed to properly follow protocols when performing maintenance on the chiller before moving it outside, that they negligently put metal flanges on the ends of the water lines, and that they failed to warn Mr. Long of their failure to follow protocol. The only major difference between the complaints is that the Industrial Commission complaint listed NCSU and "John Doe" as defendants and the superior court complaint listed defendants as individuals. As illustrated above, a plaintiff should not be able to circumvent the Industrial Commission's jurisdiction and create jurisdiction in superior court by simply alleging they are suing defendants in their individual capacities. Accordingly, the duplicative nature of plaintiff's complaints further illustrates that this suit is against defendants in their official capacities.

¶ 60 Thus, "the [allegations in the] complaint, along with the course of proceedings in the present case," indicate that this case is really an official-capacity claim couched under the heading of an individual capacity suit. *Mullis*, 347 N.C. at 554, 495 S.E.2d at 725. As such, this suit is effectively one against the State. *See White*, 366 N.C. at 363, 736 S.E.2d

at 168 ("A suit against a public official in his official capacity 'is a suit against the State.' " (quoting *Harwood*, 326 N.C. at 238, 388 S.E.2d at 443)). Thus, the Industrial Commission has exclusive jurisdiction to resolve this dispute, and plaintiff should be precluded from bringing this action in superior court.

¶ 61 Nevertheless, even assuming plaintiff's suit was against defendants in their individual capacity and the superior court had jurisdiction to hear it, plaintiff has failed to allege facts sufficient to show that defendants' actions were the proximate cause of Mr. Long's injuries. Plaintiff also failed to allege facts sufficient to state a claim for punitive damages.

> This Court reviews a trial court's order on a motion to dismiss de novo and considers "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory[.]"

Cheryl Lloyd Humphrey Land Inv. Co., LLC v. Resco Prods., Inc., 2021-NCSC-56, ¶ 8 (citation omitted) (quoting *Coley v. Stat*e, 360 N.C. 493, 494–95, 631 S.E.2d 121, 123 (2006)).

> Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Id. (citation and quotation marks omitted).

> An allegation of negligence must be sufficiently specific to give information of the particular acts complained of; a general allegation without such particularity does not set out the nature of plaintiff's demand sufficiently to enable the defendant to prepare his defense.
>
> The complaint must show that the particular facts charged as negligence were the efficient and proximate cause, or one of such causes, of the injury of which the plaintiff complains.

Stamey v. Rutherfordton Elec. Membership Corp., 247 N.C. 640, 645, 101 S.E.2d 814, 818 (1958) (cleaned up).

¶ 62 This Court has stated

> [t]he fact that the defendant has been guilty of negligence, followed by an injury, does not make him liable for that injury, which is sought to be referred to the negligence, unless the connection of cause and effect is established; and the negligent act of the defendant must not only be the cause, but the proximate cause, of the injury. The burden was therefore upon the plaintiff to show that defendant's alleged negligence proximately caused his intestate's death, and the proof should have been of such a character as reasonably to warrant the inference of the fact required to be established, and *not merely sufficient to raise a surmise or conjecture as to the existence of the essential fact.*

Byrd v. S. Express Co., 139 N.C. 273, 275, 51 S.E. 851, 851–52 (1905) (emphasis added) (citation omitted). In defining proximate cause, we have said

> [p]roximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have *reasonably foreseen* that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed. Foreseeability is thus a requisite of proximate cause, which is, in turn, a requisite for actionable negligence.

Hairston v. Alexander Tank & Equip. Co., 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984) (emphasis added) (citations omitted).

> To establish foreseeability, the plaintiff must prove that defendant, in the exercise of reasonable care, might have foreseen that its actions would cause some injury. The defendant must exercise reasonable prevision in order to avoid liability. *The law does not require a defendant to anticipate events which are merely possible but only those which are reasonably foreseeable.*

Bolkhir v. N.C. State Univ., 321 N.C. 706, 710, 365 S.E.2d 898, 901 (1988) (cleaned up) (emphasis added). Further, "[p]roximate cause is

an inference of fact to be drawn from other facts and circumstances." *Hairston*, 310 N.C. at 234, 311 S.E.2d at 566.

¶ 63 As an initial matter, the majority diminishes the pleading requirements to sufficiently allege proximate cause. In her complaint, plaintiff asserted that "[defendants] capped the inlet water pipe and the outlet water pipe of the Carrier chiller with metal flanges when [they] knew or should have known the cooler tubes could be damaged and the water tubes and pipes could become pressurized[.]" Additionally, plaintiff alleged that "[defendants] allowed the inlet water pipe and the outlet water pipe of the Carrier chiller to remain capped when [they] knew, or should have known, pressure could build up inside the chiller[.]" However, outside of a cursory allegation that defendants' negligence was a "direct and proximate result" of Mr. Long's injuries, plaintiff failed to adequately allege that the foreseeable consequence of this negligence was that the chiller would pressurize, explode, and blow the metal flange into Mr. Long causing injury.

¶ 64 As the majority notes, a sign on the chiller contained a warning indicating that it was "not possible to drain all water" from the chiller and that the chiller "must be drained and refilled with" antifreeze solution "[f]or freeze protection during shut-down." Similarly, the chiller's operating manual instructed that the chiller should be filled with antifreeze to "prevent freeze-up damage to the cooler tubes[.]" It appears that the majority is correct that defendants did not put antifreeze into the chiller. However, nothing in the work order or on the labels contained on the outside of the chiller mentioned that failing to refill the chiller with antifreeze would create a possibility of a pressurized buildup that could cause injury. In fact, the only warning mentioned on the labels was that failure to fill the chiller with antifreeze could cause "damage to the cooler tubes." Thus, the foreseeable consequence of failing to follow the chiller's warning labels is damage to the machinery itself.

¶ 65 Accordingly, plaintiff has failed allege facts sufficient to establish that defendants "in the exercise of reasonable care, might have foreseen that [their] actions" in failing to refill the chiller with antifreeze would cause some injury. *Bolkhir*, 321 N.C. at 710, 365 S.E.2d at 901. Simply put, it was not reasonably foreseeable that, in the face of the instructions on the work order and the labels on the chiller, defendants' actions would cause injury to Mr. Long. Because "[t]he law does not require a defendant to anticipate events which are merely possible but only those which are reasonably foreseeable[,]" *id.*, plaintiff has failed allege facts sufficient to establish that defendants' actions were the proximate cause of Mr. Long's injuries.

¶ 66 Lastly, the majority's holding that plaintiff adequately alleged willful or wanton conduct to bring a claim for punitive damages constitutes a dangerous reduction of the pleading requirements necessary for punitive damages in this State. Section 1D-15(a) of our General Statutes states that

> [p]unitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:
>
> (1) Fraud.
>
> (2) Malice.
>
> (3) Willful or wanton conduct.

N.C.G.S. § 1D-15(a) (2019). Section 1D-5 defines "[w]illful or wanton conduct" as

> the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. "Willful or wanton conduct" means more than gross negligence.

N.C.G.S. § 1D-5(7) (2019). "[T]his Court held that it was not sufficient to state a cause of action for punitive damages to allege that the defendant's conduct was 'willful, wanton and gross' . . . . " *Shugar v. Guill*, 304 N.C. 332, 336, 283 S.E.2d 507, 509 (1981) (quoting *Clemmons v. Life Ins. Co. of Ga.*, 274 N.C. 416, 424, 163 S.E.2d 761, 767 (1968)). Rather, a "plaintiff's complaint *must* allege facts or elements showing the aggravating circumstances which would justify the award of punitive damages." *Shugar*, 304 N.C. at 336, 283 S.E.2d at 510 (citation omitted).

¶ 67 Here, plaintiff alleged "[s]ome or all of the acts and/or omissions of defendant[s] . . . constituted gross negligence" and that "[s]ome or all of the acts and/or omissions of defendant[s] . . . demonstrated a conscious or intentional disregard or indifference to the rights and safety of others, including Joe Long, which defendant[s] . . . knew, or should have known, would be reasonably likely to result in injury or death and as such constituted willful or wanton conduct." Outside of these allegations, plaintiff failed to set out the facts and circumstances to illustrate that defendants' actions constituted a "conscious and intentional dis-

regard of and indifference to the rights and safety of others." *Hinson v. Dawson*, 244 N.C. 23, 28, 92 S.E.2d 393, 397 (1956). Plaintiff's complaint, at most, alleges that defendants negligently failed to follow the warning signs on the chiller which ultimately lead to Mr. Long's injuries. Nothing in the complaint points to any conscious disregard for the safety of others to rise to the level of willful or wanton conduct. As such, plaintiff failed to adequately allege willful or wanton conduct.

¶ 68 The allegations in the complaint, coupled with the course of proceedings, make it clear that plaintiff is suing defendants in their official capacities, and the Industrial Commission has exclusive jurisdiction over this case. Even assuming the superior court had jurisdiction to hear this case, plaintiff has failed to allege facts sufficient to show that defendants' conduct proximately caused Mr. Long's injuries. Plaintiff has also failed to state a claim for punitive damages. Therefore, the decision of the Court of Appeals should be reversed, and I respectfully dissent from the majority's opinion.

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

MARISA MUCHA
v.
LOGAN WAGNER

No. 307PA20

Filed 13 August 2021

Jurisdiction—personal—minimum contacts—cell phone calls—no knowledge recipient in N.C.

Defendant lacked the requisite minimum contacts with the state of North Carolina to be subject to the exercise of personal jurisdiction in a domestic violence protection order (DVPO) proceeding where defendant, who had previously been in a romantic relationship with plaintiff outside of North Carolina, called plaintiff's cell phone many times on the evening that plaintiff had moved from South Carolina to North Carolina—when there was no evidence that defendant knew or had reason to know that plaintiff was in North Carolina. Because he did not know plaintiff was in North Carolina, defendant's phone calls did not constitute purposeful availment of the benefits and protections of the laws of North Carolina. In

addition, plaintiff's argument that the "status exception" doctrine allowed exercise of personal jurisdiction was rejected.

On discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal of right of a substantial constitutional question pursuant to N.C.G.S. § 7A-30(1) of a unanimous decision of the Court of Appeals, 271 N.C. App. 636 (2020), affirming orders entered on 13 June 2018 and 27 June 2018 by Judge Debra S. Sasser in District Court, Wake County.

Robinson, Bradshaw & Hinson, P.A., by Erik R. Zimmerman, Andrew R. Wagner, and Jazzmin M. Romero, for plaintiff-appellee.

Parrott Law, PLLC, by Robert J. Parrott Jr., for defendant-appellant.

EARLS, Justice.

¶ 1 Before the advent of mobile telephone technology and before call forwarding was available, a person making a telephone call would know the approximate physical location of anyone who answered the phone based on the area code and prefix of the telephone number they dialed. However, the number of landlines is rapidly dwindling, and a person's phone number alone no longer provides a reliable indication of that person's location.[1] As a result, it is important to determine whether, and under what circumstances, a telephone call to a cell phone can subject the caller to personal jurisdiction in the state where the phone happens to be when it is answered.

¶ 2 Specifically, in this case, we examine whether the District Court, Wake County, could exercise personal jurisdiction over the defendant, Logan Wagner, in a proceeding initiated by the plaintiff, Marisa Mucha, who was seeking to obtain a domestic violence protection order (DVPO). The only contact Wagner had with North Carolina was a series of phone calls he made to Mucha's cell phone on the day she moved to the State. We conclude that Wagner did not have the requisite minimum contacts with North Carolina because he did not purposefully avail himself of the benefits and protections of North Carolina's laws. Therefore, we hold that the trial court could not exercise personal jurisdiction over Wagner consistent with the Due Process Clause of the Fourteenth Amendment

1. According to the National Center for Health Statistics, "[t]he second 6 months of 2016 was the first time that a majority of American homes had only wireless telephones." Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2016*, U.S. Department of Health and Human Services Centers for Disease Control and Prevention (May 2017).

to the Constitution of the United States. We reverse the decision of the Court of Appeals which affirmed the trial court's decision to exercise jurisdiction, and we vacate the trial court's order for lack of personal jurisdiction over Wagner.

I. Factual Background

¶ 3 Wagner and Mucha were previously in a romantic relationship for some time. After the relationship ended, Mucha—who was attending college in South Carolina— told Wagner—who lived in Connecticut—never to contact her again. Wagner did not abide by Mucha's request. While Mucha was living in South Carolina, Wagner sent her a letter and a text message. His unwelcome efforts to reach Mucha culminated on 15 May 2018. That afternoon, unbeknownst to Wagner, Mucha moved from South Carolina to North Carolina after finishing her college semester. That evening, Mucha received twenty-eight phone calls from an unknown number. When she answered one of the calls, Wagner identified himself, and Mucha hung up. Wagner kept calling. Mucha picked up again and told Wagner to stop. Wagner left a voice message. When Mucha listened to the message, she suffered a panic attack. The next day, she filed a pro se complaint and motion for a DVPO in District Court, Wake County.

¶ 4 Wagner's attorney entered a limited appearance for the purposes of contesting the trial court's personal jurisdiction and filed a motion to dismiss. According to Wagner, the Due Process Clause of the Fourteenth Amendment forbade the trial court from exercising personal jurisdiction over him because he neither "affirmatively direct[ed] any phone calls [to] North Carolina" nor "purposefully avail[ed] himself of any protections of the State."[2] Wagner contended that because he did not know or have any reason to know Mucha would be located in North Carolina when he called her, he lacked "fair warning that he might be required to defend himself there."

¶ 5 The trial court denied Wagner's motion to dismiss and, after a hearing during which Mucha and two witnesses testified, entered a DVPO. Wagner appealed solely the trial court's order finding personal jurisdiction. The Court of Appeals unanimously affirmed. According to the Court of Appeals, because Wagner "knew that [Mucha's] semester of

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2. Wagner failed to preserve his challenge to the trial court's jurisdiction as exceeding the scope of North Carolina's long-arm statute, N.C.G.S. § 1-75.4, which he attempted to raise for the first time on appeal. Therefore, we assume for purposes of resolving this case that the trial court's exercise of personal jurisdiction was authorized by the long-arm statute.

college had ended and she may no longer be residing [in South Carolina] . . . his conduct—purposefully directed at Mucha—was sufficient for him to reasonably anticipate being haled into court wherever Mucha resided when she received the calls." *Mucha v. Wagner*, 271 N.C. App. 636, 637–38 (2020).

II. Personal Jurisdiction Analysis

¶ 6 The reason Wagner's phone calls to Mucha brought him into contact with North Carolina is because Mucha had traveled here, just hours before Wagner made the calls to her cell phone. Although Wagner may have known or had reason to know that Mucha would be leaving South Carolina at the end of her semester, there is nothing in the record to support the inference that Wagner knew or had any reason to know that Mucha was present in North Carolina.[3] Both the trial court and the Court of Appeals ignored this distinction. In doing so, the courts below failed to adhere to the fundamental due-process principle that there is no personal jurisdiction over a defendant who has not initiated "certain minimum contacts with [the forum state]." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

¶ 7 In examining a defendant's connection to the forum state, the Due Process Clause "requires a forum-by-forum, or sovereign-by-sovereign, analysis." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011). Here, Wagner's only connection with the State of North Carolina resulted from "random, isolated, or fortuitous" events. *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 774 (1984). Under these circumstances, the Due Process Clause does not permit a North Carolina court to exercise personal jurisdiction over Wagner.

A. Personal jurisdiction under the Due Process Clause

¶ 8 "The Fourteenth Amendment's Due Process Clause limits a state court's power to exercise jurisdiction over a defendant." *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021). "The primary concern of the Due Process Clause as it relates to a court's jurisdiction over a nonresident defendant is the protection of 'an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations.' "

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3. Mucha's argument to the contrary is that Wagner "had reason to know that Mucha had recently moved" because she was a college student, "[s]pring semesters at college typically end by mid-May[,] . . . [a]nd many college students move to other states during the summer." At most, this supports the inference that Wagner should have known Mucha might not be located in South Carolina, but it does not support the inference that Mucha had reason to know where specifically Mucha had travelled.

Beem USA Ltd.-Liab. Ltd. P'ship v. Grax Consulting LLC, 373 N.C. 297, 302 (2020) (cleaned up) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985)).

¶ 9 In order for a state court to exercise jurisdiction over a defendant who is not subject to general jurisdiction in the forum state[4] and who is not present in the forum state, the defendant must "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co.*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Although this canonical formulation has been tested over the years, the United States Supreme Court has continued to emphasize that the due process inquiry is "focused on the nature and extent of '*the defendant's* relationship to the forum State.' " *Ford Motor Co.*, 141 S. Ct. at 1024 (emphasis added) (quoting *Bristol-Myers Squibb Co. v. Super. Ct. of California, San Francisco Cnty.*, 137 S. Ct. 1773, 1779 (2017)). Courts must not "improperly attribute a plaintiff's forum connections to the defendant and make those connections decisive in the jurisdictional analysis." *Walden v. Fiore*, 571 U.S. 277, 289 (2014) (quoting *Rush v. Savchuk*, 444 U.S. 230, 332 (1980)).

¶ 10 To ascertain whether a defendant's contacts are of the frequency and kind necessary to surpass the "minimum contacts" threshold, courts must first examine whether the defendant has taken "some act by which [he or she] *purposefully avails* [himself or herself] of the privilege of conducting activities within the forum State." *Hanson v. Denckla*, 357 U.S. 255, 253 (1958). To establish that a defendant has purposefully availed himself or herself of the benefits and protections of the laws of a forum state, 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." *Ford Motor Co.*, 141 S. Ct. at 1025 (second alteration in original) (quoting *Walden*, 571 U.S. at 285). The focus on the defendant's conduct reflects one of the core concerns underpinning personal jurisdiction doctrine and the Due Process Clause, "treating defendants fairly." *Id.* at 1025. Due process requires "that individuals have

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4. There is no disputing that Wagner is not subject to general jurisdiction in North Carolina because his "affiliations with the State are [not] so 'continuous and systematic' as to render [him] essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (quoting *Int'l Shoe*, 326 U.S. at 317). Instead, we consider only whether Wagner is subject to specific jurisdiction, because the proceeding at issue "aris[es] out of or relate[s] to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 (1984).

fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign," so that they may "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. v. Woodson*, 444 U.S. 297 (1980)).

¶ 11 Under the "purposeful availment" test, the absence of any evidence suggesting Wagner had any reason to know Mucha was in North Carolina at the time he called her is dispositive. In prior cases where this Court has found a defendant's one-time contacts sufficient to create specific personal jurisdiction in North Carolina, the defendant knew or reasonably should have known that by undertaking some action, the defendant was establishing a connection with the State of North Carolina. This awareness—whether actual or imputed—is what permits a court in North Carolina to exercise judicial authority over the nonresident defendant.

¶ 12 For example, in *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, the defendant was a clothing distributor with its principal place of business in New York who entered into a contract to purchase clothes from a North Carolina manufacturer. 318 N.C. 361, 362–63 (1986). When a dispute regarding the contract arose, the plaintiff sued the defendant in a North Carolina court, and the defendant moved to dismiss for lack of personal jurisdiction, which the trial court denied. *Id.* at 364. On appeal, this Court concluded that the defendant had purposefully availed itself of the benefits and protections of the laws of North Carolina when it entered into the contract with the clothing manufacturer. *Id.* at 367. Yet it was not the existence of the defendant's contract with a North Carolina resident which alone sufficed to "establish the necessary minimum contacts with this State." *Id.* at 367. It was the fact that the defendant had "made an offer to [a] plaintiff whom defendant *knew to be located in North Carolina*." *Id.* (emphasis added). Because the defendant "was told that the shirts would be cut in North Carolina, and defendant also agreed to send its personal labels to plaintiff in North Carolina for plaintiff to attach to the shirts[, d]efendant was thus aware that the contract was going to be substantially performed in this State." *Id.*

¶ 13 Similarly, in *Beem*, we held that it was permissible for a North Carolina court to exercise personal jurisdiction over a nonresident corporate defendant because the defendant's "sole representative came to North Carolina to open a bank account on behalf [of] the partnership that [it] subsequently used for [ ] business activities [with the plaintiff], and he also traveled to this state on three separate occasions to discuss

[business].” *Beem USA Ltd.-Liab. Ltd. P’ship*, 373 N.C. at 306. Thus, in both *Tom Togs* and *Beem*, it was fair to exercise personal jurisdiction over the defendant because there was evidence indicating the defendant knew (or should have known) that conduct directed at the plaintiff was conduct directed at the State of North Carolina.

¶ 14 The significance of a defendant’s awareness of the connection between the conduct the defendant chooses to engage in and the forum state is also reflected in United States Supreme Court precedent. The Due Process Clause requires evidence indicating that a defendant was on notice he or she could be subjected to suit in the specific state in which the plaintiff seeks redress, not merely in any state besides the one in which the defendant is domiciled. For example, in *Keeton*, the fact that the defendant “produce[d] a national publication aimed at a nationwide audience” did not, on its own, necessarily give rise to personal jurisdiction in every state in the nation. *Keeton v. Hustler Mag., Inc.*, 465 U.S. at 781. Instead, the New Hampshire court seeking to exercise personal jurisdiction over the defendant could do so because the defendant had “continuously and deliberately exploited the New Hampshire market,” as evidenced by the “substantial number of copies . . . regularly sold and distributed” in the state. *Id.* There was “no unfairness in calling [the defendant] to answer for the contents of that publication” in a jurisdiction it had purposefully sought to enter into. *Id.*

¶ 15 The United States Supreme Court’s more recent “stream of commerce” decisions also support Wagner’s position. These cases have drawn a distinction between conduct targeted at states generally and conduct targeted at the specific forum state seeking to exercise jurisdiction over the defendant. Thus, the Court has held that a forum state may exercise personal jurisdiction over a defendant who “delivers its products into the stream of commerce with *the expectation* that they will be purchased by consumers in the forum State,” *World-Wide Volkswagen Corp.*, 444 U.S. at 297–98 (emphasis added), but not over a defendant who “directed marketing and sales efforts at the United States” without “engag[ing] in conduct purposefully directed at [the forum state].” *J. McIntyre Mach., Ltd.*, 564 U.S. 885–86.

¶ 16 Concurring separately in *J. McIntyre*, Justice Breyer explained that jurisdiction did not arise even when the defendant “kn[ew] or reasonably should [have] know[n] that its products [we]re distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states.” *Id.* at 891 (Breyer, J., concurring) (cleaned up) (quoting *Nicastro v. McIntyre Mach. Am., Ltd.*, 201 N.J. 48, 76–77 (2010)). Rather, the defendant must have targeted the forum

state specifically. Finding personal jurisdiction without evidence that the defendant intentionally targeted the forum state would "abandon the heretofore accepted inquiry of whether, focusing upon the relationship between 'the defendant, the *forum*, and the litigation,' it is fair, in light of the defendant's contacts *with that forum*, to subject the defendant to suit there." *Id.* (quoting *Shaffer*, 433 U.S. at 204).

¶ 17 These cases establish two important principles. First, conduct directed at a person is not necessarily the same as conduct directed at a forum state. Second, a defendant's knowledge that a plaintiff could be somewhere other than the state in which the plaintiff typically resides is not sufficient to establish personal jurisdiction in any state where the plaintiff happens to be. Applying these principles to this case, Wagner has not purposefully availed himself of the benefits and protections of the laws of North Carolina. While Wagner purposefully directed conduct at Mucha, he had no way of knowing that in doing so he was establishing any connection with the State of North Carolina. There is no evidence in the record to support the conclusion that he could have "reasonably anticipate[d] being haled into court" in North Carolina. *World-Wide Volkswagen Corp.*, 444 U.S. at 297.

¶ 18 In the alternative, Mucha asserts that "purposeful availment" is not the proper test for determining personal jurisdiction when the defendant is accused of committing an act of domestic violence, which Mucha analogizes to an intentional tort. As she correctly notes, many of the cases applying the purposeful availment test "involved business-related claims and conduct," such as those arising from contract disputes or allegedly defective products. Mucha argues that instead of the "purposeful availment" test, the right standard is "purposeful direction" because Wagner has undertaken an intentional course of conduct which violated North Carolina law. According to Mucha, the purposeful direction standard differs from the purposeful availment test because "the question is not whether an intentional tortfeasor *availed* himself of the forum state's laws. It is whether he *obstructed* the forum state's laws by directing his tortious conduct at the forum."

¶ 19 Even if the "purposeful direction" standard applies—and assuming "purposeful direction" and "purposeful availment" impose distinct requirements[5]—Mucha still cannot prevail. Mucha's argument, in essence,

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5. It is not clear that they do. In *Burger King*, which involved a tortious interference claim, the Court explained that the Due Process Clause's " 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those

is that a defendant is subject to personal jurisdiction in a state whenever (1) he intentionally engages in conduct, (2) which "obstructs" the laws of the forum state, and (3) injures someone in the forum state. This proposed test overlooks the requirement that the defendant himself have established minimum contacts with the forum state, which necessitates the defendant having some reason to know his conduct will bring him into contact with the particular forum state, a requirement which is found in numerous cases resolving intentional tort claims. *See, e.g.*, *Tamburo v. Dworkin*, 601 F.3d 693, 706 (7th Cir. 2010) (holding that there was personal jurisdiction because defendants "specifically aimed their tortious conduct at [plaintiff] and his business in Illinois with the knowledge that he lived, worked, and would suffer the brunt of the injury there") (cleaned up).

¶ 20 For jurisdiction to vest in a particular forum state under the purposeful direction test, the defendant must "expressly aim" his or her conduct at that state. *Calder v. Jones*, 465 U.S. 783, 789 (1984). This requirement demands proof the defendant had some reason to foresee which state's laws would be obstructed and where harm would occur when choosing to engage in the conduct purporting to vest the forum state's courts with jurisdiction. *See Walden*, 571 U.S. at 290 ("[M]ere injury to a forum resident is not a sufficient connection to the forum. . . . The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way."); *Marten v. Godwin*, 499 F.3d 290, 297–98 (3d Cir. 2007) ("To establish that the defendant expressly aimed his conduct [at the forum state], the plaintiff has to demonstrate the defendant knew that the plaintiff would suffer the brunt of the harm caused by the tortious conduct in the forum." (cleaned up) (quoting *IMO Indus. v. Kiekert AG*, 155 F.3d 254, 265–66 (3d Cir. 1998)); *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002) (interpreting *Calder* to "require[ ] that the defendant allegedly have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant *knows is likely to be suffered in the forum state*.") (emphasis added).

¶ 21 The act of calling a cell phone number registered in one state does not automatically vest jurisdiction in any state where the recipient of

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activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–73 (1985) (citations omitted) (first quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984); then quoting *Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. 408, 414 (1984)). The Court then proceeded to analyze whether the defendant had maintained the requisite "minimum contacts" with the forum state. *Id.* at 474. This suggests that "purposeful availment" and "purposeful direction" are largely interchangeable.

the call happens to be located at the time the call is made. For example, in *Long v. Vitkauskas*, the Mississippi Supreme Court held that a Mississippi trial court lacked personal jurisdiction over a defendant in an alienation of affection action when the only evidence establishing a connection between the defendant and the state was "an extensive log of telephone calls and text messages between [the defendant] and [a Mississippi resident]." 287 So. 3d 171, 174 (Miss. 2019). Even though the defendant did not dispute that he had made phone calls to a Mississippi resident who was located in Mississippi when she received the calls, the court was found to lack jurisdiction because the Mississippi resident had a cellphone number registered in Tennessee and there was no other evidence the defendant was aware of her Mississippi residency. *Id.*; *see also Hood v. Am. Auto Care, LLC*, No. 18-CV-02807-PAB-SKC, 2020 WL 1333091, at *4 (D. Colo. Mar. 23, 2020) (holding that a Colorado court lacked personal jurisdiction over a telemarketing company who called a Colorado resident on a cell phone with a Vermont area code in the absence of "evidence that would allow the Court to infer that defendants knew that his Vermont phone number was associated with a Colorado resident").

¶ 22 Finally, Mucha argues that due process permits "a lesser showing of minimum contacts than would otherwise be required" to establish personal jurisdiction in a business dispute given the State's significant interest in protecting its residents against domestic violence. *See Burger King Corp.*, 471 U.S. at 477. No one disputes the magnitude of the State's interest in enabling its residents to live free from harassment, abuse, and violence. To be sure, DVPOs implicate very different governmental interests than the need for orderly resolution of contract disputes. Nevertheless, other state courts examining personal jurisdiction claims in the context of domestic violence orders have not jettisoned the purposeful availment requirement. *See Fox v. Fox*, 2014 VT 100, ¶ 30, 197 Vt. 466, 106 A.3d 919 (concluding that Vermont trial court lacked personal jurisdiction to enter protective order because "defendant did not avail himself of any benefits or protections of Vermont's laws, or subject himself to the authority of Vermont's courts"); *Shah v. Shah*, 184 N.J. 125, 139, 875 A.2d 931, 940 (2005) (concluding that the trial court lacked personal jurisdiction over a defendant who "has not 'purposefully availed' himself of the laws of New Jersey").

¶ 23 Indeed, under similar circumstances, a Florida intermediate appellate court concluded its courts lacked personal jurisdiction to enter a protective order against a defendant who sent voice and text messages to the plaintiff's cellphone while she was located in Florida, because the

plaintiff had a Maryland number and "there [was] nothing in the petition . . . alleging that [the defendant] knew [the plaintiff] was present in Florida at the time he left the messages on her cellular phone." *Becker v. Johnson*, 937 So. 2d 1128, 1131 (Fla. Dist. Ct. App. 2006). While these decisions are not binding on this Court, they are instructive as to how other courts have given meaning to Due Process Clause protections. We conclude that even taking into account the nature of the important governmental interest in preventing domestic violence, minimum contacts are required for personal jurisdiction to vest over a nonresident defendant, and there are not sufficient minimum contacts absent proof that the defendant purposefully established a connection with the forum state.

¶ 24 Under the Due Process Clause, the "constitutional touchstone" is always "whether the defendant *purposefully* established 'minimum contacts' in the forum State." *Burger King Corp.*, 471 U.S. 462 at 474 (emphasis added) (quoting *Int'l Shoe Co.*, 326 U.S. at 316). To hold that the magnitude of the State's interest justifies an exercise of personal jurisdiction in the absence of proof the defendant "purposefully availed" himself of or "expressly aimed" his conduct towards North Carolina would necessarily "offend 'traditional notions of fair play and substantial justice.' " *Int'l Shoe Co.*, 326 U.S. at 316 (quoting *Milliken*, 311 U.S. at 463). It would also open the door to the abandonment of due process protections in other settings where the State's interest is also compelling.

¶ 25 Our decision in this case addresses a unique situation characterized by a crucial fact: Wagner lacked any reason to know or suspect that Mucha had moved to and was present in North Carolina. Further, it also appears from the record that neither Mucha nor Wagner had any ties to North Carolina at all prior to Mucha moving to the state. In another case, it would likely alter the jurisdictional analysis if the defendant had called the plaintiff in North Carolina on a phone number linked to a physical address in North Carolina, *see, e.g.*, *Hughs ex rel. Praul v. Cole*, 572 N.W.2d 747, 751 (Minn. Ct. App. 1997) (concluding Minnesota court had personal jurisdiction because "[t]he record indicates [the defendant] made repeated telephone calls to respondent's home" in Minnesota while maintaining a relationship with his son who lived there), if the defendant had reason to anticipate that the plaintiff would travel to or "seek refuge" in North Carolina, *Becker*, 937 So. 2d at 1131, or if the prior relationship between the defendant and the plaintiff began in or significantly involved the State of North Carolina.

¶ 26 Having determined that the trial court lacked personal jurisdiction over Wagner, we now consider Mucha's argument that the trial court

did not need to have personal jurisdiction over Wagner to enter a DVPO against him.

B. The "status exception" to personal jurisdiction

¶ 27 Mucha next argues that even if Wagner did not establish minimum contacts with the State of North Carolina, the trial court could permissibly bind him through entry of the DVPO by applying the "status exception" doctrine. As we recently explained,

> The Supreme Court of the United States has long recognized that some cases warrant an exception to the traditional due process requirements. Specifically, the Court has held that 'cases involving the personal status of the plaintiff, such as divorce actions, could be adjudicated in the plaintiff's home State even though the defendant could not be served within the State.' *Shaffer v. Heitner*, 433 U.S. 186, 202, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) (citing *Pennoyer v. Neff*, 95 U.S. 714, 733–35, 24 L.Ed. 565 (1878)). The Court's recognition of the status exception implies that minimum contacts are not required in status cases because jurisdiction is established by the status of the plaintiff, rather than the location of the defendant.

In re F.S.T.Y., 374 N.C. 532, 538 (2020). Thus, in *In re F.S.T.Y.*, we concluded that the State's interest in protecting the welfare of children residing in North Carolina, combined with the procedural protections afforded to litigants in termination proceedings (including the right to appointed counsel), justified allowing a North Carolina court to enter an order terminating the parental rights of an out-of-state parent of a resident child, even though the parent lacked "minimum contacts" with this State. *Id.* at 541. The Court of Appeals has also recognized the status exception in divorce cases. *See, e.g.*, *Chamberlin v. Chamberlin*, 70 N.C. App. 474, *disc. review denied*, 312 N.C. 621 (1984). According to Mucha, "[b]ecause th[is] case focuses on the status of the relationship between the plaintiff and the defendant, as opposed to focusing on the defendant alone, the plaintiff's connection to the forum state is itself enough to justify the exercise of jurisdiction as a matter of due process."

¶ 28 Although some state courts have chosen to recognize the status exception in the domestic violence context, *see, e.g.*, *Bartsch v. Bartsch*, 636 N.W. 2d. 3 (Iowa 2001), we decline Mucha's invitation to do so here for two reasons. First, there is a significant conceptual distinction be-

tween termination-of-parental-rights and divorce proceedings on the one hand and a domestic violence proceeding on the other. When a trial court terminates an individual's parental rights or a marriage, the court acts to dissolve an extant legal relationship. An order dissolving an individual's legal identity as a parent or spouse is not itself the source of new rights or duties—it is merely "a declaration of status." *Fox*, 2014 VT at ¶ 17. By contrast, when a trial court enters a DVPO, the court creates a "status" which did not previously exist and then invokes that newly-created status to "prohibit[the defendant] from engaging in behavior that would be entirely legal but for the court's order." *Id.* at ¶ 19. Mucha concedes as much when she asserts that a DVPO "grants the plaintiff a protected status vis-à-vis the defendant." This distinction between dissolving a legal status that already exists and creating a new status with new legal consequences is a significant one, which explains why a court may find jurisdiction in the absence of minimum contacts to accomplish the former but not the latter.

¶ 29 Second, as the Court of Appeals explained in *Mannise v. Harrell*, "the issuance of a [DVPO] implicates substantial rights of [d]efendant[s]." 249 N.C. App. 322, 332 (2016). When a trial court enters a DVPO, the court may, in addition to prohibiting the defendant from engaging in future acts of domestic violence, impose various obligations on the defendant, such as requiring the defendant to vacate his or her home and granting the complainant possession of any shared residences or personal property. N.C.G.S. § 50B-3(a)(2), (5) (2019). The trial court may restrain the defendant from exercising his or her constitutional rights, including the right to purchase a firearm, N.C.G.S. § 50B-3(a)(11).[6] In addition, "[t]he entry of a North Carolina [DVPO] involves both legal and non-legal collateral consequences," which cannot easily be undone. *Mannise*, 249 N.C. App. at 332.

¶ 30 The fact that a DVPO creates significant legal consequences is, of course, not an accident. These consequences are precisely what the General Assembly has deemed are necessary to protect victims of domestic violence from further harassment, abuse, or worse. But the power and reach of a DVPO also heighten the fairness concerns which arise when a trial court chooses to act outside of the typical boundaries imposed by the Due Process Clause. For these reasons, we conclude that the status exception should not be extended to this case.

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6. Under federal law, it is unlawful for any person subject to a DVPO to purchase or possess a firearm. 18 U.S.C. § 922(g)(8).

¶ 31 Although our decision deprives Mucha of one avenue for obtaining protection against further harassment, she is not without a remedy. She may seek a DVPO in any court with personal jurisdiction over Wagner, including his home state of Connecticut, which if granted would be fully enforceable in North Carolina. *See* 18 U.S.C. § 2265(a). In addition, we note that upon receiving notice of Mucha's filing in North Carolina, Wagner became aware Mucha was residing in this State. Accordingly, in a subsequent proceeding if the alleged harassment continued, it is doubtful Wagner could successfully defeat the trial court's exercise of personal jurisdiction on the same grounds as asserted in the proceedings below.

III. Conclusion

¶ 32 "[T]raditional notions of fair play and substantial justice" require something more than proof that an out-of-state defendant has directed conduct at an individual who happened to be located in North Carolina. *Int'l Shoe Co.*, 326 U.S. at 316 (quoting *Milliken*, 311 U.S. at 463). At a minimum, there must be some evidence from which the court can infer that in undertaking an act, the defendant purposefully established contacts with the State of North Carolina specifically. The question is not, as the Court of Appeals framed it, whether Wagner should have reasonably understood the risk that Mucha would be located somewhere other than South Carolina when he chose to dial her cellphone number. The question is whether Wagner had "followed a course of conduct directed at the society or economy existing within" North Carolina, such that a North Carolina court "has the power to subject the defendant to judgment concerning that conduct." *J. McIntyre Mach., Ltd.*, 564 U.S. at 884. Because the requisite minimum contacts between Wagner and North Carolina are not present in this case, we conclude that the Due Process Clause forbids the trial court from exercising personal jurisdiction over him to enter a DVPO. Therefore, we reverse the Court of Appeals decision in this case and vacate the trial court's order for lack of jurisdiction.

REVERSED.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC.
v.
JUDY LUNSFORD

No. 242A20

Filed 13 August 2021

Motor Vehicles—insurance—underinsured motorist coverage—applicable limit—interpolicy stacking

A North Carolina resident injured in an out-of-state car accident as a passenger in a car owned and operated by a Tennessee resident and insured by a Tennessee insurer, where that driver's negligence caused the accident, was entitled to collect underinsured motor vehicle (UIM) coverage benefits from her North Carolina insurer. Based on North Carolina law allowing interpolicy stacking when calculating applicable policy limits (pursuant to N.C.G.S. § 20-279.21(b)(4)), the Tennessee policy's UIM coverage limit constituted an "applicable limit" and, because the stacked UIM coverage limits exceeded the sum of the applicable bodily injury coverage limits, the car owned by the Tennessee resident was an underinsured motor vehicle as defined in North Carolina.

Justice BARRINGER dissenting.

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

Appeal from the opinion of a divided Court of Appeals panel, 271 N.C. App. 234 (2020), affirming entry of Order and Declaratory Judgment in favor of the plaintiff on 3 February 2019 by Judge Michael D. Duncan in Superior Court, Guilford County. Heard in the North Carolina Supreme Court on 17 May 2021.

William F. Lipscomb for the Plaintiff-Appellee.

Burton Law Firm, PLLC, by Jason M. Burton, for the Defendant-Appellant.

Jon. R. Moore and C. Douglas Maynard, Jr., for North Carolina Advocates for Justice, amicus curiae.

Bailey & Dixon, LLP, by J.T. Crook, for North Carolina Association of Defense Attorneys, amicus curiae

EARLS, Justice.

¶ 1 Cars and people are, naturally, mobile. They regularly traverse state lines. Unfortunately, but inevitably, cars and people also get into accidents. When they do, it can raise issues regarding which state's law governs the interpretation of various provisions of each of the involved parties' insurance contracts. In this case, we must determine whether a North Carolina resident is entitled to collect underinsured motor vehicle coverage benefits from her North Carolina insurer, after she was injured while traveling in Alabama in a car owned and operated by a Tennessee resident and insured by a Tennessee insurer. To answer that question, we must decide if North Carolina or Tennessee law applies when ascertaining whether the Tennessee vehicle is "underinsured" within the meaning of a contract executed in North Carolina between a North Carolina resident and a North Carolina insurer.

¶ 2 Judy Lunsford, a North Carolina resident, was a passenger in her sister Levonda Chapman's vehicle when a serious accident occurred as they were travelling through Alabama. Chapman negligently drove her vehicle across a highway median into oncoming traffic, where it collided with an 18-wheeler. As a result of the accident, Lunsford was severely injured. Chapman was tragically killed.

¶ 3 Chapman was insured by a Nationwide Insurance Company policy purchased in her home state of Tennessee. As a passenger in Chapman's vehicle, Lunsford was entitled to recover from Nationwide, under the terms of Chapman's bodily injury liability coverage. Nationwide offered—and Lunsford accepted—the full $50,000 available under the policy's per person bodily injury coverage limit. Lunsford also claimed she was entitled to coverage under the underinsured motorist (UIM) provision of her own insurance contract executed in North Carolina with a different insurer, North Carolina Farm Bureau Mutual Insurance Company, Inc. (NC Farm Bureau). NC Farm Bureau denied her claim and initiated a declaratory judgment action to establish its liability to Lunsford. The trial court agreed with NC Farm Bureau's position, concluding that Chapman's vehicle was not an "underinsured highway vehicle" as defined under North Carolina's Financial Responsibility Act (FRA). A divided panel of the Court of Appeals affirmed.

¶ 4 In its argument before this Court, NC Farm Bureau concedes that the majority below "employed incorrect reasoning" in reaching its

conclusion that Lunsford was not entitled to coverage under the UIM provision of her insurance contract. Still, NC Farm Bureau argues the Court of Appeals "reached the correct result" in affirming the trial court's entry of declaratory judgment for NC Farm Bureau, contending that Chapman's vehicle is not an underinsured motor vehicle as defined by the terms of Chapman's Nationwide insurance contract, which incorporates Tennessee law.

¶ 5 However, in determining whether Lunsford is entitled to collect pursuant to the contract she entered into with NC Farm Bureau, we must apply North Carolina law to interpret the terms of a contract executed in North Carolina that necessarily incorporates North Carolina's FRA. We need not interpret Chapman's Nationwide insurance contract incorporating Tennessee law. Resolving this dispute does not require us to adjudicate any of Chapman's or Nationwide's rights, nor does it implicate any other state's interest in enforcing its own laws regulating the provision and maintenance of motor vehicle insurance.

¶ 6 Applying North Carolina law, we affirm prior decisions of the Court of Appeals allowing interpolicy stacking when calculating the "applicable" policy limits as required under the relevant provision of the FRA, N.C.G.S. § 20-279.21(b)(4) (2019). Because the amount of the stacked UIM coverage limits exceeds the sum of the applicable bodily injury coverage limits, Chapman's car is an "underinsured motor vehicle" as defined by the FRA for the purposes of giving effect to Lunsford's contract with NC Farm Bureau. Accordingly, we reverse the decision of the Court of Appeals, vacate the trial court's order entering declaratory judgment for NC Farm Bureau, and remand to the trial court for further proceedings consistent with this opinion.

I. Factual Background

¶ 7 At the time of the crash, both Lunsford and Chapman maintained motor vehicle accident insurance policies. Chapman's Nationwide policy provided her and her vehicle with bodily injury liability coverage subject to limits of $50,000 per person and $100,000 per accident, and UIM coverage subject to the same limits. Lunsford's NC Farm Bureau policy provided her with UIM coverage subject to the same limits as Chapman's bodily injury liability coverage ($50,000 per person / $100,000 per accident). After the crash, Nationwide offered, and Lunsford accepted, the full $50,000 available under the Nationwide bodily injury liability policy per person limit. Lunsford then sought an additional $50,000 in UIM coverage from her own insurer, NC Farm Bureau.

¶ 8 NC Farm Bureau denied Lunsford's claim and initiated a declaratory judgment action in Superior Court, Guilford County seeking a ruling establishing that "the UIM coverage of [the NC Farm Bureau policy] does not apply to [Lunsford's] injuries from the . . . motor vehicle collision in question and that [Lunsford] is not entitled to recover any UIM coverage from said policy." NC Farm Bureau contended that Chapman's vehicle was not an "underinsured motor vehicle" under North Carolina law. Lunsford argued in response that, under the relevant provision of the FRA as interpreted by the Court of Appeals in *Benton v. Hanford*, 195 N.C. App. 88 (2009), she was entitled to stack her NC Farm Bureau UIM coverage limit ($50,000) with the Nationwide UIM coverage limit ($50,000) for the purposes of determining whether "the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy" exceeded "the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident." *Id.* at 92 (quoting N.C.G.S. § 20-279.21(b)(4)). After stacking the policies, Lunsford contended she would be entitled to recover UIM benefits from NC Farm Bureau because the stacked UIM limits ($100,000) would be greater than Nationwide's bodily injury liability coverage limit ($50,000).

¶ 9 On 19 December 2018, the trial court entered judgment on the pleadings in NC Farm Bureau's favor. The trial court reasoned that because the Nationwide insurance contract was executed in Tennessee, "Chapman's policy is governed by Tennessee law." Under Tennessee law, an "uninsured[1] motor vehicle does not include a motor vehicle . . . [i]nsured under the liability coverage of the same policy of which the uninsured motor vehicle coverage is a part." Tenn. Code § 56-7-1201(2) (2016). Because Chapman's vehicle was "insured under the liability coverage of the same policy from which the claimant [Lunsford] is seeking UIM coverage," the trial court concluded that Chapman's vehicle "*cannot* be an underinsured motor vehicle under Chapman's policy, the UIM coverage of Chapman's policy does not apply to the accident in question and, therefore, it is not 'applicable' UIM coverage within the meaning of the North Carolina UIM statute's definition of the 'underinsured highway vehicle' and [*Benton*]." Since the Nationwide UIM coverage was not "applicable," there was no limit for Lunsford to stack with her own NC Farm Bureau UIM coverage limit. Defined thusly, "Chapman's vehicle does not satisfy [the FRA's definition of an underinsured motor vehicle]

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1. Chapman's contract uses the term "uninsured motor vehicle" in a manner which encompasses what would be termed an "underinsured motor vehicle" under North Carolina law. We use the latter throughout for ease of reading.

because the liability coverage of Chapman's policy ($50,000 / $100,000) is equal to (not less than) the UIM coverage of Lunsford's policy."

¶ 10 A divided panel of the Court of Appeals affirmed, but on a different rationale than the one utilized by the trial court. The majority agreed with the trial court that Chapman's Nationwide UIM policy was not "applicable at the time of an accident under [N.C.G.S.] § 20-279.21(b)(4)." *North Carolina Farm Bureau Mut. Ins. Co., Inc. v. Lunsford*, 271 N.C. App. 234, 238 (2020). However, the majority's conclusion that the Nationwide policy was not "applicable" rested upon its belief that Lunsford did not "qualif[y] as a 'person insured' [under the Nationwide policy] as that term is defined by [N.C.G.S. § 20-279.21(b)(3)]." *Id.* According to the majority, because Lunsford was neither "the named insured [nor], while resident of the same household, the spouse of the named insured [or] relatives of either," she did not "qualif[y] as a 'person insured' " under Chapman's Nationwide policy, precluding Lunsford from stacking the Nationwide UIM coverage limit. *Id.* at 237 (quoting *Sproles v. Greene*, 329 N.C. 603, 608 (1991)).

¶ 11 Judge Murphy dissented based upon his interpretation of Chapman's contract with Nationwide. According to Judge Murphy, Chapman's Nationwide policy contained a "conformity clause" stating that the insurer would "adjust this policy to comply . . . [w]ith the financial responsibility law of any state or province which requires higher liability limits than those provided by this policy." *Id.* at 242–43 (Murphy, J., dissenting). Therefore, Judge Murphy read Chapman's Nationwide policy as "explicitly incorporat[ing] our FRA," requiring the court to apply the definition of an "underinsured motor vehicle" provided by N.C.G.S. § 20-279.21(b)(4). *Id.* at 242. Under *this* definition of an underinsured motor vehicle, as interpreted by the Court of Appeals in *Benton*, Lunsford was entitled to "stack the $50,000.00 limit of UIM coverage in Chapman's Nationwide policy with the $50,000.00 limit of UIM coverage in Lunsford's [NC Farm Bureau] policy." *Id.* at 245.

¶ 12 Judge Murphy also disputed the majority's conclusion that Lunsford was not a "person[ ] insured" by Chapman's Nationwide policy. He noted that in *Sproles*, this Court interpreted the relevant provision of the FRA, N.C.G.S. § 20-279.21(b)(3), to

> essentially establish[ ] two "classes" of "persons insured": (1) the named insured and, while resident of the same household, the spouse of the named insured and relatives of either and (2) any person who uses with the consent, express or implied, of the named insured, the insured vehicle, and a guest in such vehicle.

Id. at 244. Applying *Sproles*, Judge Murphy concluded that "Lunsford, as the named insured, is a class one insured with respect to the NCFB policy . . . . She is also a class two insured with respect to Chapman's Nationwide policy as a guest in the insured vehicle with consent of the named insured." *Id.*

II. Analysis

¶ 13 All insurers doing business in North Carolina are required to offer UIM coverage. *See* N.C.G.S § 20-279.21(b)(4) (stating that every insurer's "policy of liability insurance . . . [s]hall . . . provide underinsured motorist coverage"). "The purpose of underinsured motorist (UIM) coverage in our state is to serve as a safeguard when tortfeasors' liability policies do not provide sufficient recovery—that is, when the tortfeasors are 'under insured.' " *Lunsford v. Mills*, 367 N.C. 618, 632 (2014) (Newby, J., concurring in part, dissenting in part). UIM coverage kicks in when the insured is injured due to the tortious conduct of another driver. "Following an automobile accident, a tortfeasor's liability coverage is called upon to compensate the injured plaintiff, who then turns to *his own UIM coverage* when the tortfeasor's liability coverage is exhausted." *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 188 (1992) (emphasis added); see also Douglas R. Richmond, *Issues and Problems in "Other Insurance," Multiple Insurance, and Self-Insurance*, 22 Pepp. L. Rev. 1373, 1420 (1995) ("UIM policies provide first-party coverage" to insureds).

¶ 14 To determine whether Lunsford is entitled to access the UIM coverage she purchased from NC Farm Bureau, "[t]he threshold question . . . is whether the tort-feasor's vehicle is an 'underinsured highway vehicle' as the term is used in N.C.G.S. § 20–279.21(b)(4)." *Harris*, 332 N.C. at 187. Under N.C.G.S. § 20–279.21(b)(4), a vehicle is an "underinsured highway vehicle" if

> the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy.

¶ 15 Everyone agrees that the only bodily injury liability insurance policy "applicable at the time of the accident" is Lunsford's Nationwide policy, and that Lunsford's NC Farm Bureau UIM policy is an "applicable" UIM coverage limit. The crux of the parties' dispute is whether Chapman's Nationwide UIM coverage limit is also an "applicable limit of underin-

sured motorist coverage for the vehicle involved in the accident and insured under the owner's policy." Lunsford says it is. NC Farm Bureau says it is not.

¶ 16 Because of each policy's respective limits, the answer to this question is dispositive in this case. If the Nationwide UIM coverage limit is "applicable," then—under Court of Appeals precedent which NC Farm Bureau does not challenge—Lunsford is entitled to stack the Nationwide UIM coverage limit ($50,000) with the NC Farm Bureau coverage limit ($50,000). *Benton*, 195 N.C. App. at 92 ("UIM coverage may be stacked interpolicy to calculate the applicable limits of underinsured motorist coverage for the vehicle involved in the accident for the purpose of determining if the tortfeasor's vehicle is an 'underinsured highway vehicle.' "). If Lunsford is entitled to stack the Nationwide and NC Farm Bureau UIM coverage limits, "the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident" (Nationwide's $50,000 bodily injury coverage limit) would be "less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy" (the $100,000 in stacked UIM coverage limits), and Chapman's vehicle would be "underinsured." If the Nationwide UIM coverage limit is not "applicable," then it cannot be stacked with Lunsford's NC Farm Bureau coverage limit, the bodily injury liability coverage limit ($50,000) would be equal to the sum of the "applicable" UIM coverage limits ($50,000), and Chapman's vehicle would not be "underinsured."

¶ 17 Initially, we reject the distinction the majority below relied upon in arriving at its conclusion that Chapman's Nationwide coverage limit was not "applicable" within the meaning of N.C.G.S. § 20-279.21(b)(4). As Judge Murphy's dissent correctly explains, there are two "classes" of "persons insured" set forth in N.C.G.S. § 20-279.21(b)(3), "Class I" insureds (named insureds and relatives who reside in the insured's household) and "Class II" insureds (individuals using a vehicle with the driver's consent). Lunsford is plainly a "Class I" insured with regards to the NC Farm Bureau policy and a "Class II" insured with regards to the Nationwide policy. Therefore, the fact that Lunsford is not a relative who resides in Chapman's household is irrelevant. NC Farm Bureau acknowledges as much—in their presentation to this Court, they concede that "it is undisputed that Lunsford *was an insured* of Chapman's UIM coverage . . . because she was occupying Chapman's vehicle and the [c]ourt's opinion does not explain why her status as a Class II insured of the Chapman policy prevents that policy from being applicable within the meaning of N.C.G.S. § 20-279.21(b)(4)."

¶ 18 Rather than defend the Court of Appeals' reasoning—or ask this Court to overrule *Benton* and other cases recognizing the propriety of interpolicy stacking—NC Farm Bureau contends that interpolicy stacking is not permitted in this case because Chapman was a Tennessee resident who entered into a contract with Nationwide in Tennessee. In NC Farm Bureau's view, Chapman's Nationwide contract does not incorporate North Carolina's FRA, and it need not, because it was executed in Tennessee and North Carolina lacks any substantial connection to Chapman or the accident at issue. By extension, NC Farm Bureau contends that the terms of the Nationwide contract, which incorporate Tennessee's definition of an underinsured motor vehicle, supply the definition to be applied in determining whether Chapman's vehicle is underinsured. It is uncontroverted that under the relevant Tennessee statute, Tenn. Code § 56-7-1201(2), Chapman's vehicle cannot be underinsured.

¶ 19 To be clear, NC Farm Bureau does not dispute that (1) Lunsford is seeking UIM coverage under her *own* insurance policy issued by NC Farm Bureau pursuant to a contract entered into in North Carolina, (2) all automobile accident insurance policies executed in North Carolina necessarily incorporate North Carolina's FRA, and (3) this Court must apply North Carolina law when interpreting an insurance policy issued in North Carolina to a North Carolina insured. What NC Farm Bureau appears to be arguing is that North Carolina law requires us to look to the terms of Chapman's Nationwide policy to ascertain whether the UIM coverage limit contained therein is an "*applicable* limit[ ] of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy." N.C.G.S. § 20-279.21(b)(4) (emphasis added). As we understand it, NC Farm Bureau's position can be articulated as follows: When an individual is injured by a driver's tortious conduct, the driver's UIM coverage limit is not an "applicable limit[ ] of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy" which can be stacked with the injured party's UIM coverage limit if, under the terms of the *tortfeasor's* contract, the vehicle is not underinsured.

¶ 20 The essential question in this case is one of statutory interpretation: What did the General Assembly intend by using the phrase "applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy" in N.C.G.S. § 20-279.21(b)(4)? "The primary objective of statutory interpretation is to ascertain and effectuate the intent of the legislature." *Lunsford v. Mills*, 367 N.C. at 623. "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." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664 (2001) (cleaned up). Thus, we begin with the statutory language the General Assembly selected. "If the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms so long as it is reasonable to do so." *Id.* If the language is ambiguous or susceptible to multiple meanings, we turn to the other sources to identify the General Assembly's intent.

¶ 21 Read in context, the General Assembly's choice of the term "applicable" does not unambiguously answer the question of whether an injured party is or is not permitted to stack the tortfeasor's UIM coverage limit under these circumstances. *Black's Law Dictionary* defines applicable as "1. Capable of being applied; fit and right to be applied. 2. (Of a rule, regulation, law, etc.) affecting or relating to a particular person, group, or situation; having direct relevance." *Black's Law Dictionary* (11th ed. 2019). Citing a similar dictionary definition, NC Farm Bureau argues that "[t]he UIM coverage of Chapman's policy is not capable of being applied to Lunsford's claim because the policy provisions, and the applicable Tennessee statutes, preclude her vehicle from being an underinsured vehicle for the UIM coverage of her policy."

¶ 22 But this tautological proposition smuggles into the FRA the very premise NC Farm Bureau seeks to uncover in the statutory text. The provision does not state that "applicable" means "contained in a policy which would by its own terms define the tortfeasor's vehicle as underinsured." The text contains only the phrase "applicable limits." The question before this Court is what meaning the General Assembly intended to communicate by including that phrase. NC Farm Bureau offers one possible answer, but that answer cannot be derived from the text alone, and we must not read into a statute "language that simply is not there." *Boseman v. Jarrell*, 364 N.C. 537, 554 (2010) (Hudson, J., dissenting); *see also Borden v. United States*, 141 S.Ct. 1817, 1829 (2021) ("[W]e must construe the [statutory clause] as it is—without first inserting the word[s] that will (presto!) produce the dissent's reading.").

¶ 23 *Benton* and the other cases construing N.C.G.S. § 20–279.21(b)(4) to allow interpolicy stacking do not precisely define the phrase "applicable limits." Still, nothing in those cases supports NC Farm Bureau's proposed construction. In *Benton*—which, we reiterate, NC Farm Bureau does not challenge—the Court of Appeals did not refer to the tortfeasor's state of residence. The Court of Appeals explicitly rejected the tortfeasor's insurer's effort to define "underinsured motor vehicle" in accordance with the terms of the *tortfeasor's* UIM policy, instead defining "underinsured motor vehicle" in accordance with the terms of the

FRA. *Benton*, 195 N.C. App. at 91–92 ("Because the [FRA] specifically defines 'underinsured highway vehicle[,]' . . . we turn to the Act and the cases interpreting it without regard to the definition of the term in the [tortfeasor's] policy."). In applying the definition supplied by the FRA, the *Benton* court without further explanation treated "the UIM coverage for the vehicle owned by the [tortfeasor] policy holder" as "applicable." *Id.* at 97.

¶ 24 Even though *Benton* interpreted and applied N.C.G.S. § 20–279.21(b)(4), the decision contains no reference to the fact NC Farm Bureau and the dissent now claims was dispositive.[2] Acknowledging this omission, NC Farm Bureau invites us to take "judicial notice" that the record in *Benton* indicates the tortfeasor's insurance contract was executed in North Carolina. We decline the invitation to read *Benton* as turning on a fact which, upon close examination of the decision itself, appears to have been entirely extraneous to the court's reasoning and ultimate holding. We are unconvinced by NC Farm Bureau's effort to find in *Benton* a legal rule the court did not propound.

¶ 25 Instead, we understand the General Assembly's use of the phrase "applicable limits" to refer to the UIM coverage limits contained within the insurance policy covering the tortfeasor's vehicle, in a circumstance such as this one where the tortfeasor is the driver and the injured party is a passenger seeking to access the UIM coverage contained within his or her own policy incorporating North Carolina's FRA. This interpretation is consistent with "the spirit of the [FRA] and what the [FRA] seeks to accomplish." *Lenox*, 353 N.C. at 664 (cleaned up).

¶ 26 "The avowed purpose of the Financial Responsibility Act, of which N.C.G.S. § 20–279.21(b)(4) is a part, is to compensate the innocent victims of financially irresponsible motorists. It is a remedial statute to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished." *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C.

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2. Although *Benton* is not controlling, it is also not irrelevant, as the dissent suggests. In addition to not asking this Court to consider whether *Benton* was wrongly decided, NC Farm Bureau does not dispute that *Benton* was the governing law at the time it entered into an insurance contract with Lunsford. Thus, although we undoubtedly have the authority to displace *Benton*, doing so sua sponte would risk depriving the parties of the benefit of the bargain they struck. Further, we find it notable that the General Assembly has not acted in a way that evinces disagreement with *Benton* in the years since that case was decided. *See, e.g.*, *Brown v. Kindred Nursing Centers E., L.L.C.*, 364 N.C. 76, 83 (2010) ("[L]egislative acquiescence is especially persuasive on issues of statutory interpretation. When the legislature chooses not to amend a statutory provision that has received a specific interpretation, we assume lawmakers are satisfied with that interpretation.").

259, 265 (1989) (citation omitted). Interpreting the ambiguous language contained in N.C.G.S. § 20–279.21(b)(4) to permit interpolicy stacking in this circumstance is "[i]n keeping with the purpose of the [FRA]" because it allows injured North Carolina insureds to access the UIM coverage they paid for in a greater number of circumstances, reducing the likelihood that the costs of the damage caused by an underinsured tortfeasor will be borne by the insured alone. *Benton*, 195 N.C. App. at 92; *see also Proctor v. North Carolina Farm Bureau Mut. Ins. Co.*, 324 N.C. 221, 225 (1989) ("[T]he statute's general purpose, which has not been changed, is best served when the statute is interpreted to provide the innocent victim with the fullest possible protection."). The magnitude of North Carolina's interest in protecting insureds in no way depends upon the state in which the tortfeasor executed his or her insurance contract. Nor is there any reason to look to another state's law in defining the circumstances under which a North Carolina insured can access UIM coverage under his or her own insurance policy.

¶ 27 Further, NC Farm Bureau's proposed interpretation does not reflect the way UIM coverage functions. UIM coverage becomes available to an insured from his or her own insurer when the damage caused by a tortfeasor exceeds the tortfeasor's bodily injury liability coverage limits. The circumstances under which an insured will be able to claim UIM benefits are dictated by the terms and limits of the insured's own contract with his or her insurer—and, by extension when the insurance contract is executed in North Carolina, the provisions of the FRA. *See, e.g.*, *Lunsford v. Mills*, 367 N.C. at 635 (2014) (Newby, J., concurring in part, dissenting in part) ("[A]n insured plaintiff's UIM recovery 'is controlled contractually by the amount of the UIM policy limits purchased and available to her.' ") (quoting *Nikiper v. Motor Club of Am. Cos.*, 232 N.J. Super. 393, 398–99, *certification denied*, 117 N.J. 139 (1989)). It follows logically that the availability of UIM coverage to the insured—which hinges upon the threshold determination of whether a vehicle is underinsured—should be dictated by the terms of the bargain struck by the insured and the insurer, not by the terms of the bargain struck by the tortfeasor with his or her insurer. The availability of the UIM coverage Lunsford obtained should not be contingent on the tortfeasor fortuitously residing in a state whose elected officials share the North Carolina General Assembly's concern for protecting injured insureds to the same extent.

¶ 28 If it were Chapman seeking to recover UIM benefits from Nationwide after an accident caused by Lunsford's tortious driving, then the terms of the Nationwide contract would supply the definition of an "underinsured

vehicle."[3] But the very reason an insurance contract includes a UIM coverage provision is to define the circumstances under which another vehicle (the one driven by the tortfeasor) is to be considered underinsured, for the purpose of establishing when the insurer's obligation to disburse UIM benefits is triggered. The definition of an underinsured motor vehicle that a North Carolina insured agrees to with his or her insurer does not incorporate or in any way depend upon the definition that would be operative if it were the tortfeasor who was seeking to recover under his or her own insurance policy.

¶ 29 It is not at all anomalous that a vehicle might be considered "underinsured" as that term is defined in a North Carolina contract incorporating the FRA, but not "underinsured" as that term is defined in an out-of-state contract incorporating that state's insurance laws. Out of concern for the consequences of leaving North Carolina insureds vulnerable to financial ruin, or even simply being undercompensated, when they are harmed by irresponsible drivers, North Carolina has chosen to mandate that insurers make UIM coverage available in a circumstance where Tennessee has not. To give effect to the public policy considerations motivating the General Assembly's legislative choice, and to honor the bargains struck by North Carolinians with their insurers in light of the North Carolina FRA, we must apply the definition of an "underinsured motor vehicle" chosen by the representatives of the people of North Carolina, not the one chosen by the representatives of the people of Tennessee. *See Fortune Ins. Co. v. Owens*, 351 N.C. 424, 428 (2000) ("[A]n automobile insurance contract should be interpreted and the rights and liabilities of the parties thereto determined in accordance with the laws of the state where the contract was entered."). Therefore, we hold that the UIM coverage limit contained in Chapman's Nationwide policy is an "applicable" limit within the meaning of N.C.G.S. § 20–279.21(b)(4).[4]

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3. If this circumstance were presented to this Court, we would be called upon to interpret a contract executed in Tennessee incorporating Tennessee law, and NC Farm Bureau's argument that the Full Faith and Credit Clause of Art IV. § 1 of the United States Constitution might be relevant. However, in this case, we are called upon to interpret a contract executed in North Carolina ordering the relations between two North Carolina residents which incorporated North Carolina law.

4. Because we reach this conclusion based upon our interpretation of Lunsford's NC Farm Bureau insurance contract and the North Carolina FRA, we do not reach the question of whether the "conformity clause" in Chapman's Nationwide insurance contract incorporates N.C.G.S. § 20-279.21(b)(4).

III. Conclusion

¶ 30 When a passenger who has previously obtained UIM coverage pursuant to a contract executed in North Carolina is injured while travelling in a vehicle driven by someone else, and the injury results from that driver's tortious conduct, the driver's UIM coverage limits are "applicable" within the meaning of N.C.G.S. § 20-279.21(b)(4). Under these circumstances, the injured passenger is entitled to stack the driver's UIM coverage limit with the limits contained in the passenger's own policy for the purposes of determining whether the vehicle is an "underinsured motor vehicle" within the meaning of his or her own policy, which necessarily incorporates North Carolina's FRA. In this case, after stacking the applicable Nationwide and NC Farm Bureau coverage limits, Chapman's vehicle is "underinsured" as that term is defined in N.C.G.S. § 20-279.21(b)(4). Accordingly, we reverse the decision of the Court of Appeals and remand to the trial court for entry of an order granting a declaratory judgment in favor of Judy Lunsford.

REVERSED.

Justice BARRINGER, dissenting.

¶ 31 This matter concerns the underinsured motorist bodily injury coverage in the insurance policy between North Carolina Farm Bureau Mutual Insurance Company, Inc. (Farm Bureau) and Judy Lunsford (Lunsford Policy). The material facts are undisputed and the law well-established. However, the majority assumes the role of the legislature in this matter and ignores our well-established principles for the construction of insurance policies and the determination of what law applies to insurance policies. Applying the plain language of the statute enacted by the North Carolina legislature to a policy entered in North Carolina and Tennessee law to a policy entered in Tennessee, consistent with our precedent, clearly leads to affirming the trial court's granting of judgment on the pleadings in Farm Bureau's favor. Therefore, I respectfully dissent.[1]

I. Background

¶ 32 Lunsford, while a resident of North Carolina, applied in North Carolina for and was issued in North Carolina the Lunsford Policy from

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1. However, we agree with the majority and the parties to this appeal that the Court of Appeals erred in its application of the classes of insured. *N.C. Farm Bureau Mut. Ins. Co., Inc. v. Lunsford*, 271 N.C. App. 234, 238–39 (2020). In this matter, it is undisputed that Lunsford was an insured under Chapman's underinsured motorist coverage.

Farm Bureau. The named insured for the Lunsford Policy was Lunsford, and the Lunsford Policy covered a 2016 Toyota RAV4, which at all relevant times, was titled and registered to Lunsford in North Carolina. The Lunsford Policy provided uninsured and underinsured motorist bodily injury coverage of $50,000 per person/$100,000 per accident.

¶ 33 While a passenger in a 2015 Chevrolet Silverado (Silverado) owned by and being driven by Levonda Chapman, a resident of Tennessee, Lunsford was seriously injured as a result of Chapman's negligent driving. The accident occurred in Alabama. At the time of the accident, Chapman's Silverado was covered by an automobile insurance policy between Nationwide Mutual Insurance Company (Nationwide) and Chapman (Chapman Policy), which provided bodily injury liability coverage of $50,000 per person/$100,000 per occurrence and underinsured motorist coverage of $50,000 per person/$100,000 per occurrence. The Chapman Policy was entered into in Tennessee. Nationwide offered the policy limit of the Chapman Policy bodily injury liability coverage, $50,000, to Lunsford.

¶ 34 The dispute between Lunsford and Farm Bureau concerns whether Chapman's vehicle was an underinsured highway vehicle. As relevant to this appeal, the underinsured motorist coverage under the Lunsford Policy applies when "[Lunsford] is legally entitled to recover from the owner or operator of an underinsured [highway] vehicle because of bodily injury sustained by [her] and caused by the accident." Recognizing that the definition of underinsured highway vehicle in the Lunsford Policy is narrower than the applicable subsection of the statute, N.C.G.S. § 20-279.21(b)(4), enacted by the North Carolina legislature, Farm Bureau conceded that N.C.G.S. § 20-279.21(b)(4) prevails over the narrower policy provision in the Lunsford Policy. Subsection 20-279.21(b)(4) of the General Statutes of North Carolina defines underinsured highway vehicle as

> a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy. For purposes of an underinsured motorist claim asserted by a person injured in an accident where more than one person is injured, a highway vehicle will also be an "underinsured highway vehicle" if the total amount

> actually paid to that person under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy. Notwithstanding the immediately preceding sentence, a highway vehicle shall not be an "underinsured motor vehicle" for purposes of an underinsured motorist claim under an owner's policy insuring that vehicle unless the owner's policy insuring that vehicle provides underinsured motorist coverage with limits that are greater than that policy's bodily injury liability limits.

N.C.G.S. § 20-279.21(b)(4) (2019).

¶ 35 Farm Bureau also acknowledges that the Court of Appeals has construed the legislature's use of the plural "limits" in the phrase "less than the applicable limits" to allow interpolicy stacking of applicable policies and does not challenge this holding in this matter. *See Benton v. Hanford*, 195 N.C. App. 88, 92–93 (2009); *N.C. Farm Bureau Mut. Ins. Co. v. Bost*, 126 N.C. App. 42, 50–51 (1997). Instead, Farm Bureau contends that the Chapman Policy is not an *applicable* policy. Specifically, the Chapman Policy excludes from the definition of underinsured highway vehicle[2] the Silverado—as both a vehicle insured under the liability coverage of the Chapman Policy and a vehicle operated by the insured, Chapman. This exclusion is consistent with the statutes enacted by the Tennessee legislature defining an uninsured highway vehicle for purposes of uninsured and underinsured motorist coverage. *See* Tenn. Code §§ 56-7-1201, -1202 (2016).

¶ 36 Lunsford does not dispute that the Chapman Policy is an insurance contract entered into in Tennessee by a Tennessee resident or the construction of the Chapman Policy under Tennessee law presented by Farm Bureau. Instead, Lunsford, relying on *Benton*, appears to contend that the definition of underinsured highway vehicle in the statute enacted by the North Carolina legislature applies to every policy, including the Chapman Policy. Thus, according to Lunsford, we ignore the plain language of the Chapman Policy and Tennessee law. Lunsford also ar-

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2. The Chapman Policy and the Tennessee statutes use the term "uninsured motor vehicle." Because the distinction in the terms is not significant and to aid the reader, the term "underinsured highway vehicle" is also used when referring to the Chapman Policy and the Tennessee statutes.

gues Tennessee law does not apply because injury to a North Carolina resident is sufficient to establish a close connection with North Carolina and require the application of North Carolina law to the construction of the policy as in *Collins & Aikman Corp. v. Hartford Acc. & Indemnity* Co., 335 N.C. 91 (1993). Lastly, Lunsford raised in her reply before the Court of Appeals and her brief with this Court that a financial responsibility provision in the Chapman Policy dictates the application of North Carolina law in this matter.

II. Construction of Insurance Policies

¶ 37 "This Court has long recognized its duty to construe and enforce insurance policies as written, without rewriting the contract or disregarding the express language used." *Fid. Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380 (1986). "However, when a statute is applicable to the terms of an insurance policy, the provisions of the statute become a part of the policy as if written into it." *Bray v. N.C. Farm Bureau Mut. Ins. Co.*, 341 N.C. 678, 682 (1995). Thus, the policy is construed in accordance with its written terms unless a binding statute, regulation, or order requires a different construction. *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 345 (1967). When unambiguous, the plain language of the policy controls, *N.C. Farm Bureau Mut. Ins. Co. v. Martin*, 376 N.C. 280, 286 (2020), or if superseded by a binding statute, the plain language of the statute controls, *see generally Fid. Bank v. N.C. Dep't of Revenue*, 370 N.C. 10, 20 (2017).

> Where a policy defines a term, that definition is to be used. If no definition is given, non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended. The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect.

Woods v. Nationwide Mut. Ins. Co., 295 N.C. 500, 505–06 (1978). This Court regularly looks to non-legal dictionaries to determine plain meaning for policies and statutes. *See, e.g.*, *Raleigh Hous. Auth. v. Winston*, 376 N.C. 790, 2021-NCSC-16, ¶ 8 (2021); *Martin*, 376 N.C. at 287.

¶ 38 When a provision of an insurance policy is ambiguous, the provision will be given the meaning most favorable to the insured. *Shelby Mut.*, 269 N.C. at 346. However, "[t]he terms of another contract between different parties cannot affect the proper construction of the provisions of an insurance policy." *Id.* Rather,

> [t]he existence of the second contract, whether an insurance policy or otherwise, may or may not be an event which sets in operation or shuts off the liability of the insurance company under its own policy. Whether it does or does not have such effect, first requires the construction of the policy to determine what event will set in operation or shut off the company's liability and, second, requires a construction of the other contract, or policy, to determine whether it constitutes such an event.

Id.

¶ 39 In this matter, Farm Bureau has argued that the language written into the Lunsford Policy of N.C.G.S. § 20-279.21(b)(4)—"the applicable limits of underinsured motorist coverage"—is clear and unambiguous. Farm Bureau, relying on the definition from the American Heritage Dictionary of English Language, identifies that the plain meaning of "applicable" as "[c]apable of being applied; relevant or appropriate." *Applicable*, *The American Heritage Dictionary of the English Language* (5th ed. 2020), https://ahdictionary.com/word/search.html?q=applicable. Lunsford has neither disputed that the language is unambiguous nor disputed or offered an alternative plain meaning of the term "applicable."

¶ 40 The language is unambiguous. Thus, the statutory language and policy language of the Lunsford Policy provide that only underinsured motorist coverage capable of being applied are added together, i.e., stacked, for purposes of determining whether the threshold requirement of an underinsured highway vehicle is met under N.C.G.S. § 20-279.21(b)(4). Thus, in order for Lunsford to prevail, she would have to prove that the underinsured motorist coverage of the Chapman Policy is capable of being applied. *See Martin*, 376 N.C. at 285 ("The party seeking coverage under an insurance policy bears the burden 'to allege and prove coverage.' " (quoting *Brevard v. State Farm Mut. Auto. Ins. Co.*, 262 N.C. 458, 461 (1964)). In this case, which state's law applies determines whether the underinsured motorist coverage of the Chapman Policy is capable of being applied.

¶ 41 Adopting Lunsford's argument as done by the majority requires this Court to omit the word "applicable" and read the statute as:

> An "uninsured motor vehicle," as described in subdivision (3) of this subsection, includes an "underinsured highway vehicle," which means a highway vehicle with respect to the ownership, maintenance,

> or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the . . . limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy.

N.C.G.S. § 20-279.21(b)(4). This construction clearly disregards established canons of construction for statutes and insurance policies that, when possible, "every word and every provision is to be given effect," *Woods*, 295 N.C. at 506.

¶ 42 The majority's construction also does not serve the avowed purpose of the Motor Vehicle Safety and Financial Responsibility Act (the Act) "to require financial responsibility of reckless, inefficient and irresponsible operators of motor vehicles involved in accidents." *Howell v. Travelers Indem. Co.*, 237 N.C. 227, 232 (1953). This case does not involve mandatory or compulsory motor vehicle liability insurance to protect against the financial irresponsibility of reckless drivers. *Under*insured motorist coverage is optional for the insured. *Comp.* N.C.G.S. § 20-279.21(b)(4) *with* N.C.G.S. § 20-279.21(b)(2), (3); *see also Hartford Underwriters Ins. Co. v. Becks*, 123 N.C. App. 489, 493–94 (1996) (rejecting defendants' suggestion that underinsured motorist coverage "is 'required' or 'deemed mandatory' in *all* liability policies"). Our legislature also specifically provided in subsection 20-279.21(n) of the General Statutes of North Carolina that "[n]othing in this section shall be construed to provide greater amounts of uninsured or underinsured motorist coverage in a liability policy than the insured has purchased from the insurer under this section." N.C.G.S. § 20-279.21(n). Ironically, the construction adopted by the majority also results in Chapman's vehicle being deemed an *under*insured highway vehicle when Chapman's vehicle has the *same* liability coverage amounts as Lunsford's policy amounts for underinsurance. The majority's decision, thus, provides compensation for Lunsford exceeding her purchase as an insured and may have the effect of limiting the options available to residents in North Carolina for underinsured motorist coverage by increasing the costs of underinsured motorist coverage beyond the means of some. Thus, while the Act is remedial and to be liberally construed, *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 573–74 (2002), substituting the Court's judgment and words for that of the legislature, especially when it may undermine the beneficial purposes of the Act, is not appropriate. *See Howell*, 237 N.C. at 232 ("Whether [the Act] ought to be brought more nearly into harmony with its declared object is a legislative and not a judicial matter.").

III. Choice of Law

¶ 43 This Court has held in accordance with the principles of *lex loci contractus* that an automobile insurance policy "should be interpreted and the rights and liabilities of the parties thereto determined in accordance with the laws of the state where the contract was entered even if the liability of the insured arose out of an accident in North Carolina." *Fortune Ins. Co. v. Owens*, 351 N.C. 424, 428 (2000) (citing *Roomy v. Allstate Ins. Co.*, 256 N.C. 318, 322 (1962)). However, this Court in *Collins* construed N.C.G.S. § 58-3-1 as recognizing an exception to the general rule of *lex loci contractus* "where a close connection exists between this State and the interests insured by an insurance policy." *Id.* (citing *Collins*, 335 N.C. at 95). *Collins* acknowledged that when a policy was purchased in another state, owned by a resident of another state, and for a vehicle titled in another state, the policy is governed by the law of the state in which the policy was issued. *Collins*, 335 N.C. at 94 (1993) (citing *Connor v. Insurance Co.*, 265 N.C. 188, 190 (1965); *Roomy*, 256 N.C. at 322). However, *Collins* involved an umbrella/excess liability insurance policy covering the wrongful acts of agents of the insured with property predominately in North Carolina—ninety-seven trucks titled in North Carolina where the insured's transportation division was located. *Id.* at 93–95. Given this close connection between North Carolina and the interests insured, the Court in *Collins* applied North Carolina law instead of the law of the state where the policy was issued. *Id.* at 95.

¶ 44 The Chapman Policy, however, did not insure any property in North Carolina. Also, as the accident did not occur in North Carolina, neither the Silverado, Chapman, nor Lunsford were in North Carolina at the time of the liability triggering event. Thus, Lunsford's reliance on *Collins* for the proposition that North Carolina has a close connection to the interests insured under the Chapman Policy is misplaced.

¶ 45 The Court of Appeals decision in *Benton*, relied on by Lunsford, also does not support Lunsford's position. Not only is this decision not binding on this Court, but it is not relevant to the dispute. *Benton* did not involve or address a policy entered outside of North Carolina. *See* 195 N.C. App. at 89–90.[3]

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3. The majority dismisses but does not deny that *Benton* did not involve or address a policy entered outside of North Carolina. While the *Benton* opinion does not expressly state that it addresses policies entered outside or inside of North Carolina, it is clear from the *Benton* opinion that the argument before this Court concerning the impact of an out-of-state policy was not decided by the *Benton* court. Thus, we neither ignore Farm Bureau's argument nor precedent from this Court. We are also mindful that even when

¶ 46 Instead, this case is more analogous to *Owens* where this Court found no error in the trial court's conclusion that no significant connections existed between the tortfeasor's policy and North Carolina where the policy was issued to the tortfeasor in Florida, the insured vehicle involved in the accident had a Florida identification number and Florida license plate, the tortfeasor had a Florida license, the tortfeasor never had a North Carolina license, and the accident occurred in North Carolina. 351 N.C. at 428–29. In *Owens*, the location at the time of the accident was casual, and all significant connections occurred in Florida. *See id.* at 429. As a result, this Court concluded the policy "must be construed in accordance with Florida law." *Id.*

¶ 47 In this matter, it is undisputed that the policy was purchased in Tennessee, owned by a Tennessee resident, and covered a vehicle owned by a Tennessee resident. The accident also did not occur in North Carolina. Thus, all the significant connections occurred in Tennessee. The residency of the passenger at the time of the accident occurred by chance, just as the location of the accident occurred by chance in *Owens*. Thus, Tennessee law applies to the Chapman Policy. The residency of a passenger in North Carolina at the time of the accident by itself does not constitute a sufficient connection to warrant application of North Carolina law.[4]

¶ 48 As it is undisputed that underinsured motorist coverage is not capable of being applied under Tennessee law in the facts of this case, there are no "limits of underinsured motorist coverage," applicable under the Chapman Policy. *See* N.C.G.S. § 20-279.21(b)(4). Hence, the underinsured motorist coverage limits under the Chapman Policy of $50,000 per person/$100,000 per accident cannot be stacked, i.e., added to the underinsured motorist coverage under the Lunsford Policy. Because the "sum of the limits of liability under all bodily injury liability bonds and

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our rulings do not implicate the Full Faith and Credit Clause of Art IV. § 1 of the United States Constitution, we should not only consider our law where consideration for other sovereigns in this federation is due.

4. Lunsford's final argument that the financial responsibility provision, located in the Auto Liability section of the Chapman Policy, mandates that North Carolina law applies to the Chapman Policy in this matter was not raised before the trial court and was presented for consideration for the first time on appeal in her reply before the Court of Appeals. This Court, however, "has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court.' " *State v. Sharpe*, 344 N.C. 190, 194 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10 (1934)). Because this is a new theory for the application of North Carolina law not raised before the trial court, it is not appropriate for this Court to address this argument.

insurance policies applicable at the time of the accident," $50,000 per person/$100,000 per accident under the Chapman Policy, is not less than the sum of "the applicable limits of underinsured motorist coverage," $50,000 per person/$100,000 per accident under the Lunsford Policy, there is no underinsured highway vehicle. N.C.G.S. § 20-279.21(b)(4). Absent an underinsured highway vehicle, Lunsford cannot satisfy the statutory and policy requirement for underinsured motorist coverage in North Carolina—that the insured person, Lunsford, be legally entitled to recover bodily damages from the owner or operator of an *underinsured highway vehicle*. *See* N.C.G.S. § 20-279.21(b)(3), (4).

IV. Conclusion

¶ 49 Applying the plain language of the statute dictates that the underinsured motorist coverage of the Chapman Policy must be capable of being applied to be stacked. As Tennessee law applies to the Chapman Policy and excludes underinsured motorist coverage in the facts of this case, the trial court's judgment in favor of Farm Bureau should be affirmed.

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

SOUTHERN ENVIRONMENTAL LAW CENTER
v.
THE NORTH CAROLINA RAILROAD COMPANY, and Michael Walters, Jacob F. Alexander III, William V. Bell, Martin Brackett, Liz Crabill, William H. Kincheloe, James E. Nance, John M. Pike, George Rountree III, Franklin Rouse, Nina Szlosberg-Landis, and Michael L. Weisel, in their official capacities as members of the Board of Directors of the North Carolina Railroad Company

No. 453A20

Filed 13 August 2021

Public Records—North Carolina Railroad Company—private company—State sole shareholder—not subject to Public Records Act

The North Carolina Railroad Company—a private company whose sole shareholder was the State of North Carolina and which was organized and operated for the benefit of the public—was not an agency or subdivision of the North Carolina government subject to the Public Records Act. Although, among other things, the State was the company's sole shareholder, the State selected the company's board members, and the State would receive the company's assets in the event of the company's dissolution, nonetheless the General Assembly indicated its intent in relevant legislation that the company should not be considered an entity of the State, and decisions of other State entities also supported this conclusion. Furthermore, the company consistently maintained its separate corporate identity and made decisions independently, demonstrating that the State's exercise of authority over the company was in its capacity as shareholder rather than as sovereign.

Justice EARLS dissenting.

Justice HUDSON joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order and opinion entered on 20 August 2020 by Judge Michael L. Robinson, Special Superior Court Judge for Complex Business Cases, in Superior Court, Wake County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 19 May 2021.

Kimberly Hunter, Ramona H. McGee, and Maia Hutt for plaintiff-appellant.

James P. Cooney III and Rebecca C. Fleishman for defendant-appellees.

ERVIN, Justice.

¶ 1 In this case, we are called upon to decide whether defendant North Carolina Railroad Company is an "agency" or "subdivision" of "North Carolina government" for purposes of the Public Records Act, N.C.G.S. § 132-1. In order to resolve this issue, we are required to interpret the pertinent provisions of the Public Records Act, in light of the totality of the circumstances, in order to determine whether the state government exercises such substantial control over the Railroad that it is necessarily an agency or subdivision of state government. After carefully weighing all of the relevant facts and circumstances, we determine that the Railroad has been an independent, private corporation since it was chartered in 1849 and that, while the State does exert a considerable degree of control over the Railroad, it primarily exercises this authority in its capacity as the Railroad's sole shareholder rather than in its capacity as a sovereign. As a result, we affirm the trial court's order.

I. Factual and Procedural Background

A. History and Current Operations of the Railroad

¶ 2 The Railroad, which was chartered by an act of the General Assembly in 1849, An Act to incorporate the North Carolina Rail Road Company, ch. LXXXII, § 1, 1848–1849 N.C. Laws, 138, 139, is the oldest existing North Carolina corporation. Although interest in building a railroad in North Carolina surfaced as early as the 1820's and even though the construction of such a facility was delayed for over twenty years by high construction costs and the fact that "[p]rivate capital was inadequate," "the legislature long refused to tax the public for state aid." Trelease, Allen W., *The North Carolina Railroad, 1849-1871, and the Modernization of North Carolina*, 14 (1991). Throughout this period, the proponents of a railroad argued that the availability of such a facility was critical to the improvement of North Carolina's notoriously poor internal transportation system and expressed concern that, without a railroad, "North Carolina's ports would continue to languish while her neighbors waxed rich and powerful at her expense" and that the State "would remain what many of her citizens ruefully admitted her to be, a backwater, the Rip Van Winkle State." *Id.*

¶ 3 Although many people opposed the idea of State ownership of a business enterprise, the State's involvement in the development, construction, and operation of a railroad was "the product of state pride and economic necessity." Trelease, Allen W., *The Passive Voice: The State and the North Carolina Railroad, 1849-1871*, 61 The North Carolina Historical Review 174, 175 (1984). In view of the fact that the proposed railroad had an estimated construction cost of three million dollars and the fact that "[n]o one believed that private investors in the state would or could subscribe that much money," railroad advocates believed that "[c]hief reliance would have to be placed on the public sector, primarily the state." *Id.* at 177. On the other hand, railroad critics "demanded most commonly that the state turn over control of the road to its private stockholders, whose enlightened self-interest would quickly maximize earnings and dividends." *Id.* at 175. According to the Railroad, "[t]he working model devised was a public-private entity structured as a private business corporation."

¶ 4 As an initial matter, the State pledged to contribute two million dollars to the cost of building the proposed railroad, with this amount to be paid once private investors had pledged the remaining one million dollars. *Id.* at 177. After construction of the railroad began, however, it became apparent that the completion of the project would require another one million dollars, with the State ultimately agreeing to provide the needed additional funds for the project. *Id.* at 178.

¶ 5 The Railroad's original charter allowed the Governor to appoint eight of the twelve members of the Railroad's board. *Id.* According to an amended charter that was approved by the board in 1855, the State held three-quarters of the Railroad's stock and an equivalent number of voting shares in corporate elections. *Id.* at 179. However, "[t]he state's power was exercised very lightly." *Id.* at 180. More specifically, "[a]lthough politics played a large role in directorship appointments, it almost never intruded on operational or financial matters," so that, as a general proposition, "[s]tate control was unobtrusive." Trelease, Allen W., *A Southern Railroad at War: The North Carolina Railroad and the Confederacy*, 164 Railroad History 5, 5 (1991).

¶ 6 In 1997, the General Assembly authorized the State to buy out the remaining privately held shares of Railroad stock. An Act to Make Appropriations for Current Operations and for Capital Improvements for State Departments, Institutions, and Agencies, and for Other Purposes [hereinafter 1997 Budget Appropriation], ch. 443 § 32.30, 1997 N.C. Sess. Laws 1344, 1842–44. In 1998, the State loaned the Railroad sixty-one million dollars to complete this stock purchase transaction. The Railroad

repaid the principal amount of this loan to the State over a period of five years, during the first two of which it paid interest on the loan, after which the General Assembly enacted legislation which provided that interest would no longer accrue on the principal balance. As a result of the buyout, the State became the only holder of voting shares in the Railroad by 1998 and became the Railroad's sole shareholder in 2006.

¶ 7 After the approval of the purchase of the remaining privately held shares by the State in 1997, all of the Railroad's directors have been appointed by the State. *Id.* at 1843–44. At present, the Railroad's board consists of thirteen directors, seven of whom are appointed by the Governor, three of whom are appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, and three of whom are appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate. N.C.G.S. § 124-15(a) (2019). Of the seven gubernatorial appointees, one must be a member of the Board of Transportation and one must be either the Secretary of Commerce or the Secretary's designee. *Id.* The Railroad cannot sell, lease, mortgage, or otherwise encumber its property without board approval. *Id.* § 124-15(b).

¶ 8 Consistently with the requirements of Chapter 55 of the North Carolina General Statutes, the Railroad operates pursuant to a set of corporate bylaws. Although the Governor does appoint a majority of the members of the board, the board does not have to obtain approval from the Governor or any other state official before taking actions such as establishing a budget or selling property. In 2019, the Governor sent a letter to the Railroad asking to be provided with the information required by N.C.G.S. § 124-17, additional information relating to the actions that had been taken at board meetings, and the contents of trackage rights agreements and requesting that, "as the shareholders' representative," "the Board refrain from engaging in any real estate transactions until further notice." Although the board complied with the Governor's request for information, it "continued to do business in [its] real estate transactions" while "ke[eping the Governor's office] abreast of the negotiations" relating to a specific real estate transaction in which the Governor had expressed interest. All of the members of the Railroad's board testified that they cast independent votes during board meetings and act independently of the will of the Governor or the General Assembly.[1]

1. At least one board member testified that he had "never–in [his] entire time on the Board . . . gotten directions from" or "been directed to do something by anybody, either legislatively or executive branch," while another testified that no elected official, member or

¶ 9 At present, the Railroad owns approximately 317 miles of railroad trackage that runs from Charlotte to Morehead City. The Railroad holds this property in its own corporate name and pays property taxes to the sixteen counties through which its tracks run. The Railroad's revenue is derived from a trackage rights agreement that it has with Norfolk Southern, a private railroading entity that operates using the Railroad's property. In addition, the Railroad generates revenue through utility encroachment fees, the proceeds from leasing real property, and investment earnings. The Railroad's stated mission is to "develop the railroad's unique assets for the good of the people of North Carolina" "by enabling freight to grow business, expanding rail to move people and investing in North Carolina."

¶ 10 The General Assembly directed the Railroad to pay a one-time dividend of $15,500,000 to the State, in its capacity as the Railroad's sole shareholder, in 2013. An Act to Make Base Budget Appropriations for Current Operations of State Departments, Institutions, and Agencies, and for Other Purposes [hereinafter 2013 Budget Appropriation], S.L. 2013-360, § 34.14(f), 2013 N.C. Sess. Laws 995, 1340. In addition, the 2013 legislation required the Railroad to submit annual reports to the General Assembly that included information concerning its strategic and capital investment plans; its anticipated dividends for the next three fiscal years; and a description of its business and subsidiaries, the markets in which it operates, and the properties that it owns. *Id.* § 34.14(d) at 1339–40.

¶ 11 Although the Railroad pays property taxes to the counties in which it owns property, it does not pay property taxes to the State. The Railroad does, however, pay franchise taxes to the State. In spite of the fact that it files a federal income tax return, it does not pay federal taxes because its revenues qualify as "income derived from . . . the exercise of any essential governmental function and accruing to a State." 26 U.S.C. § 115. The State University Railroad Company, which is a for-profit subsidiary of the Railroad, pays both federal and state income taxes.

¶ 12 The Railroad works closely with the Department of Transportation and communicates frequently with Department employees concerning transportation-related matters. In the past, the Department of Transportation has made investments using federal and state funds to

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agent of the General Assembly, or representative of the Department of Transportation or the Department of Commerce had ever directed him to vote a certain way during a board meeting.

improve the Railroad's corridor. According to the Railroad, these monies constitute a "capital contribution to the company by the shareholder."

B. Procedural History

¶ 13 In 2018, plaintiff Southern Environmental Law Center was one of several organizations advocating for the construction of the Durham-Orange light rail transit project, a 17.7-mile system that would have provided an additional mass transit connection between Durham and Chapel Hill. The proposed light rail project would have utilized facilities adjacent to certain existing railroad trackage and other real property that the Railroad owned in downtown Durham. In 2019, the Railroad and certain other entities declined to sign a cooperative agreement that would have allowed the light rail project to move forward. After the collapse of the proposed cooperative agreement, the project's board voted to cease further efforts toward the completion of the light rail project. On 23 May 2019, SELC, acting in reliance upon the Public Records Act, submitted a request to defendant Scott M. Saylor, president of the Railroad, seeking to inspect all of the records in the Railroad's possession relating to the light rail project that had been generated on or after 1 January 2018. The Railroad declined to provide the requested records on the grounds that it was not subject to the Public Records Act.

¶ 14 On 1 July 2019, the SELC filed a complaint in the Superior Court, Wake County, against, Mr. Saylor; the Railroad; and Michael Walters, Jacob F. Alexander, III, William V. Bell, Martin Brackett, Liz Crabill, William H. Kincheloe, James E. Nance, John M. Pike, George Rountree, III, Franklin Rouse, Nina Szlosberg-Landis, and Michael L. Weisel, in their official capacities as members of the Railroad's board of directors, in which it requested the entry of an order declaring that the Railroad was an agency of the State of North Carolina for purposes of the Public Records Act, declaring that the records that SELC had requested from the Railroad constituted public records, and ordering the Railroad to make those records available for inspection by SELC. On 2 August 2019, defendants filed a motion seeking the entry of judgment on the pleadings in their favor, which the trial court denied on 11 September 2019.

¶ 15 After the discovery process had been completed, the parties filed cross-motions seeking the entry of summary judgment in their favor, with both parties having acknowledged that an examination of the record did not reveal the issue of any genuine issue of material fact and that the sole issue before the trial court was "whether, as a matter of law, the [Railroad] is an agency of the State for purposes of the Public

Records Act." On 20 August 2020, the trial court entered an order granting summary judgment in favor of defendants.

¶ 16 In reaching this result, the trial court began by describing the establishment and subsequent operations of the Railroad before discussing the decisions of the Court of Appeals in *News & Observer Publ'g. Co. v. Wake Cty. Hosp. Sys., Inc.*, 55 N.C. App. 1, 7 (1981), and *Chatfield v. Wilmington Hous. Fin. and Dev. Inc.*, 166 N.C. App. 703 (2004), both of which addressed the issue of whether certain entities were subject to the Public Records Act. According to the trial court, "the facts of neither case [we]re substantially similar to the unique situation before the court [in this case]—a private corporation whose sole shareholder is the State of North Carolina; therefore, a comparison of these two cases to the facts of this case [was] insufficient" to permit a determination of whether the Railroad was a government agency or subdivision.

¶ 17 After concluding that the ultimate issue that it faced in this case hinged "on whether the [Railroad was] subject to provisions of the Public Records Act, a statute duly enacted by the General Assembly of North Carolina," the trial court reasoned that it "ha[d] a responsibility to consider whether the General Assembly intended for the [Railroad] to be considered a government agency for purposes of the Act." In conducting the required inquiry, the trial court identified "several instances in which the General Assembly ha[d] seemingly expressed its intent that the [Railroad] should not be considered an agency of the State," such as the fact that N.C.G.S. § 124-12 authorized the Railroad to exercise the power of eminent domain under the statutory provisions related to private condemnors rather than public condemnors. In addition, the trial court pointed out that "the fact that the [Railroad] has to qualify for an exemption in order for its taxable gross income to be excluded from the Internal Revenue Code is further indication that the [Railroad] is not an agency of the State" on the theory that state government agencies "are not subject to federal taxation to begin with." In the same vein, the trial court determined that the fact that the Secretary of Commerce was statutorily required to serve as a member of the Railroad's board provided further evidence that the Railroad was not a government agency in light of the constitutional and statutory provisions that are intended to limit double office-holding.

¶ 18 The trial court further noted that legislation enacted in 2013, which required the Railroad to make an annual report to the General Assembly, provided additional grounds for believing that the General Assembly did not intend for the Railroad to be subject to the Public Records Act. 2013 Budget Appropriation, S.L. 2013-360, § 34.14, 2013 N.C. Sess. Laws

at 1138–42. The 2013 legislation rested upon a study completed by the General Assembly's Program Evaluation Division,[2] an independent entity that conducts research for the General Assembly, which found that the Railroad was "not subject to the State's public records law." After highlighting the Railroad's corporate status, the trial court expressed concern that "equating majority, or sole, ownership with degree of supervisory control would, in effect, collapse the [Railroad]'s corporate personhood" on the theory that a corporation, even one with a single owner, is an entity that is distinct from its shareholders. For that reason, the trial court concluded that the SELC was essentially asking it to ignore the Railroad's corporate structure, an action that the trial court did not believe itself authorized to take. In light of its determinations that the Railroad "operates as an independent corporate entity" and that the General Assembly had failed on multiple occasions to declare the Railroad a public agency, the trial court concluded that, since the Railroad was not an agency of the State, it was not subject to the Public Records Act. The SELC noted an appeal from the trial court's order to this Court.

C. Parties' Arguments

¶ 19 In seeking relief from the trial court's order before this Court, the SELC begins by arguing that the Railroad should be deemed to be subject to the Public Records Act on the grounds that it performs important public and government functions, that the State owns one hundred percent of the Railroad's stock, and that the Railroad "was formed to enhance the economic well-being of the State and its citizens as a whole." In discussing the nine factors enumerated by the Court of Appeals in *News & Observer*, 55 N.C. App. at 11, the SELC asserts that, when each of these factors is properly evaluated in light of the record that was developed before the trial court in this case, the resulting analysis "establish[es] the State's substantial degree of supervision and control"

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2. N.C.G.S. § 120-36.11 provides that the Program Evaluation Division

> is established as a staff agency of the General Assembly. The purpose of the [Program Evaluation Division] is to assist the General Assembly in fulfilling its responsibility to oversee government functions by providing an independent, objective source of information to be used in evaluating whether programs or activities of a State agency, or programs or activities of a non-State entity conducted or provided using State funds, are operated and delivered in the most effective and efficient manner and in accordance with law.

over the Railroad. More specifically, the SELC argues that: (1) the State selects all of the Railroad's directors; (2) the State must approve all substantive amendments to the Railroad's articles of incorporation; (3) the State provided the primary source of funding for the initial construction of the Railroad, loaned sixty-one million dollars to the Railroad at the time that the remaining shares of that entity came into State ownership in 1998, and has continued to invest in the Railroad; (4) the Railroad is required to transfer its assets to the State upon dissolution; (5) revenue collected by the Railroad is to be used "for the public good"; (6) the Railroad's records are subject to government audit pursuant to N.C.G.S. § 124-17; (7) the Railroad must make a report concerning its receipts, expenditures, debts, leases, sales, property acquisitions, sales of stock, and more to the State pursuant to N.C.G.S. § 124-17; (8) the State reviews the Railroad's investment plan and has influence upon the Railroad's annual budget by virtue of the fact that two appointees to positions in the Governor's administration are required to serve on the Railroad's board; and (9) the State has other means to control the Railroad's activities, including the fact that the Governor has the ability to appoint members of the board and the fact that the Railroad's "stated purpose is to serve North Carolina rather than generate profit."

¶ 20 In light of the substantial degree of control that the State exercises over the Railroad, the SELC argues that the trial court's decision that the Railroad was not subject to the Public Records Act conflicts with *News & Observer* and *Chatfield*. In the SELC's view, the fact that the Railroad has a separate corporate existence does not make the Railroad a distinct entity from the State, which is "different from a traditional private shareholder," rendering the Railroad "a unique entity, with unique powers and responsibilities owed to its citizens as a sovereign." According to the SELC, the issue of "why the State exerts control [over the Railroad] is less important than the substance of the control," with the extensive degree of control that the State exercises over the Railroad being sufficient to make the Railroad the functional equivalent of an agency of the State.

¶ 21 The SELC disputes the validity of the trial court's analysis of the relevant legislative intent by arguing that the trial court erroneously examined legislative materials other than the Public Records Act in the course of determining that the Railroad was not subject to the Public Records Act. According to the SELC, the trial court's determination that the Railroad is not an agency of the State "as a general matter" and "for all purposes" is irrelevant to the issue that is before us in this case on the theory that the trial court should have focused upon the issue of whether the Railroad was an agency of the State for purposes of the Public

Records Act rather than whether it was an agency of the State for all purposes. The SELC argues that the Program Evaluation Division's conclusion that the Railroad was "not subject to the State's public records law" was nothing more than an "unconsidered statement by staff in a report prepared decades after the Public Records Act" that "warrants no deference and does not come close to constituting legislative intent," with "[f]ootnotes in legislative research reports [not being] how law is made in North Carolina." Finally, the SELC contends that the people's power to inspect government records under the Public Records Act is derived from the constitutional principle that all governmental power originates "from the people," N.C. Const. art. I § 2, and that the people of North Carolina "shall not be taxed or made subject to the payment of any impost or duty without the consent of themselves or their representatives in the General Assembly, freely given." N.C. Const. art. I § 8. As a result, the SELC argues that the citizens of North Carolina "must have access to records of the railroad company they own."

¶ 22 In seeking to persuade us to uphold the trial court's order, defendants argue that the State does not exercise sufficient control over the Railroad to warrant a finding that the Railroad is a public agency under the factors discussed in *News & Observer* and *Chatfield*. Defendants note that *Chatfield* held that "an entity's stated purpose of performing a function that is of use to the general public, without more, is insufficient to make the Public Records Law applicable," 166 N.C. App. at 709, and that many private organizations, such as non-profit corporations, have been formed for the purpose of benefiting the general public. In defendants' view, the Railroad is not a government agency for purposes of *Chatfield* given that it acts independently of the State and has, on occasion, declined to comply with requests that the board had received from the Governor.

¶ 23 After discussing the nine factors delineated in *News & Observer* for the purpose of determining the degree of control that the government exercises over the Railroad, defendants conclude that a proper analysis of the relevant factors weighs in favor of a determination that the Railroad is a private entity. For example, defendants argue that the only reason that the Railroad's assets would be transferred to the State upon dissolution is that the State is the Railroad's sole shareholder and that any one hundred percent shareholder would be able to name all of the members of the corporation's board. In addition, defendants note that the Railroad owns its real property independently of the State and that the State is required to pay the Railroad for the right to lease property from it. Similarly, defendants assert that the Railroad is a

for-profit corporation that earns its own revenue and distributes dividends to the State at the sole discretion of the board.

¶ 24 According to defendants, the ultimate issue that must be decided in this case is one of statutory interpretation, which means that the General Assembly's intent with respect to whether the Railroad is subject to the Public Records Act should be deemed to be controlling. Defendants contend that the trial court correctly evaluated the impact of the 2013 legislation, which "imposed reporting requirements [on the Railroad] similar to those required of companies whose stock is publicly traded" and evinced the General Assembly's belief that the Railroad was not a government agency. In defendants' view, the Program Evaluation Division's report regarding the Railroad did not constitute an "unconsidered statement" or a "footnote"; instead, defendants contend that this determination was critical to an understanding of the manner in which the 2013 legislation was structured. Defendants express concern that a decision to disregard the Railroad's corporate existence in this case would have broader implications for other for-profit and non-profit corporations in which the State holds interests. In view of the fact that the State "invests as a shareholder in hundreds, if not thousands, of entities, both publicly traded and privately held," defendants caution that a holding that the State's ownership of corporate stock has the effect of making the entity in question a public agency would render many private and nonprofit institutions entities subject to the Public Records Act.

II. Legal Analysis

A. Standard of Review

¶ 25 This Court reviews appeals from trial court summary judgment orders using a de novo standard of review. *JVC Enterprises, LLC v. City of Concord*, 376 N.C. 782, 2021-NCSC-14, ¶ 8 (citing *In re Will of Jones*, 362 N.C. 569, 573 (2008)). Summary judgment is appropriate when "there is no genuine issue as to any material fact" and a "party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2019). As both parties have acknowledged in their briefs, the record in this case does not reveal the existence of a disputed issue of material fact. For that reason, the ultimate issue that has been presented for our consideration in this case is the purely legal question of whether, given the undisputed facts set out in the record, the Railroad is an "agency of North Carolina government or [a] subdivision" of such an agency as defined by the Public Records Act. *See Chatfield*, 166 N.C. App. at 706–07 (holding that summary judgment was appropriate when the facts were not disputed "and the only issues are whether as a matter of law [the entity] is subject to the Public Records Law of North Carolina").

¶ 26 The North Carolina Public Records Act provides that:

> (a) "Public record" or "public records" shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions. Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority, or other unit of government of the State or of any county, unit, special district or other political subdivision of government.
>
> (b) The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law. . . .

N.C.G.S. § 132-1 (2019). "When interpreting statutes, our principal goal is to effectuate the purpose of the legislature." *State v. Jones*, 358 N.C. 473, 477 (2004) (quoting *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 574 (2002)) (cleaned up). "Legislative intent controls the meaning of a statute." *In re B.O.A.*, 372 N.C. 372, 380 (2019) (quoting *Brown v. Flowe*, 349 N.C. 520, 522 (1998)). "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." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664 (2001) (quoting *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297 (1998)) (cleaned up).

¶ 27 Although the issue of whether a particular entity is "an agency" or "subdivision" of state government for purposes of the Public Records Act is a question of first impression for this Court, the Court of Appeals has previously addressed this issue on two prior occasions. In *News & Observer*, 55 N.C. App. at 7, the Court of Appeals considered the extent to which the Wake County Public Health System was an "agency

of North Carolina government" for purposes of the Public Records Act. According to the Court of Appeals, "[t]he critical determination" that had to be made in deciding whether the Public Health System was a government agency was whether its " 'independent authority' so overshadows the county's supervisory responsibilities that it forecloses a conclusion that the System is an 'agency of North Carolina government or its subdivisions.' " *Id.* at 9. In holding that the Public Health System was subject to the Public Records Act, the Court of Appeals "look[ed] at the nature of the relationship between the System and the county" government and found that the county's "supervisory responsibilities and control over the System [were] manifest." *Id.* at 11. In the course of its analysis, the Court of Appeals identified the following facts as indicative of the substantial degree of control that the county government exercised over the Public Health System:

> (1) that upon its dissolution, the System would transfer its assets to the county; and (2) that all vacancies on the board of directors would be subject to the Commissioners' approval[;] (3) that the System occup[ies] premises owned by the county under a lease for $ 1.00 a year; (4) that the Commissioners review and approve the System's annual budget; (5) that the county conduct[s] a supervisory audit of the System's books; and (6) that the System report[s] its charges and rates to the county[;] (7) that the System be financed by county bond orders; (8) that revenue collected pursuant to the bond orders be revenue of the county; and (9) that the System would not change its corporate existence nor amend its articles of incorporation without the county's written consent.

Id. In the Court of Appeals' view, the county continued to exercise substantial control over the Public Health System, the Public Health System performed important public functions, and, before the Public Health System had assumed corporate status, it had conceded that it was an agency of the state and had "undergone little more than a change of name through incorporation." *Id.* at 12. As a result, the Court of Appeals found that the Public Health System was a governmental agency subject to the Public Records Act.

¶ 28 In *Chatfield*, 166 N.C. App. at 704, the Court of Appeals was called upon to decide whether an entity which had been formed by the Wilmington Housing Authority and the City of Wilmington as a nonprofit corporation and the charter of which had been modified to make it more

independent of the Housing Authority and the City, was subject to the Public Records Act. At the beginning of its analysis, the Court of Appeals noted that "each new arrangement must be examined anew and in its own context" and that the "nature of the relationship between a corporate entity and the government is the dispositive factor in determining whether the corporate entity is governed by the Public Records Law." *Id.* at 707–08 (quoting *News & Observer*, 55 N.C. App. at 11). After holding that, "[p]ursuant to this Court's decision in *News & Observer*, the government must exercise 'supervisory responsibilities and control' over a corporate entity for such an entity to qualify as a government agency and fall within the ambit of the Public Records Law," the Court of Appeals found that none of the nine factors indicating substantial government control upon which it had relied in *News & Observer* were present in *Chatfield*, with "an entity's stated purpose of performing a function that is of use to the general public, without more, [being] insufficient to make the Public Records Law applicable." *Id.* at 709.

¶ 29 Although we believe that both *News & Observer* and *Chatfield* were correctly decided and that the analytical approach that was utilized in those decisions is certainly relevant to the proper resolution of this case, we are not prepared to conclude that the nine factors delineated in *News & Observer* should be treated as outcome-determinative. Instead, we recognize that the Court of Appeals utilized a totality of the circumstances approach in both *News & Observer* and *Chatfield*, pursuant to which it weighed all of the relevant facts and circumstances in order to determine whether the record, when viewed in its entirety, showed that the government exercised such substantial control over the operations of the relevant entity as to render it a governmental agency or subdivision, with "each new arrangement [to] be examined anew and in its own context." *Id.* at 707–08. At the end of the day, however, we must recognize that we are necessarily attempting to determine whether the relevant facts do or do not satisfy a statutory standard, a fact that, ultimately, makes the inquiry in which we are required to engage in this case, in large part, one of statutory construction. After conducting the required totality of the circumstances evaluation, we hold that the Railroad is not an agency or subdivision of government that is subject to the requirements of the Public Records Act.

B. Legislation involving the North Carolina Railroad Company

¶ 30 In examining past laws, decisions, and governmental opinions relating to the Railroad, we conclude that, in addition to the fact that the General Assembly has had multiple opportunities to define the Railroad as a governmental agency without having done so, various components

of state government have acted on numerous occasions in such a manner as to suggest their belief that the Railroad is a private corporate entity rather than a governmental agency or subdivision. While these determinations do not, of course, control the outcome in this case, they are, when taken in conjunction with our evaluation of the relevant facts and circumstances outlined in *News & Observer* and *Chatfield*, sufficient to persuade us that the Railroad is not a governmental agency or subdivision for purposes of the Public Records Act.

¶ 31 As we have already noted, the General Assembly enacted new reporting requirements applicable to the Railroad in the 2013 Budget Appropriation, S.L. 2013-360, § 34.14(d), 2013 N.C. Sess. Laws at 1139–40 (codified at N.C.G.S. § 124-17), pursuant to which the Railroad was required to "submit an annual report" to the General Assembly that included the Railroad's strategic and capital investment plans, the dividends that the Railroad anticipated paying during the next three fiscal years, a list of the properties owned by the Railroad, and a list of the Railroad's officers and directors, among other things. N.C.G.S. § 124-17(a). The enactment of the 2013 legislation followed a comprehensive study of the Railroad conducted by the Program Evaluation Division. In the legislation commissioning the Program Evaluation Division's study of the Railroad, An Act to Make Technical, Clarifying, and Other Modifications to the Current Operations and Capital Improvements Appropriations Act [hereinafter 2011 Technical Corrections Act], S.L. 2011-391, § 52, 2011 N.C. Sess. Law 1557, 1584–85, the General Assembly noted that, for the purposes of the study, "the terms 'State agency' or 'agency' as used under Article 7C of Chapter 120 of the General Statutes shall include the North Carolina Railroad Company." The inclusion of this language tends to suggest a recognition on the part of the General Assembly that the Railroad was not a state agency, given that the Program Evaluation Division is tasked with "evaluating whether programs or activities of a State agency, or programs or activities of a non-State entity conducted or provided using State funds" are being operated efficiently and in accordance with law. N.C.G.S. § 120-36.11 (2019). Since the Railroad is not a "State agency" and is not operated "using State funds," it was necessary for the General Assembly to define the Railroad as a state agency in the 2011 Technical Correction Act, S.L. 2011-391, § 52, 2011 N.C. Sess. Law at 1585, to give it the authority to conduct the required evaluation. This language would have been unnecessary in the event that the Railroad was already considered a state agency.

¶ 32 On the first page of the study that it performed pursuant to the requirements of the 2011 legislation, the Program Evaluation Division

noted that the "State ha[d] limited mechanisms for oversight" of the Railroad given the Railroad's status as "a private corporation" and that the Railroad was subject to "less stringent reporting requirements than publicly-traded corporations." For that reason, the Program Evaluation Division suggested that the General Assembly "amend Chapter 124 of the General Statutes to strengthen reporting" requirements applicable to the Railroad. In support of its recommendations, the Program Evaluation Division stated that the

> State of North Carolina is the sole shareholder of the [Railroad], but it remains a private corporation. . . . As a private corporation, [the Railroad] files with the U.S. Internal Revenue Service as a C corporation and is subject to Chapter 55 of the General Statutes. Because [the Railroad] is not part of state government, several state laws do not apply to the corporation.
>
> - [Railroad] employees are not state employees under the State Personnel Act.
> - [The Railroad's] Board of Directors is not a covered board under the State Government Ethics Act.
> - [The Railroad] is not subject to the State's public records law.
> - [The Railroad] is not reviewed as a part of the state budget process because it does not receive state appropriations.

Although the Program Evaluation Division acknowledged that the General Assembly had the authority to transform the Railroad into an entity of state government by repealing the Railroad's corporate charter and dissolving the corporation, it cautioned that acting in such a manner "would be a lengthy and complicated process" that had "several legal and financial implications," including the risk that the State would become responsible for the Railroad's financial obligations and the fact that the State would lose the income that was currently being derived from the Railroad's franchise tax payments. As a result, the Program Evaluation Division did not advise the General Assembly to convert the Railroad into a state agency and, instead, recommended that the General Assembly enact legislation strengthening the reporting requirements to which the Railroad was subject and requiring the Railroad to pay a dividend to the State.

¶ 33 According to the SELC, the trial court placed "undue reliance on a footnote in a report written by the [Program Evaluation Division]—unelected staff tasked with completing research, not drafting law," in reaching the conclusion that the Railroad was not subject to the Public Records Act. Although the SELC is certainly correct in pointing out the non-binding nature of the Program Evaluation Division's comment, the record also reflects that the General Assembly enacted legislation during the 2013 session that imposed additional reporting requirements upon the Railroad and required the Railroad to make a specific dividend payment. Although the General Assembly did not, to be sure, include any sort of explicit endorsement of the Program Evaluation Division's position with respect to the issue of whether the Railroad was subject to the Public Records Act in the 2013 legislation, the General Assembly's decision to adopt the Division's ultimate recommendations does tend to suggest that it agreed with the logic that undergirded those recommendations.

¶ 34 In addition, the General Assembly stated in the 2013 legislation that:

> (b) Upon the request of the Governor or any committee of the General Assembly, [the Railroad] shall provide all additional information and data within its possession or ascertainable from its records. . . . At the time [the Railroad] provides information under this section, it shall indicate whether the information is confidential. Confidential information shall be subject to subsection (c) of this section.
>
> (c) Confidential information includes (i) information related to a proposed specific business transaction where inspection, examination, or copying of the records would frustrate the purpose for which the records were created, or (ii) information that is subject to confidentiality obligations of [the Railroad]. Confidential information is exempt from Chapter 132 of the General Statutes and shall not be subject to a request under G.S. 132-6(a).

N.C.G.S. at § 124-17(b), (c). A careful reading of N.C.G.S. § 124-17 suggests that, consistently with the approach adopted by the Program Evaluation Division, the General Assembly did not consider the Railroad to be a governmental agency or subdivision that was subject to the Public Records Act. Simply put, there would have been no need for the enactment of subsection (b), which requires the Railroad to provide

the information that had to be submitted to the Governor or the General Assembly without in any way limiting such requests to confidential information, in the event that the Railroad was already subject to the provisions of the Public Records Act. A similar deduction can be made from the fact that, in subsection (c), the General Assembly adopted a confidentiality provision applicable to information that it received from the Railroad that would have been unnecessary in the event that the Public Records Act directly applied to the Railroad. As a result, we find it difficult to reach any conclusion other than that the General Assembly agreed with the Program Evaluation Division that the Railroad was not, under existing North Carolina law, an agency or subdivision of State government that is obligated to comply with the Public Records Act.

¶ 35 Although the history surrounding the language contained in the 2013 legislation provides the strongest indication of the General Assembly's belief that the Railroad is not a governmental agency or subdivision subject to the Public Records Act, the language of other statutory provisions points in a similar direction. For example, in 1997, the General Assembly enacted legislation permitting the members of the Railroad's board to request coverage under the State's officers, directors, and employees' liability policy while specifying that "[c]overage of the officers, directors, and employees of the [Railroad] under this subsection shall not be construed as defining the [Railroad] as a public body or defining its officers, directors, or employees as public officials." 1997 Budget Appropriation, ch. 443, § 32.30, 1997 N.C. Sess. Laws at 1844. In 2000, the General Assembly passed An Act to Implement the Recommendations of the Future of the North Carolina Railroad Study Commission, S.L. 2000-146, 1999 N.C. Sess. Laws 869, 872, which gave the Railroad "the power of eminent domain to acquire property in fee simple for the purposes specified in G.S. 40A-3(a)(4)," which affords eminent domain authority to private, rather than public, condemnors. N.C.G.S. § 124-12. As a result, other relevant statutory provisions enacted by the General Assembly consistently suggest that the Railroad is not a governmental agency or subdivision subject to the Public Records Act.

¶ 36 The Attorney General has suggested that the Railroad is not subject to the Public Records Act as well. In a 2000 opinion, the Attorney General stated that the "North Carolina Constitution [ ] sanctions the appropriation of public money to a private corporation for the accomplishment of a public purpose," citing N.C. Const. art. V, § 2(7). After noting that "the 1997 General Assembly authorized the investment of Sixty-One Million Dollars ($61,000,000) in order to acquire the outstanding private shares, and thereby total control, of the [Railroad]," the Attorney

General opined that the State also had the authority to acquire control over a healthcare corporation without rendering that corporation an agency of the State, described the Railroad as an example of a private corporation in which the State is nothing more than a shareholder, and stated that "it is clear that the System's acquisition of corporate control over a nonprofit corporation does not alter the legal status of the corporation or vest within it attributes of the State of North Carolina." Letter from Grayson G. Kelley, Senior Deputy Attorney General, to Representative Daniel T. Blue, *Proposed Acquisition of Rex Healthcare by the University of North Carolina Health Care System* (Mar. 8, 2000) (available at https://ncdoj.gov/opinions/proposed-acquisition-of-rex-healthcare-by-the-university-of-north-carolina-health-care-system/).

¶ 37 Similarly, according to materials provided to the trial court in this case, the State Ethics Commission voted in 2010 that the Railroad's directors were not subject to the provisions of the State Government Ethics Act, Chapter 138A of the General Statutes.[3] In seeking a determination that the Railroad was not a state agency subject to the provisions of the State Ethics Act, the Railroad contended, by means of a letter drafted by private counsel,[4] that the "fact that the State is the sole-shareholder . . . does not change the private corporate status" of the Railroad, with there being multiple grounds for concluding that the Railroad was not an agency of state government, including the fact that the Railroad did not have the eminent domain authority available to public condemnors, that the Railroad paid property taxes to the sixteen counties in which it owned property, that the Railroad did not have the benefit of sovereign immunity, and that the Railroad's employees were not state employees. In light of these and similar factors, the Commission concluded that the Railroad was a "unique agency," that it "presented special issues not previously considered by the Commission," and that it should not be deemed to be a state agency subject to the State Ethics Act. As a result, certain relevant statutory provisions and the decisions of the Attorney General and the State Ethics Commission, which clearly constitute persuasive authority that sheds light on the question that is before us in this

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3. The State Government Ethics Act is intended to "ensure that elected and appointed State agency officials exercise their authority honestly and fairly, free from impropriety, threats, favoritism, and undue influence," with the Act serving to establish a code of ethical conduct "for elected and appointed state agency officials." N.C.G.S. § 138A-2 (2019).

4. We further note that the Railroad is not represented by the Department of Justice in this case and has, instead, conducted its defense using privately retained counsel, a fact that further tends to show that the Railroad is not a governmental agency or subdivision.

case, suggest, if they do not explicitly state, that the Railroad is not a governmental agency or subdivision subject to the Public Records Act.

C. Presence of "Substantial Government Control"

¶ 38 The legislative enactments and other official determinations outlined above are consistent with our understanding of the information contained in the record concerning the extent to which the State, acting in a governmental capacity, exercises sufficient supervision and control over the Railroad to make it a state agency or subdivision. Admittedly, the Railroad has enjoyed and continues to enjoy a number of benefits from its relationship with the State. For example, the State provided three-quarters of the Railroad's initial capital and loaned the Railroad the funds that it used to complete the purchase of its remaining shares. In addition, the General Assembly allowed the Railroad to forego the payment of interest on the principal balance of this loan during the final three years of the repayment period. Finally, the Railroad benefits from the use of state and federal funds in making safety and service-related improvements to the corridor that the Railroad owns and the fact that it is not required to pay state and federal income taxes. As a result, a number of factors would tend to support a determination that the Railroad is a governmental agency or subdivision.

¶ 39 However, we believe that a number of countervailing factors arising from the Railroad's status as a separate corporate entity outweigh the factors that favor classifying the Railroad as a governmental agency or subdivision. Among other things, the undisputed record evidence reflects that the Railroad has consistently maintained its separate corporate identity and structure and makes decisions independently of any directives that it might receive from governmental officials, including the Governor. For example, the Railroad adopts and funds its own budget without the necessity for prior approval from any governmental entity. In addition, the Railroad, rather than the State, owns title to its own property and exercises eminent domain authority as a private, rather than a public, condemnor. The revenues that the Railroad uses to support its operations are titled to the Railroad rather than the State; are derived from the Railroad's trackage right agreements, utility encroachment agreements, real estate leases, and investment earnings rather than from the appropriation of state funds; and are spent, as a general proposition, in a manner controlled by the board rather than the Governor, the General Assembly, or any other agency of State government. Although the Railroad does, and has even been ordered, on one occasion, to pay dividends to the State, those dividend payments are, for the most part, made at the behest of and in an amount determined

by the board. The revenues earned by the Railroad are reinvested into the company, whether through dividends that are received by the State and reinvested in the company's infrastructure, or as directed by the board. Similarly, the Railroad pays local property taxes to the counties in which it owns property and a franchise tax to the State and claims an exemption from federal income taxation on the basis of a statutory provision that would be irrelevant in the event that the Railroad was a governmental agency. Although the Railroad does, on occasion, engage in planning-related activities with governmental agencies, the same can be said of other private entities as well. As a result, the manner in which the Railroad operates much more closely resembles the activities of a private corporation rather than those of a governmental agency or subdivision.

¶ 40 In seeking to persuade us to reach a different result, the SELC emphasizes the fact that the State is the Railroad's sole shareholder, that the members of the board are chosen by the Governor and the General Assembly, that certain members of the board must be members of the Governor's administration, that the Railroad's property must be transferred to the State upon dissolution, that the State must approve fundamental changes to the Railroad's corporate documents, that the Railroad is entitled to favorable tax treatment in some instances, and that the General Assembly has exercised authority over the Railroad for the purpose of requiring the provision of certain information and the making of certain dividend payments.[5] Although the State, in its capacity as the Railroad's sole shareholder, does have a certain degree of indirect control of the entity's day-to-day operations and has the right to approve or disapprove certain fundamental corporate decisions, those facts, standing alone, do not serve to make the Railroad a state agency or subdivision and exist in all situations in which the corporation is owned by a single stockholder. The same is true of the fact that the Railroad was organized and continues to operate for the benefit of the public rather than for purely profit-seeking purposes, with a similar statement being applicable to many nonprofit corporations in which the State has no interest. Simply put, most of the information upon which the SELC relies in seeking to persuade us that the Railroad should be deemed subject

5. In view of the fact that many of the indicia of control upon which the SELC relies stem from the fact that the State is the Railroad's sole shareholder, any effort to cumulate both the fact that the State is the Railroad's sole shareholder and the fact that the State's status as the Railroad's sole shareholder gives it the right to make certain decisions relating to the Railroad, such as the election of the members of the Railroad's board, seems to us to result in the placing of impermissible weight upon those more specific factors in the required totality of the circumstances analysis.

to the Public Records Act is the direct result of the State's status as the Railroad's sole shareholder rather than the exercise of the State's sovereign authority.

¶ 41 Although the SELC argues that the nature of the State's authority over the Railroad, rather than the source of that authority, should be deemed controlling, we do not find this argument persuasive. The SELC's argument to the contrary notwithstanding, the basis of the State's influence over the Railroad is critical to the proper resolution of the issue of whether the Railroad is a governmental agency or subdivision for purposes of the Public Records Act. The fundamental difference between a governmental entity and a private one is the extent, if any, to which the entity in question exercises the sovereign authority of the State. As a result, it stands to reason that the extent to which the State exercises sovereign authority, rather than authority derived from some other source, should be an important feature of any determination concerning the applicability of the Public Records Act.

¶ 42 The SELC's suggestion that we should overlook the nature and source of the State's authority over the Railroad is inconsistent with this Court's jurisprudence for a second reason as well. Although the Railroad's separate corporate existence does not, of course, control the outcome of this case, we have consistently, throughout our history, been disinclined to disregard the distinction between a corporation and its shareholders. For that reason, we have recently stated, in a different context, that, "[o]nce a corporate form of ownership is properly established, the corporation is an entity distinct from the shareholder, even a shareholder owning one-hundred percent of the stock." *Glob. Textile All., Inc. v. TDI Worldwide, LLC*, 375 N.C. 72, 74 (2020). Nothing in the present record tends to suggest that the Railroad has failed to take the steps necessary to maintain its separate corporate identity or to operate in a fashion that exhibits a degree of independence from direct governmental control, a fact that further persuades us to refrain from holding that the mere fact that the State has certain authority over the Railroad by virtue of its status as the Railroad's sole shareholder and the fact that the Railroad was organized and operates for the benefit of the public suffices to make the Railroad a governmental agency or subdivision subject to the provisions of the Public Records Act.[6]

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6. The SELC's suggestion that the trial court erred by examining whether the Railroad was a governmental agency or subdivision in general, rather than whether it was a governmental agency or subdivision for purposes of the Public Records Act, does not strike us as persuasive given that nothing in the relevant statutory language suggests that there is any difference between a governmental agency or subdivision, in general, and a

¶ 43 Thus, given that both the General Assembly and other governmental entities have consistently treated the Railroad as a private corporation rather than a public agency or subdivision and given that the State, acting in its capacity as sovereign, does not have a sufficient degree of control over the day-to-day operations of the Railroad, we hold that the trial court did not err by granting summary judgment in defendants' favor in this case. As a result, the trial court's order is affirmed.

AFFIRMED.

Justice EARLS dissenting.

¶ 44 This case presents a single question: can a corporate entity, wholly owned by the State of North Carolina, directed by a board whose members are appointed by State elected officials, wielding the power of eminent domain, and comprised of assets that will escheat to the State in the event of dissolution, evade public scrutiny under the Public Records Act (the Act)? The majority says yes. Because this holding runs contrary to the purpose of the Act and privileges the form of the corporation over the public nature of its governance and activities, I respectfully dissent.

I. Background

¶ 45 The North Carolina Railroad Company (NCRR) was created by statute in 1849. An Act to incorporate the North Carolina Rail Road Company, ch. LXXXII, § 1, 1848–1849 N.C. Laws, 138. The State paid $2 million to be NCRR's majority shareholder at that time, *Id.* § 36, came to own more of NCRR's stock through transactions in the ensuing decades, and by 2006 owned *all* NCRR stock. Today, through its officials, the State chooses NCRR's directors (N.C.G.S. § 124-15 (2019)), approves all substantive changes to NCRR's articles of incorporation, facilitates financing for NCRR, receives reports of NCRR rates and rate changes (N.C.G.S. § 124-17), assumes control of revenue it collects, and stands to receive the assets of NCRR in the event of dissolution.

¶ 46 In 2019, the Southern Environmental Law Center (SELC) wrote to NCRR to request records related to NCRR's involvement in a light rail project. SELC believed NCRR would be compelled to provide the

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governmental agency or subdivision for purposes of the Public Records Act. Instead, the relevant statutory language simply speaks of an "agency" or "subdivision" of State government. In the same vein, any argument that the Public Records Act requires an expansive interpretation of what is and is not a "public agency" or "subdivision" assumes the answer to the point at issue given that the relevant statutory language invariably refers to covered agencies or officers as "public" without further elaboration.

records under the Public Records Act. NCRR denied the request and sent no records, claiming it was not subject to the Act. SELC filed suit to compel production of the records. After a hearing, the North Carolina Business Court granted NCRR's motion for summary judgment, concluding "that if it were the Legislature's intent that [NCRR] be subject to the Public Records Act, [the Legislature] could have made that expressly clear . . . ." Today's majority affirms the Business Court's decision, holding that although the State has exercised a "considerable degree" of authority over NCRR in the past 170 years, it has done so as NCRR's "sole shareholder rather than in its capacity as a sovereign." But the majority's decision ignores the legislative intent of the Public Records Act, the scope of the statutes governing NCRR's activities, and the realities of NCRR's relationship with the government of North Carolina.

¶ 47 Today's decision runs contrary to precedent and threatens the vitality of the Public Records Act. It allows a corporate entity—fully owned by the State and operationally intertwined with numerous government officials and agencies—to shield from public scrutiny its records made in connection with the transaction of public business. It also risks allowing the State to sidestep the requirements of the Public Records Act by conducting its business through a nominally private entity. It is the substance of an entity's actions or operations, not its particular form, which dictates whether the public has right to access its records. Accordingly, I would hold that NCRR is a government agency subject to the Public Records Act. I respectfully dissent.

II. Analysis

¶ 48 Enacted in 1975, the North Carolina Public Records Act provides that "[t]he public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people." N.C.G.S. § 132-1(b) (2019). A "public record" is defined to include documents "made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions." N.C.G.S. § 132-1(a). The Act further defines "agency of North Carolina government or its subdivisions" broadly to include "every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government." *Id.* The question we must answer—and where I differ from the majority—is whether the phrase "agency of North Carolina government or its subdivisions" includes NCRR for the purposes of the Public Records Act.

A. NCRR's operations are sufficiently intertwined with those of North Carolina's government to subject it to the Public Records Act

¶ 49 Forty years ago, the Court of Appeals concluded that the Wake County Hospital System, organized as a nonprofit corporation, was a government agency within the meaning of the Public Records Act because it "exercise[d] its 'independent authority' so intertwined with the [government] that it must be, and is, an 'agency of North Carolina government or its subdivisions.' " *News & Observer Pub. Co. v. Wake Cty. Hosp. Sys., Inc.*, 55 N.C. App. 1, 12 (1981), *disc. rev. denied*, 305 N.C. 302 (1982). Since the Court of Appeals decided *Wake County Hospital System*, it has been the undisturbed law of our state that a formally corporate entity may be considered a government agency for the purposes of the Act depending upon "the nature of the relationship between the [entity] and the [government]." *Id.* at 11. Given the legislature's intent in passing the Public Records Act, this rule makes good sense—the purpose of the Act is to ensure that the people of North Carolina have the information they need to hold the government accountable to the citizens it serves.

¶ 50 A corporation's public-serving actions do not, on their own, subject the corporation to the Act. *See Chatfield v. Wilmington Hous. Fin. and Dev. Inc.*, 166 N.C. App. 703, 709 (2004) ("[A]n entity's stated purpose of performing a function that is of use to the general public, without more, is insufficient to make the [Act] applicable."). Rather, it is the "substance and not the form of the [corporation] that is the key" to our evaluation. *Wake Cty. Hosp. Sys., Inc.*, 55 N.C. App. at 10. The substance of the corporation is often revealed by the extent to which the government exercises "supervisory responsibilities and control" over the entity. *See Chatfield*, 166 N.C. App. at 707. Put simply, a corporation can be "so intertwined" with the government that it is "an agency of North Carolina" for the purposes of the Act. *Wake Cty. Hosp. Sys., Inc.*, 55 N.C. App. at 12. But critically, it is possible that such a corporate entity, intertwined with the State, can be considered a public agency for the purposes of the Act without being treated as a state agency for all purposes. *See id.* at 7-8. The majority errs by collapsing this distinction.

¶ 51 In *Wake County Hospital System*, the Court of Appeals cited several specific aspects of the relationship between the hospital system and the county that demonstrated the government and the hospital system were substantially "intertwined." They are of the categories that are essential to the operation of a corporate entity, including, but not limited to, financing, asset management, operations, and decision-making and

control. *Id*. at 11. But as the court also noted, these aspects are not factors or elements that can be applied in each circumstance— "each new arrangement must be examined anew and in its own context." *Id.*

¶ 52 Indeed, "examin[ing]" the relationship between NCRR and the State of North Carolina "anew and in its own context" reveals that the state's "responsibilities and control" over NCRR are "manifest." *Wake Cty. Hosp. Sys., Inc.*, 55 N.C. App. at 11. A close examination of the relationship supports only the conclusion that NCRR must be a state agency for the purposes of the Act. The State selects every Director of NCRR, N.C.G.S. § 124-15, and those Directors perform State-mandated obligations. N.C. Exec. Order No. 2009-034 (Dec. 9, 2009). Two of the thirteen Directors must be members of the Governor's administration, N.C.G.S. § 124-15, serving both NCRR and the administration to ensure effective communication and coordination between the organizations. The State must approve all substantive amendments to NCRR's articles of incorporation. Revenue earned today by NCRR belongs to the State and is treated as revenue for "the public good." In turn, the General Assembly often directs how those revenues are spent once they accrue to the State. *See* An Act to Make Base Budget Appropriations for Current Operations of State Departments, Institutions, and Agencies, and for Other Purposes [hereinafter 2013 Budget Appropriation], S.L. 2013-360, 2013 N.C. Sess. Laws 995. NCRR's finances and records are subject to State review and records requests from State officials, and the results of external audits are provided to the General Assembly. N.C.G.S. § 124-17. Moreover, NCRR is statutorily mandated to annually submit to the General Assembly a detailed financial report concerning its strategy, operations, and personnel. *Id.* NCRR also enjoys powers of eminent domain. N.C.G.S. § 124-12. As the majority notes, that authority is given to NCRR as a private condemnor, not a public one, under N.C.G.S. § 40A-3(a)(4). Yet N.C.G.S. § 40A-3(a) grants the power of eminent domain for "the public use or benefit," another example of NCRR's obligations to the people of North Carolina.

¶ 53 Just like conventional state agencies, NCRR is frequently a partner to departments of state government in planning and decision-making. NCRR often collaborates on projects with the Department of Transportation (DOT), and staff from both NCRR and DOT discuss those projects routinely. Leaders at the organizations aim to have a "regular exchange of information" between their respective governing boards. NCRR cooperates with DOT to serve as an intermediary between DOT and Norfolk Southern, another railroad company. Elsewhere, directors from the Department of Commerce are regularly updated on NCRR's

activities so that, in the words of one such director, "[c]ommerce [can] thrive in North Carolina."

¶ 54 And, as mentioned previously, the State has owned all of NCRR's stock since 2006. NCRR contends that many of its entanglements with the State, like those detailed above, arise from the fact that the State is the sole shareholder of NCRR's stock, and are thus irrelevant. But the State's control of NCRR is essential context. To NCRR, the appointment of its Board members by elected state officials—the Governor and the General Assembly—is "the same . . . as any other private corporation." Legislation mandating the frequency and content of reports is merely a "shareholder agreement." As noted, under current arrangements, were the NCRR to be dissolved as a corporation, its assets would return to the State. NCRR claims that because this is simply one post-dissolution option among many, it should not bear on our analysis But I am unconvinced that what is presently true should be discounted simply because we can imagine other future alternatives. NCRR seeks to hide behind "the fundamental principle of corporate law that a corporation has a legal existence that is distinct from its shareholders" and accuses SELC of attempting to "merge the identity" of the State with that of the corporation, but this case requires us to examine the substantive relationship between the corporation and the State. We cannot, as the majority does, rely upon the fact of NCRR's "separate corporate identity" or "corporate form." Our inquiry concerns when a corporation is obligated to be transparent about its operations, and we beg the question if we rest on corporate formalities.

¶ 55 The majority notes that we have "consistently . . . been disinclined to disregard the distinction between a corporation and its shareholders." In the majority's view, we may recognize that the State is NCRR's "sole shareholder," possesses "a certain degree of indirect control of the entity's day-to-day operations," and "has the right to approve or disapprove certain fundamental corporate decisions," but "those facts, standing alone, do not serve to make [NCRR] a state agency or subdivision." Yet this gives insufficient weight to the many facts relevant to our inquiry which all point in the direction of treating NCRR as a public entity for the purposes of the Act. When the State owns the corporation, appoints its board, mandates its reporting, spends its revenue, and stands to receive the assets in the event of dissolution, we should recognize the obvious truth that the identity of the corporation and its sole shareholder—the State—are meaningfully intertwined. NCRR's argument—that the activities of this kind of corporation can be hidden from scrutiny by the people of North Carolina—is a self-interested attempt to cleave its

public business from its public responsibilities. Today's decision gives that attempt the force of law. The "manner in which [NCRR] operates," which the majority characterizes vaguely as "resembl[ing] the activities of a private corporation," should not distract us from the manifest conclusion that NCRR and the State are substantially intertwined.

B. Holding that NCRR is subject to the Public Records Act is consistent with the legislature's intentions toward both NCRR and the Public Records Act

¶ 56 Contrary to the arguments promoted by NCRR and the majority, the conclusion that NCRR is subject to the Public Records Act is consistent with the intent of the General Assembly. This is true for two reasons.

¶ 57 First, the legislature created NCRR to benefit the State, and it has continued to exercise its authority over NCRR to serve the public. Troubled by the poor condition of the State's transportation system and the limited connections between western North Carolina and the State's eastern seaports, the General Assembly chartered NCRR "[t]o create a railroad company . . . to promote growth in the state." Their efforts were motivated by a belief in "the importance of the railroad to the economic well-being of the State and its citizens as a whole." While it is true, as NCRR repeatedly notes, that the large amount of money required to fund the initial investment in NCRR came from private sources, it is also apparent from the records of the time that the General Assembly intended to link the eastern and western parts of the State by rail with a new public-private venture.[1] Moreover, the State invested the lion's share of the capital: two-thirds of the initial $3 million capitalization and an additional $1 million just four years later. NCRR's charter gave it powers of eminent domain and the liberty to build widely, "across or along any public road or water source." An Act to incorporate the North Carolina Rail Road Company, ch. LXXXII, §§ 26–28, 1848–1849 N.C. Laws, 138, 145–50.

¶ 58 The General Assembly's actions in the years since corroborate its original intent to require NCRR to operate for the benefit of the state.

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1. NCRR contends that its view of history, that "[the Company] was formed as a private corporation to meet a pressing public need the government had been unable to meet and in which private participation was necessary," is "[c]ontrary to" SELC's "assertion that the Company was created 'for the benefit of the State.' " This is an attempt to draw a distinction without a difference. It benefits the State when the government charters a company to build a railroad connecting the ends of the State to one another and provides the majority of the start-up capital. An action undertaken to "meet[ ] a pressing public need" is an action undertaken "for the benefit of the State." Here, the private nature of the corporation does not alter the General Assembly's intention, which was to create a railroad to serve North Carolina and its people.

In 1992, a State advisory study group issued a report in which it noted that "where the State grants a private corporation special governmental powers, such as eminent domain, those powers are to be used for the public benefit," and public-private partnerships like NCRR are "obligated to carry out the public purpose for which they were chartered." In service to this obligation, the State began buying more of NCRR's shares "to help promote trade, industry, and transportation within the State of North Carolina and to advance the economic interest of the state." An Act to Make Appropriations for Current Operations and for Capital Improvements for State Departments, Institutions, and Agencies, and for Other Purposes, ch. 443 § 32.30, 1997 N.C. Sess. Laws 1344, 1842–1844. This is not to say, of course, that any public-private venture necessarily becomes subject to the Public Records Act. However, where the venture is wholly owned and controlled by the State, it seems self-evident that the "public" part of the venture holds more import than that which is "private," at least for the purposes of the Public Records Act.

¶ 59 Second, and separately, the legislature enacted the Public Records Act to enable public inspection of the workings of the state government and its agencies, not to create formalistic hideouts for public-private partnerships that wish to escape scrutiny. Sorely missing from the majority's "totality of the circumstances analysis" is any meaningful evaluation of the scope and purpose of the Public Records Act. In my view, the General Assembly's motivations for passing the Public Records Act suggest it intended entities like NCRR to fall within the Act's purview.

¶ 60 The first North Carolina public records statute affirmed that public records are "the chief monuments of North Carolina's past and are invaluable for the effective administration of government [and] for the conduct of public and private business." An Act to Safeguard Public Records in North Carolina, ch. 265, § 1, 1935 N.C. Sess. L., 288. This statute and its 1975 successor are in keeping with American common law's centuries-old recognition of the public's right to inspect public records. *See* Joseph D. Johnson, *Administrative Law—Public Access to Government-Held Records: A Neglected Right in North Carolina*, 55 N.C. L. Rev. 1187 (1977). Historically, our appellate courts have agreed. Given the legislature's "mandate for open government," *News & Observer Pub. Co., Inc. v. Poole*, 330 N.C. 465, 475 (1992), "it is clear that the legislature intended to provide [through the Public Records Act] that, as a general rule, the public would have liberal access to public records." *News & Observer Pub. Co. v. State ex rel. Starling*, 312 N.C. 276, 281 (1984). This is because "[g]ood public policy is said to require liberality in the right to examine public records." *Advance Publ'ns, Inc.*

v. Elizabeth City, 53 N.C. App. 504, 506 (1981). Just last year, this Court affirmed this principle:

> The Act is intended to be liberally construed to ensure that governmental records be open and made available to the public, subject only to a few limited exceptions. The Public Records Act thus allows access to all public records in an agency's possession "*unless* either the agency or the record is specifically exempted from the statute's mandate." *Times-News*, 124 N.C. App. at 177, 476 S.E.2d at 452 (emphasis added). "Exceptions and exemptions to the Public Records Act must be construed narrowly." *Carter-Hubbard Publ'g Co.*, 178 N.C. App. at 624, 633 S.E.2d at 684.

DTH Media Corp. v. Folt, 374 N.C. 292, 300–01 (2020).

¶ 61 Liberal access to public records is, of course, not the same as liberal construction of what is a public record. But there, too, our lawmakers have recognized the importance of granting the people ready access to records concerning the operations and transactions of their government: "It is an uncontestable pre-condition of democratic government that the people have information about the operation of their government . . . ." Sam J. Ervin, Jr., *Controlling "Executive Privilege*,", 20 Loy. L. Rev. 11, 11 (1974). At bottom, "[w]hile some degree of confidentiality is necessary for government to operate effectively, the general rule in the American political system must be that the affairs of government be subject to public scrutiny." Johnson, 55 N.C. L. Rev. at 1188. Today's decision undermines that principle.

¶ 62 "In matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished." *Elec. Supply Co. of Durham, Inc. v. Swain Elec. Co., Inc.*, 328 N.C. 651, 656 (1991). That purpose is "first ascertained from the plain words of the statute." *Id.* When the General Assembly passed the Public Records Act, it was so the public would have insight into how decisionmakers were going about their work, how public policy was being enacted, and how the agencies of North Carolina were being operated. Indeed, the Act applies to records produced by an "agency" which are "made . . . in connection with the transaction of *public business*." N.C.G.S. § 132-1(a). Furthermore, the legislature provided an expansive definition of what might be considered an agency. As discussed above, if we were to apply the rule which has been the law in our state for the

past forty years, NCRR falls firmly within the meaning of "agency." While some government entities are enumerated, the language of the statute considers that not all could be named specifically:

> Agency of North Carolina government or its subdivisions shall mean and *include every* public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority *or other unit of government* of the State or of any county, unit, special district or other political subdivision of government.

N.C.G.S. § 132-1 (emphasis added). If we were to place NCRR within the definition of "agency" within the statute, it would fit well within "institution" and certainly within the catchall of "other unit of government."

¶ 63 In our consideration of the statues relevant to this case, we should "adopt an interpretation which will avoid absurd or bizarre consequences." *State ex rel. Com'r of Ins. v. N.C. Auto. Rate Admin. Office*, 294 N.C. 60, 68, (1978). An interpretation that results in an entity created by the State for public benefit shielding its records from public scrutiny is an absurd one. Accordingly, I reject the necessary premise of the majority's decision which says that the legislature, in enacting the 1975 Public Records Act, intended to permit the State or a related entity to hide from scrutiny merely by conducting its operations behind the corporate form.

¶ 64 The majority, as did the Business Court, makes much of a 2011 report from the General Assembly's Program Evaluation Division (PED), which is "a staff agency of the General Assembly . . . [purposed to provide] an independent, objective source of information to be used in evaluating" the activities of state agencies or those of non-state entities conducted using state funds. N.C.G.S. § 120-36.11(a) (2019). In that 2011 report, as was well-documented by both parties, the PED found that "[NCRR] is not subject to the State's [Public Records Act]." Both parties rightly recognize that whether NCRR is subject to the Public Records Act, a question of law, is a determination to be made by this court, not by a staff agency of the General Assembly.[2] The PED report, then, adds little to our analysis.

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2. Whether the NCRR is subject to the Public Records Act, a narrow question of law, is also not a determination to be made by the Attorney General or the State Ethics Commission in their realms of authority, though the majority points to decisions by both as "persuasive" in support of its ruling.

¶ 65 As the majority notes, in advance of the PED study of NCRR, the General Assembly passed legislation stipulating that "[f]or the purposes of [the] evaluation, the terms 'State agency' or 'agency' " would include NCRR. An Act to Make Technical, Clarifying, and Other Modifications to the Current Operations and Capital Improvements Appropriations Act, S.L. 2011-391, § 52, 2011 N.C. Sess. Law No. 1557, 1584–85. The majority claims that that "this language tends to suggest a recognition on the part of the General Assembly that [NCRR] was not a state agency," but this does not follow in light of the issue before us. It seems instead that the legislature thought it necessary to define the NCRR as a "State agency" for the limited purpose of the evaluation. I believe the Public Records Act contemplates the same—that a corporate entity can be considered a state agency for some purposes, but not all.

¶ 66 The majority advances two further arguments by pointing to General Assembly activities in the wake of the PED report. Neither is availing. Both arguments focus on a 2013 statute imposing "additional reporting requirements," N.C.G.S. § 124.17. In that legislative process, the General Assembly—equipped with the 2011 PED report which stated NCRR was not subject to the Public Records Act—"deci[ded] to adopt" the recommendations in the report, a decision the majority reads to mean the General Assembly "agreed with" the PED's assessment of NCRR. However, it is just as likely that the General Assembly disagreed with the PED report and saw no need to act in light of it. In other words, the General Assembly did not bring NCRR within the auspices of the Act in 2013 because they believed NCRR to already be there. The PED is, after all, a staff agency of the General Assembly. It is unlikely that, faced with a report containing an inaccuracy from one of its staff agencies, the General Assembly would see a need to respond with legislation to correct the error.

¶ 67 The majority also points to the provisions of the 2013 statute that imposed those additional reporting requirements, arguing that such legislation would be superfluous if NCRR were already a state agency. This position defies the plain reading of the 2013 statute. The statute is indeed meant to provide for an "*[e]nhanced* annual report." N.C.G.S. § 124-17 (emphasis added). NCRR is mandated to "submit an annual report to the Joint Legislative Commission of Governmental Operations and the Joint Legislative Transportation Oversight Committee." N.C.G.S. § 124-17(a). In other words, the Public Records Act imposes no affirmative obligation on NCRR to produce a report or records—the 2013 statute does. An entity subject to the Public Records Act is only required to make some of its records made available on request. The 2013 statute, on the other hand, establishes an affirmative reporting requirement for NCRR

to regularly provide information to certain state government entities. As a result, the reporting requirements of the 2013 statute say nothing about whether NCRR was already subject to the requirements of the Public Records Act.

¶ 68 The majority's argument regarding the 2013 statute is called into further question by a comparison of the text of that statute to the text of the Public Records Act. The 2013 statute requires that NCRR, "[u]pon the request of the Governor or any committee of the General Assembly . . . provide *all* additional information and data within its possession or ascertainable from its records." N.C.G.S. § 124-17(b) (emphasis added). The Public Records Act, however, only applies to information "made or received pursuant to law or ordinance in connection with the transaction of public business." N.C.G.S. § 132-1(a). These obligations are not the same. The 2013 statute compels NCRR to provide *all* information by request of the Governor or legislature; the Public Records Act makes available only information related to public businesses.

¶ 69 The majority attempts a similar line of reasoning with respect to the 2013 statute's provision allowing NCRR to "indicate whether the information [provided upon request of the Governor or General Assembly] is confidential." N.C.G.S. § 124-17(b). Were NCRR subject to the Public Records Act, it might possess information that is not covered by the Act, but which would otherwise become subject to the Act upon fulfilling a request for information from the Governor of the General Assembly pursuant to Section 124-17(b). This provision, then, does not prove extraneous to the Public Records Act or any of NCRR's obligations under it. Instead, it provides additional safeguards for the enhanced reporting requirements the legislature has chosen to impose on NCRR.

¶ 70 Ultimately, I am unpersuaded by the evidence cited by the majority for the proposition that NCRR should not be subject to the Public Records Act. Rather, I believe a more just and accurate reading of the legislature's intent in passing the Public Records Act and in creating NCRR is that NCRR is subject to the Act.[3]

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3. Whether the specific records sought by SELC are covered by the Act's requirements is a separate question not before us here. However, there is no denying that the public has been impacted by NCRR's decision to abandon a light rail project in the Triangle. Public/private partnerships for the public good are not new. It is equally still true that the public's trust in government suffers when government decision-making is shielded from public view. "The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to." *EPA v. Mink*, 410 U.S. 73, 105 (1973) (Douglas, J. dissenting) (quoting Henry Steele Commager).

III. Conclusion

¶ 71 Subjecting NCRR to the Public Records Act would not grant the people of North Carolina unfettered access to NCRR's records. As discussed, the Public Records Act only applies to records "made or received pursuant to law or ordinance in connection with the transaction of public business." N.C.G.S. § 132-1(a). NCRR maintains the right to indicate that other information is confidential when it is "related to a proposed specific business transaction where inspection, examination, or copying of the records would frustrate the purpose for which the records were created." N.C.G.S. § 124-17(b), (c). NCRR, then, would still be permitted to limit the public's access to its records. But given the deeply intertwined relationship between NCRR and the State, those records which are sufficiently connected "with the transaction of public business" should be made available for public scrutiny.

¶ 72 I agree with the majority that our approach to interpreting statutes must always reckon with the "totality of the circumstances." The circumstances to be considered here include both the scope and purpose of the Public Records Act and the legislation governing the NCRR's activities. Because I believe the legislature's intent was for the Public Records Act to make more, not less, of our government's activities and operations available for public examination, and because I read our state's prior appellate cases and the General Assembly's actions as indicating that the North Carolina Railroad Company, owned fully by the State of North Carolina and obligated in several ways to its branches of government, should be subject to the Public Records Act, I respectfully dissent.

Justice HUDSON joins in this dissenting opinion.

[378 N.C. 236, 2021-NCSC-85]

STATE OF NORTH CAROLINA
v.
BRYAN XAVIER JOHNSON

No. 3A20

Filed 13 August 2021

Search and Seizure—traffic stop—Terry search for weapons in vehicle—totality of circumstances—history of violent crime

A police officer who initiated a traffic stop of defendant for a fictitious license plate had reasonable suspicion to justify a *Terry* search for weapons in the areas of the vehicle that were under defendant's immediate control where the traffic stop occurred at night in a high-crime area, defendant appeared very nervous, defendant bladed his body when he accessed his center console to look for registration papers, and defendant's criminal history indicated a trend in violent crime. Further, the traffic stop was not unconstitutionally prolonged where the officer stopped defendant's vehicle, spoke with defendant, performed a routine records check that showed defendant's violent criminal history, and then performed the *Terry* search of the vehicle for weapons.

Chief Justice NEWBY concurring.

Justice EARLS dissenting.

Justice HUDSON 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, 269 N.C. App. 76 (2019), finding no error after appeal from an order denying defendant's Motion to Suppress entered on 29 June 2018 by Judge Forrest D. Bridges in Superior Court, Mecklenburg County. Heard in the Supreme Court on 22 March 2021.

Joshua H. Stein, Attorney General, by Kristin J. Uicker, Assistant Attorney General, for the State-appellee.

Kimberly P. Hoppin for defendant-appellant.

MORGAN, Justice.

¶ 1 Defendant's appeal requires this Court to review the trial court's order denying defendant's motion to suppress evidence of a bag of narcotics seized from his vehicle during a traffic stop on 14 January 2017. The dispositive question on appeal is whether the law enforcement officers conducting a search for weapons on defendant's person and in the areas of defendant's vehicle under his immediate control possessed the requisite reasonable suspicion to initiate such a warrantless search pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). Because we hold that the law enforcement officer who conducted the traffic stop presented articulable facts at the suppression hearing which gave rise to a reasonable suspicion that defendant was armed and dangerous, the trial court did not commit error in denying defendant's request to suppress the controlled substances which were discovered as a result of the search of the areas of defendant's vehicle which were under defendant's immediate control.

I. Factual and Procedural Background

¶ 2 As a seven-year veteran of the Charlotte-Mecklenburg Police Department (CMPD) and a member of the law enforcement agency's Crime Reduction Unit, Officer Whitley was conducting patrol operations in the early morning hours of 14 January 2017 in a location of the city that he described at the suppression hearing as a "very high crime area." Officer Whitley and his partner, Sergeant Visiano, were traveling along Central Avenue in the Hickory Grove section of Charlotte when they observed a black Dodge Charger. While Officer Whitley continued to operate their patrol vehicle, Sergeant Visiano ran the license plate displayed on the Dodge Charger through the agency's computer system and discovered that the license plate was actually registered to an Acura MDX. Having determined that the tag displayed on the Dodge Charger was "fictitious," Officer Whitley initiated a traffic stop, and the two vehicles pulled into a Burger King parking lot.

¶ 3 While approaching the driver's side of the Dodge Charger, Officer Whitley noticed that the car's occupant had raised his hands in the air. It was determined that the individual in the Dodge Charger was defendant. Officer Whitley subsequently testified at the suppression hearing that he had observed persons raising their hands in such a manner ten to twenty times previously and that, based upon his experience which included specialized training in recognizing armed individuals, this behavior can "sometimes . . . mean that they have a gun." Officer Whitley conversed with defendant at the driver's window as defendant remained seated in the Dodge Charger, while Sergeant Visiano positioned himself at the passenger side window in order to see defendant's right side. Officer Whitley asked for defendant's driver's license and registration and in-

quired about the possible presence of any weapons in the vehicle; defendant denied the presence of such items. Officer Whitley explained that the mismatched license plate served as the reason for the traffic stop, prompting defendant to volunteer that defendant had just purchased the Dodge Charger in a private sale that day and that defendant knew that the displayed tag did not belong to the vehicle that he was driving. Defendant readily produced his driver's license but had to search for the car's registration and bill of sale in the center console of the vehicle. Officer Whitley testified at the suppression hearing that during this interaction, defendant "seemed very nervous . . . like his heart is beating out of his chest a little bit. He was very nervous." Further, as defendant reached into the center console to find the requested documentation, Officer Whitley recalled during his testimony that defendant was "blading [his body] . . . as if he is trying to conceal something that is to his right, as if he's using his body to distance what I can see from what he's doing." This appeared odd to Officer Whitley, who testified at the suppression hearing that while "typically people obviously reach and turn" to retrieve items from the center consoles of their vehicles, defendant did so "to the extent where his shoulders were completely off the seat."

¶ 4 "[A]t this point," Officer Whitley testified, defendant's positioning of his hands above his head as the officers approached his vehicle, his nervousness, and the "blading" of his body as he reached into the center console were "adding up as . . . characteristics of an armed subject." After defendant produced a bill of sale for the Dodge Charger from the center console, Officer Whitley left defendant in the driver's seat of the vehicle while defendant spoke with Sergeant Visiano. Meanwhile, Officer Whitley returned to his patrol car in order to process the information and paperwork provided by defendant through multiple law enforcement intelligence databases, which is "a standard practice for every traffic stop that" the officer conducts. Information gathered from Officer Whitley's search of North Carolina's CJLEADS system—a database which details a person's history of contacts with law enforcement in the form of a list of criminal charges filed against the individual—indicated that defendant had been charged with multiple violent crimes and offenses related to weapons from the years 2003 through 2009. While he could not offer testimony as to which charges against defendant had resulted in convictions, Officer Whitley testified that the "trend in violent crime" revealed by the CJLEADS search, combined with the "holding up of the hands, as well as the blading of the body," and the fact that defendant appeared very nervous, "led [the officer] to believe that he was armed and dangerous at that point."

¶ 5 Officer Whitley exited his patrol car, returned to defendant's vehicle, and asked defendant to step out of the Dodge Charger, with the intent of conducting a frisk of defendant's person and a search of the vehicle. Defendant got out of his car and went to the rear door on the driver's side of the vehicle at Officer Whitley's request before defendant consented to be frisked by the law enforcement officer for weapons. A pat down of defendant's clothing revealed no weapons or other indicia of contraband. At this point, Officer Whitley walked to the rear of defendant's Dodge Charger and asked for defendant's consent to search the vehicle. Defendant refused to grant such consent. Officer Whitley then explained that the officers were going to conduct a limited search of defendant's vehicle nonetheless based on defendant's "criminal history . . . and some other things." While defendant continued to protest the search of the Dodge Charger, Officer Whitley left him with Sergeant Visiano and began a search of the front driver's side of defendant's vehicle. Immediately upon opening the unlocked center console, Officer Whitley discovered a baggie of "[w]hat appeared to be powder cocaine" and removed the suspected contraband from the vehicle. After completing his search of the area of the vehicle immediately behind the driver's seat, Officer Whitley placed defendant under arrest.

¶ 6 On 14 January 2017, defendant was charged with the felonious offense of possession with intent to sell or deliver cocaine and the misdemeanor offense of possession of drug paraphernalia, and was formally indicted by a Mecklenburg County grand jury for possession of cocaine on 25 September 2017.

¶ 7 Defendant filed a motion to suppress on 16 May 2018, which came on for hearing before the Honorable Forrest D. Bridges in Superior Court, Mecklenburg County, on 26 June 2018. Officer Whitley testified about the course of events which resulted in defendant's arrest. Additionally, the trial court viewed Officer Whitley's body camera recording of the incident after defendant's counsel stipulated to the video's admissibility. After hearing arguments from counsel for the State and defendant, the trial court denied defendant's motion to suppress. While defendant initially indicated a desire to proceed to trial, he agreed to plead guilty to felony possession of cocaine and misdemeanor possession of drug paraphernalia after a short recess before the jury was selected. The trial court accepted defendant's guilty plea and noted for the record that defendant had preserved his right to appeal the trial court's earlier ruling on defendant's motion to suppress.

¶ 8 The trial court then asked the State's attorney to prepare an order reflecting the details of the hearing on defendant's motion to suppress.

In providing direction regarding the desired contents of the order, the trial court recounted the factual basis upon which it had concluded that Officer Whitley had established the reasonable suspicion necessary to conduct a *Terry* search[1] of defendant's vehicle. In open court, the trial court recalled the manner in which Officer Whitley had conducted the traffic stop in the location which the officer had described as a high-crime area and the officer's discovery of defendant's prior charges, upon researching the state's criminal record databases, for robbery with a dangerous weapon, assault with a deadly weapon with the intent to kill, and discharging a weapon into occupied property. The trial court noted that defendant raised his hands out of the window of the Dodge Charger as Officer Whitley approached, which had put the officer "on alert for the possible presence of a gun within the vehicle." In addition, the trial court explained that, while Officer Whitley reasonably believed that defendant's maneuver to raise his hands out of the car's window could indicate the presence of a gun, defendant had acted appropriately in holding his hands up and out of the window "in this day and time," and such conduct was not to be considered independently incriminating. The trial court entered a written order dated 29 July 2018 which included the above findings and concluded:

> 2. That based on the totality of [the] circumstances, *including but not limited to*: the [d]efendant's hands in the air upon the Officer's approach, and the [d]efendant's prior criminal history, that the limited frisk of the lungeable areas of the vehicle was justified.
>
> 3. That the Officer's scope of the frisk was properly limited only to areas where the [d]efendant would have had access to retrieve a weapon if he chose to do so.

¶ 9 Defendant was sentenced to a term of 8 to 19 months in prison, which was suspended for 24 months of supervised probation. Defendant appealed to the North Carolina Court of Appeals, where a divided panel issued its decision on 17 December 2019 affirming the trial court's denial of defendant's motion to suppress. Defendant appeals to this Court as a matter of right pursuant to N.C.G.S. § 7A-30(2) based upon the dissenting opinion filed in the lower appellate court's consideration of this matter.

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1. A shorthand reference commonly used to describe a warrantless search which is performed pursuant to the principles stated in *Terry v. Ohio*, 392 U.S. 1 (1968).

II. Analysis

¶ 10 Defendant argues before this Court that several of the trial court's findings and conclusions announced in open court and reproduced in the subsequent written order in which the trial court denied defendant's motion to suppress were not supported by the evidence. In removing these disputed findings and conclusions from the trial court's contemplation, defendant contends that Officer Whitley did not have a reasonable suspicion that defendant was armed, that the *Terry* search of defendant's vehicle represented an unconstitutional extension of the traffic stop, and that this Court's correction of the trial court's supposed error should result in an outcome which vacates the trial court's order and overturns defendant's conviction. We disagree with defendant's assertions and address them in turn.

A. Standard of Review

¶ 11 We review a party's challenges to a trial court's findings of fact to ascertain whether those findings are supported by any competent evidence, the presence of which will render such findings binding on appeal. *State v. Reed*, 373 N.C. 498, 507 (2020). The trial court's conclusions of law, including the ultimate conclusion as to whether a law enforcement officer had the constitutional authority to conduct a *Terry* frisk of a defendant's vehicle, are reviewed on a de novo basis. *Id.*

B. Trial Court's Findings and Conclusions

¶ 12 As an initial matter, defendant complains of the consideration by the Court of Appeals of Officer Whitley's uncontroverted testimony concerning defendant's nervousness and the "blading" of defendant's body as defendant accessed the center console of his vehicle, as well as the lower appellate court's recognition that the traffic stop took place late at night. To bolster his position, defendant observes that the trial court did not make express findings concerning these factors. Although North Carolina statutory law establishes that, "in making a determination whether or not evidence shall be suppressed," the trial court is required to "make findings of fact and conclusions of law which shall be included in the record, pursuant to [N.C.]G.S. [§] 15A-977(f)[,]" N.C.G.S. § 15A-974(b) (2019), nonetheless the reduction of the trial court's considerations to a written order is not required. *State v. Oates*, 366 N.C. 264, 268 (2012) ("While a written determination is the best practice, nevertheless [N.C.G.S. § 15A-977(f)] does not require that these findings and conclusions be in writing."). In the present case, the trial court, in its discretion, included a recitation of some of the evidence before the tribunal in its written order and specifically noted the sufficiency of

the evidence to establish reasonable suspicion in the mind of the officer to support a *Terry* search, which involved the trial court's evaluation of factors which "includ[ed] but [was] not limited to" the factors listed in the written order. "Although [N.C.G.S. § 15A-974(b)'s] directive is in the imperative form, only a material conflict in the evidence" requires a trial court to make "explicit factual findings that show the basis for the trial court's ruling." *State v. Bartlett*, 368 N.C. 309, 312 (2015) (citing *State v. Salinas*, 366 N.C. 119, 123–24 (2012)). Thus, "[w]hen there is no conflict in the evidence," an appellate court may infer a trial court's findings in support of its decision on a motion to suppress so long as that unconflicted evidence was within the trial court's contemplation. *Bartlett*, 368 N.C. at 312 (citing *State v. Munsey*, 342 N.C. 882, 885 (1996)). In applying these enunciated principles to the instant case, the Court of Appeals did not wrongly infer from the uncontroverted evidence before the trial court adduced at the suppression hearing and the subsequent findings and conclusions which the trial court entered in its order, that the factors—among other factors—of Officer Whitley's testimony about defendant's nervousness, defendant's "blading" of his body, and the late hour of the traffic stop constituted circumstances which provided reasonable suspicion for the *Terry* search to be conducted. The lack of controverted evidence at the suppression hearing strengthened the trial court's ability to choose the evidentiary facts and the resulting persuasive factors which the trial court elected to expressly include in its order.

¶ 13 Furthermore, defendant does not contest the evidence, in the form of Officer Whitley's testimony and the body camera footage viewed by the trial court, regarding defendant's nervousness and defendant's maneuver of "blading" his body; rather, defendant opts to attempt to contextualize these behavioral displays by characterizing defendant's emotional and physical issues during his interaction with Officer Whitley. In this regard, defendant merely attempts to relitigate the veracity of Officer Whitley's interpretation of defendant's conduct. "The weight, credibility, and convincing force of such evidence is for the trial court, who is in the best position to observe the witnesses and make such determinations." *Macher v. Macher*, 188 N.C. App. 537, 540, *aff'd per curiam*, 362 N.C. 505 (2008). The trial court in this matter was "the sole judge of the credibility and weight of the evidence," and it was free to "accept or reject the testimony of a witness, either in whole or in part, depending solely upon whether it believes or disbelieves the same." *Moses v. Bartholomew*, 238 N.C. 714, 718 (1953). For this Court to accept defendant's invitation to reinterpret Officer Whitley's suppression hearing testimony, when the original interpretation of defendant's conduct made by the officer on scene has already been evaluated by the trial

court in a manner contemplated by, and consistent with, the operational structure of our legal system, would be to ignore the trial court's status as "the sole judge of the credibility of the witnesses and of the weight of their testimony." *State v. Johnson*, 230 N.C. 743, 745 (1949).

¶ 14 Likewise, defendant does not challenge the evidentiary basis for the trial court's consideration of Officer Whitley's discovery of defendant's criminal history as a contributing factor to the officer's development of reasonable suspicion to justify the officer's execution of a *Terry* search; instead, defendant submits that the evidence "did not support a finding that Officer Whitley had reasonable concerns for his safety based on [defendant's] prior criminal history." Additionally, defendant endeavors to fortify his impression that the officer's concerns for the officer's safety were not supported by the evidence of the officer's awareness of defendant's criminal history at the time of the traffic stop by emphasizing that the officer did not fully recall at the suppression hearing all of the details and the outcomes of defendant's criminal history, which therefore negated the manifestation of reasonable suspicion in the mind of the officer during Officer Whitley's interaction with defendant. Again, like defendant's concerns about Officer Whitley's observance of defendant's nervousness and "blading" of his body, this amounts to defendant's renewed invitation for our Court to substitute our judgment regarding the veracity and accuracy of a witness's testimony for the determination of a trial court which occupied "the best position to observe the witnesses and make such determinations." *Macher*, 188 N.C. App. at 540 (quoting *Freeman v. Freeman*, 155 N.C. App. 603, 608 (2002)). Here, Officer Whitley testified without contravention that he "discovered that the defendant did have a history, violent history, related to firearms" in the form of various charges extending from 2003 to 2009, which the officer described as a "trend in violent crime" that, in conjunction with the other evidentiary facts already discussed, "led [him] to believe that [defendant] was armed and dangerous at that point." Defendant's position from this cosmetically different, yet fundamentally identical, premise is also without merit.

¶ 15 By way of review, the unconflicted evidence introduced by the State at the hearing conducted by the trial court on defendant's motion to suppress—that (1) the traffic stop occurred late at night (2) in a high-crime area, with (3) defendant appearing "very nervous" to the detaining officer to the point that it "seem[ed] like his heart [was] beating out of his chest a little bit[,]" with (4) defendant "blading his body" as he accessed the Dodge Charger's center console, and (5) defendant's criminal record indicating a "trend in violent crime" and weapons-related charges—was

sufficient for the trial court to make findings of fact and conclusions of law that the investigating law enforcement officer had reasonable suspicion to conduct a *Terry* search of defendant's person and in areas of defendant's vehicle under defendant's immediate control for the officer's safety.

C. Reasonable Suspicion for the *Terry* Search

¶ 16 Both the Fourth Amendment to the Constitution of the United States and article I, section 20 of the North Carolina Constitution protect private citizens against unreasonable searches and seizures. *State v. Otto*, 366 N.C. 134, 136 (2012). Traffic stops are considered seizures subject to the strictures of these provisions and are "historically reviewed under the investigatory detention framework first articulated in *Terry v. Ohio*." *Id.* at 136–37 (quoting *State v. Styles*, 362 N.C. 412, 414 (2008)); *Reed*, 373 N.C. at 507. Law enforcement officers may initiate a traffic stop if the officer has a "reasonable, articulable suspicion that criminal activity is afoot." *Styles*, 362 N.C. at 414 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000)). The reasonableness of a traffic stop is determined "by examining (1) whether the traffic stop was lawful at its inception, and (2) whether the continued stop was 'sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.' " *Reed*, 373 N.C. at 507 (citations omitted) (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983)). Once the traffic stop is initiated, a law enforcement officer may conduct a limited search of the passenger compartment of the vehicle so long as the officer develops a reasonable suspicion that the suspect of the traffic stop is armed and dangerous. *Terry*, 392 U.S. at 27. The Supreme Court of the United States has extended the reasonable suspicion standard originally established in *Terry* to allow for these limited searches:

> [T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

Michigan v. Long, 463 U.S. 1032, 1049 (1983) (quoting *Terry*, 392 U.S. at 21). Reasonable suspicion demands more than a mere "hunch" on the part of the officer but requires "less than probable cause and considerably

less than preponderance of the evidence." *State v. Williams*, 366 N.C. 110, 117 (2012). In any event, reasonable suspicion requires only "some minimal level of objective justification," *Styles*, 362 N.C. at 414 (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)), and arises from "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the intrusion presented by the limited search of the vehicle, *Terry*, 392 U.S. at 21.

¶ 17 As discussed above, competent evidence exists in the record of the suppression hearing that Officer Whitley encountered a "very nervous" individual—specifically, defendant—late at night in a high-crime area. The officer saw defendant "blade" his body by way of defendant's assumption of a physical position which the officer interpreted to be an effort by defendant to conceal defendant's entry into the vehicle's center console. "All [of] these things," Officer Whitley testified, were "adding up as, from my training and experience, as characteristics of an armed suspect." Also, upon Officer Whitley's return to his patrol car in order to conduct a criminal records check of defendant, the officer obtained information about defendant's criminal history that solidified the existence of reasonable suspicion for the officer to conduct a *Terry* search, based on the belief developed by Officer Whitley that defendant was armed and dangerous.

¶ 18 Standing alone, defendant's criminal record for which defendant has already paid his debt to society does not constitute reasonable suspicion and hence cannot singly serve as a basis for the law enforcement officer who effected the traffic stop to conduct a *Terry* search of the passenger compartment of defendant's vehicle.[2] Likewise, defendant's mere presence in a high-crime area does not solely provide the officer with the necessary reasonable suspicion to authorize the officer to order defendant to exit the vehicle so that the officer can look for weapons. *See State v. Jackson*, 368 N.C. 75, 80 (2015). Similarly, defendant's nervousness does not in and of itself amount to reasonable suspicion when displayed to a detaining officer. *State v. Pearson*, 348 N.C. 272, 276 (1998). However, we do not assess each of these factors, specifically

2. However, a law enforcement officer's specific knowledge of a suspect's felonious criminal *convictions* alters the reasonable suspicion inquiry when the officer (1) conducts a lawful investigative stop of the suspect for the very conduct which serves as the basis for those criminal convictions (albeit this circumstance is not present here), and (2) testifies that based on the training and experience of the officer, the felonious conduct for which defendant has been convicted and is currently being investigated is normally associated with the possession of weapons. *State v. McGirt*, 122 N.C. App. 237, 240 (1996), *aff'd per curiam*, 345 N.C. 624 (1997).

articulated by Officer Whitley in this case, in isolation. *See Jackson*, 368 N.C. at 80. We examine the totality of the circumstances surrounding Officer Whitley's interaction with defendant in order to achieve a comprehensive analysis as to whether the officer's conclusion that defendant may have been armed and dangerous was reasonable. *Id.* In the case at bar, in which the officer rendered uncontroverted testimony that he conducted a late-night traffic stop of defendant's vehicle in a high-crime area and encountered defendant who acted very nervous, appeared to purposely hamper the officer's open view of defendant's entry into the vehicle's center console, and possessed a criminal history which depicted a "trend in violent crime," we conclude that the officer's suspicion of defendant's potentially armed and dangerous status was reasonable. Therefore, Officer Whitley operated within the bounds of both the Fourth Amendment to the Constitution of the United States and article I, section 20 of the North Carolina Constitution in removing defendant from the Dodge Charger and searching the area of the vehicle's passenger compartment that was within defendant's control for weapons.

¶ 19 In determining that the aforementioned factors were sufficient to constitute reasonable suspicion for the officer's *Terry* search based on the totality of the circumstances, we have purposely and expressly removed from the assemblage of factors which were considered by the trial court to establish reasonable suspicion the factor gleaned from Officer Whitley's uncontroverted testimony that defendant's act of raising his hands and extending them from the driver's side window, so that defendant's hands could readily be seen by the approaching officers, was interpreted by Officer Whitley as a sign that there could be the presence of a firearm in the vehicle. The officer testified at the suppression hearing that defendant's placement of defendant's hands figured into the officer's belief that defendant "was armed and dangerous at that point." The Court of Appeals, in giving deference to the officer's right "to rely on his experience and training" and to the trial court's order, included this factor of "raising one's hands" as defendant did in the present case to be properly considered in the totality of the circumstances which resulted in the existence of the officer's reasonable suspicion to execute the *Terry* search. *Johnson*, 269 N.C. App. at 85–86.

¶ 20 In his brief, defendant's appellate counsel argues that defendant's action of raising defendant's hands and clearly exposing them to the officers as they neared defendant's vehicle during the traffic stop should be construed differently than Officer Whitley, the trial court, and the Court of Appeals did:

> In this case, the trial court commended [defendant] for raising his hands and placing them out the window upon being stopped by officers . . . . He was praised by the trial court for taking action considered helpful to avoid getting shot, but this same action was found to establish, in part, the basis for a frisk for weapons. This presents an unjust choice.

¶ 21 We do not need, nor choose, to address any such real or perceived conundrum with regard to the existence of reasonable suspicion for the *Terry* search because in this Court's view, the factor of defendant's raised hands upon the officer's effectuation of the traffic stop is unnecessary to consider for the purpose of the establishment of reasonable suspicion in light of the totality of the circumstances which include the other factors comprising the officer's reasonable suspicion which collectively have already been deemed by this Court to be sufficient in the present case. Like the Fourth Circuit Court of Appeals, we harbor some "concern about the inclination of the [State] toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity." *State v. Nicholson*, 371 N.C. 284, 291 n.4 (2018) (quoting *United States v. Foster*, 634 F.3d 243, 248 (4th Cir. 2011)). Nonetheless, for the purpose of our legal analysis as to the State's establishment of the existence of reasonable suspicion for the officer's *Terry* search, we conclude that the totality of the circumstances supports the trial court's ultimate conclusion that such reasonable suspicion existed, even after this Court eliminates defendant's gesture of raising his hands as a factor.

D. Extension of the Stop

¶ 22 Lastly, defendant contends that Officer Whitley's search of defendant's vehicle after discovering defendant's criminal history represented an unconstitutional extension of the traffic stop because "it seems evident that Officer Whitley was satisfied that a traffic citation for displaying a fictitious tag was not warranted under the circumstances as he did not issue such a citation." Therefore, defendant posits that the officer's subsequent *Terry* frisk of defendant's person and accompanying search of defendant's vehicle were not in furtherance of the officers' safety while fulfilling the purpose of the traffic stop itself, but were instead independent investigative actions targeting other unarticulated suspicions of criminal activity. In defendant's view, since Officer Whitley did not demonstrate a reasonable suspicion prior to leaving defendant to conduct the criminal records check, coupled with the officer's inability to form reasonable suspicion to justify the *Terry* search based on

defendant's criminal history alone, then the officer's decision to search defendant after the juncture when defendant assumes that Officer Whitley had decided not to charge defendant for the traffic violation constituted an unlawful extension of the traffic stop. This description mischaracterizes the timing of Officer Whitley's interactions with defendant and disregards the totality of the circumstances which yielded the factors upon which Officer Whitley formed the reasonable suspicion required to conduct the limited Fourth Amendment search.

¶ 23 "[T]he duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission of the stop, unless reasonable suspicion of another crime arose before that mission was completed." *State v. Bullock*, 370 N.C. 256, 257 (2017) (citations omitted). While this rule describes the temporal nature of the scope of a constitutionally appropriate traffic stop, the exercise of "police diligence 'includes more than just the time needed to issue a citation.' " *Reed*, 373 N.C. at 509 (quoting *Bullock*, 370 N.C. at 257). To ensure that the exercise of such enterprise by law enforcement remains within the confines of the Fourth Amendment, however, "an investigation unrelated to the reasons for the traffic stop must not prolong the roadside detention." *Reed*, 373 N.C. at 509. In order to prolong a traffic stop beyond the amount of time necessary to investigate and address the reason for the stop itself, the detaining officer must "possess a justification for doing so other than the initial traffic violation that prompted the stop in the first place." *Id.* at 510 (quoting *United States v. Branch*, 537 F.3d 328, 336 (4th Cir. 2008)). The development of a reasonable suspicion that a suspect may be armed in the normal course of an investigation into the basis for a traffic stop provides one such justification. *Id.* (quoting *Branch*, 537 F.3d at 336, to explain that prolonging a traffic stop "requires either the driver's consent or a reasonable suspicion that illegal activity is afoot").

¶ 24 Here, Officer Whitley testified that after observing that defendant exhibited some of the characteristics of an armed subject, the officer returned to the officer's patrol car in order to conduct a records check of defendant and of the vehicle itself to confirm the veracity of defendant's statements as to the ownership of the car. Such a course of action on the part of Officer Whitley is readily recognized as a proper function of the police during traffic stops which are effected under the Fourth Amendment, and the officer's deeds were directly related to addressing the purpose of the stop itself. *Rodriguez v. United States*, 575 U.S. 348, 355 (2015). The officer's activities were not, as represented by defendant, exercises of the officer which were external to the traffic stop,

nor did they prolong the stop beyond the mission's purpose. Although Officer Whitley testified that he did not intend to arrest defendant for the minor traffic infraction of a fictitious license plate which served as the impetus for the traffic stop, the officer did not testify—inconsistent with defendant's self-serving assumption—that the officer had already made a determination to refrain from charging defendant for the traffic violation at the time that the officer was engaged in the process of performing the records check. The officer's declination to issue a citation to defendant for the traffic offense, with only defendant's speculation as to the timing of the officer's decision to refrain from charging defendant with the violation in the dearth of any evidence to support defendant's theory, does not equate to a conclusion that the officer unreasonably prolonged the traffic stop. This is particularly true in light of the testimony rendered by Officer Whitley as to the actual chain of events and the observations by the officer which culminated in the *Terry* search. The officer represented at the suppression hearing that the records check was a standard aspect of any traffic stop that he conducted. The information obtained by the officer from the records check disclosed defendant's "trend in violent crime."

¶ 25 The entirety of the sequence of events which was started by virtue of Officer Whitley's initiation of a traffic stop of defendant's vehicle in order to investigate an apparent license plate violation, during which the officer's interaction with defendant featured behavioral cues by defendant that prompted Officer Whitley to consider that defendant might be armed, which in turn led the officer to particularly note during the officer's routine records check that he performed pursuant to every traffic stop that he effectuated that defendant's criminal history indicated a "trend in violent crime," thus compelling Officer Whitley to believe that defendant was "armed and dangerous" and establishing reasonable suspicion in the officer's mind so as to justify a *Terry* frisk of defendant's person and a *Terry* search of defendant's vehicle for weapons in areas that were subject to defendant's direct and immediate control, demonstrate that there was not an unconstitutional extension of the traffic stop. In light of these facts, we adopt the observant phrase employed by the Supreme Court of the United States, "[c]learly this case does not involve any delay unnecessary to the legitimate investigation of the law enforcement officers." *United States v. Sharpe*, 470 U.S. 675, 687 (1985).

III. Conclusion

¶ 26 Based upon the foregoing factual background, procedural background, and analysis, we affirm the holding of the Court of Appeals

finding no error in the trial court's order denying defendant's motion to suppress in agreement with the conclusion of the Court of Appeals as modified by our discussion in this opinion.

AFFIRMED.

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

Chief Justice NEWBY concurring.

¶ 27 I agree with the well-reasoned majority opinion that the evidence it considers was sufficient for the trial court to find Officer Whitley had reasonable suspicion to justify the limited *Terry* search for weapons in the area immediately surrounding defendant. Although not needed to resolve this case, however, I do not believe this Court should remove from the analysis defendant's gesture of raising his hands out of his car window. Like other movements, which may be innocent standing alone, with the proper testimony the act of raising one's hands can be a factor to support an officer's reasonable suspicion.

¶ 28 The trial court here found:

> 8. That after the Defendant stopped, he raised both of his hands in the air upon the officers' approach.
>
> 9. That Officer Whitley observed the Defendant's hands in the air, and based on Officer Whitley's training and experience, he believed that the gesture of raising one's hands in the air can indicate that a person has a gun inside the vehicle.
>
> 10. That based on his training and experience, Officer Whitley was on alert about the possible presence of a gun.

Based on these findings, the trial court concluded:

> 1. That the motion of having hands up upon an officer's approach does not automatically incriminate an individual by itself, and the Defendant's action of showing his hands was reasonable. However, based on an officer's experience, it is reasonable for an officer to infer that the motion of hands up upon

> an officer's approach could indicate the presence of a weapon.

Thus, based on Officer Whitley's testimony, the trial court included defendant's action of raising his hands as a factor to support reasonable suspicion.

¶ 29 The trial court properly considered all the relevant factors to determine that Officer Whitley had reasonable suspicion justifying the limited *Terry* search for a weapon. In determining whether reasonable suspicion exists, this Court "consider[s] 'the totality of the circumstances—the whole picture,' " *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quoting *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 695 (1981)), including the perspective "of a reasonable, cautious officer, guided by his experience and training," *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (quoting *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70). Other courts have found that a defendant's raised hands can support reasonable suspicion for a limited *Terry* search. *See Clark v. Clark*, 926 F.3d 972, 979 (8th Cir. 2019) (concluding that the defendant's action of "pull[ing] over and put[ting] his hands outside the driver's side window" supported reasonable suspicion for a *Terry* investigatory seizure and search of the defendant's vehicle for a gun); *State v. King*, 206 N.C. App. 585, 590, 696 S.E.2d 913, 916 (2010) (holding that "the unusual gesture of [the d]efendant placing his hands out of his window" supported reasonable suspicion for a limited *Terry* search); *cf. State v. Mbacke*, 365 N.C. 403, 404–10, 721 S.E.2d 218, 219–22 (2012) (analogizing the "reasonable to believe" standard from *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710 (2009), to the *Terry* reasonable suspicion standard to conclude that officer had reason to believe the defendant's vehicle contained additional evidence of the offense of arrest to justify search for handgun while the defendant was detained outside the vehicle based on, *inter alia*, the defendant's furtive behavior of lowering hands off the steering wheel), *cert. denied*, 568 U.S. 864, 133 S. Ct. 224 (2012). Therefore, I believe the trial court properly relied on defendant's raised hands as a factor in finding the existence of reasonable suspicion. Otherwise, I fully concur with the majority opinion.

Justice EARLS dissenting.

¶ 30 The sole question before this Court is whether, under "the totality of the circumstances as viewed from the standpoint of an objectively reasonable police officer," *State v. Wilson*, 371 N.C. 920, 926 (2018) (cleaned

up) (quoting *State v. Johnson*, 370 N.C. 32, 34–35 (2017)), it would be reasonable for an officer "to believe that he [was] dealing with an armed and dangerous individual" after initiating a traffic stop of Bryan Xavier Johnson. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). The majority answers in the affirmative. To reach this conclusion, the majority converts a jumble of subjective, innocuous, or irrelevant facts into indicia of dangerousness. The result is a decision inconsistent with the Fourth Amendment and which fails to consider the racial dynamics underlying reasonable suspicion determinations. Therefore, I respectfully dissent.

I. Reasonable suspicion under *Terry*

¶ 31 According to the majority, five factors contribute to the reasonable belief that Johnson was armed and dangerous under *Terry*: "(1) the traffic stop occurred late at night (2) in a high-crime area, with (3) defendant appearing 'very nervous' to the detaining officer to the point that it 'seem[ed] like his heart [was] beating out of his chest a little bit[,]' with (4) defendant 'blading his body' as he accessed the Dodge Charger's center console, and (5) defendant's criminal record indicating a 'trend in violent crime' and weapons-related charges." The majority repeatedly asserts that although no one individual factor may be sufficient to justify the search "standing alone," these factors are sufficient when viewed collectively under the "totality of the circumstances." Although I agree with the majority that *Terry* demands a flexible, holistic approach, I cannot join the majority in its refusal to enforce the limits imposed by the Fourth Amendment on the State's authority to conduct warrantless searches. Facts which individually do not contribute to reasonable suspicion in isolation should not be accorded outsized significance merely because they appear alongside other facts which also do not contribute to reasonable suspicion. Even viewed under the "totality of the circumstances," I would hold that the State has failed to meet its burden of proving that an objective officer would reasonably believe Johnson was armed and dangerous at the time Officer Whitley initiated the search of his vehicle.

1. Presence in a "high crime area" late at night

¶ 32 At the suppression hearing, Officer Whitley described the area in which he apprehended Johnson as a "very high crime area, where we have a lot of narcotic sales." A defendant's presence in a "high crime area" can sometimes be "among the relevant contextual considerations in a *Terry* analysis." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) However, a defendant's presence in a "high crime area" is only probative when it is paired with conduct suggesting the defendant's presence

is in some way connected to the criminal conduct known to occur in that area. There must be some basis for suspecting the individual was someone other than one of the countless innocent people whose daily routines involve spending time in a "high crime area" for the individual's mere presence to be relevant.

¶ 33 Thus, in *State v. Butler*, it was not the defendant's mere presence on a street corner the arresting officer "knew . . . to be a center of drug activity" which contributed to reasonable suspicion, it was the defendant's presence coupled with the fact that the defendant "was seen in the midst of a group of people congregated on a corner known as a 'drug hole' " and that "upon making eye contact with the uniformed officers, [the] defendant immediately moved away, behavior that is evidence of flight." 331 N.C. 227, 233 (1992). Similarly, in *State v. Jackson*, the defendant's presence in a "high crime area" contributed to reasonable suspicion because the defendant "stood at 9:00 p.m. in a specific location known for hand-to-hand drug transactions . . . walked in [the] opposite direction[ ] upon seeing a marked police vehicle approach . . . came back very near to the same location once the patrol car passed . . . [and] walked [away] a second time upon seeing [the police officer] return." 368 N.C. 75, 80 (2015). In both cases, it was the combination of a defendant's presence in a "high crime area" with behavior suggestive of the defendant's personal involvement in the area's criminal activities which made the defendant's geographic location relevant under *Terry*.

¶ 34 By contrast, in this case, Johnson did not do anything to suggest his presence in a "high crime area" was in any way motivated by or connected to the alleged prevalence of drug trafficking in that neighborhood. He was simply driving his vehicle down Central Avenue in Charlotte. He was stopped because the license plate on his vehicle was not registered to the type of vehicle he was driving. He was not observed interacting with suspected drug dealers, visiting places where drug transactions were known to occur, or attempting to evade the police. Nothing Officer Whitley observed distinguished Johnson from the many other people who undoubtedly pass through this "high crime area" with no intention of doing anything other than getting from one location to the next. In my view, this renders Johnson's physical location irrelevant to the *Terry* analysis.

¶ 35 There is nothing reasonable about believing that an individual is armed and dangerous merely because he drove his vehicle down a particular street, no matter where that street is located. The majority's rejoinder that Johnson's location is probative when considered "in the totality of the circumstances" does not answer the question of why

Johnson's presence in this particular location in any way suggested he was armed and dangerous. Johnson's conduct did nothing to convert Officer Whitley's generalized observation about the nature of the area into a reasonable, particularized, and individualized suspicion regarding Johnson. The majority's position risks "making the simple act of [driving] in one's own neighborhood a possible indication of criminal activity." *Jackson*, 368 N.C. at 80.

¶ 36 In his brief, Johnson does not appear to directly challenge the trial court's implied finding of fact that the area he was travelling through was fairly characterized as a "high crime area." However, in a different case, it may be necessary for this Court to define what a "high crime area" is, what competent evidence is necessary to support the finding that a defendant was located in one, and the circumstances under which a defendant's presence in a "high crime area" supports an officer's reasonable suspicion that he is armed and dangerous.

¶ 37 For example, the First Circuit has held that in order for a defendant's location in a "high crime area" to contribute to reasonable suspicion, the government is required to present evidence tending to prove "(1) [a] nexus between the type of crime most prevalent or common in the area and the type of crime suspected in the instant case, (2) limited geographic boundaries of the 'area' or 'neighborhood' being evaluated, and (3) temporal proximity between evidence of heightened criminal activity and the date of the stop or search at issue." *United States v. Wright*, 485 F.3d 45, 53–54 (1st Cir. 2007) (citations omitted). Further, while it is certainly appropriate to credit "the testimony of police officers[ ] describing their experiences in the area" in determining whether an area is a "high crime area," I would agree with the First Circuit that we should also look to data and other sources of information to ensure the reasonableness inquiry at the heart of the *Terry* analysis remains tethered to objective facts. *Id.* at 54; *see also N. Mariana Islands v. Crisostomo*, 2014 WL 7072149, at *2 (N. Mar. I. Dec. 12, 2014) ("[A]n officer's confident body language and tone of voice are not enough to prove a high-crime claim. Allowing such a finding solely through unsubstantiated testimony (no matter how confidently stated) would give police the power to transform 'any area into a high crime area based on their unadorned personal experiences.' " (quoting *United States v. Montero-Camargo*, 208 F.3d 1122, 1143 (9th Cir. 2000))).

¶ 38 Further, I share the concern expressed by many courts that encouraging reliance on undefined, amorphous signifiers like "high crime area" as a proxy for suspected criminal activity risks subjecting identifiable racial minority communities to disproportionate, invasive, and unlawful

searches. *See*, *e.g.*, *United States v. Caruthers*, 458 F.3d 459, 467 (6th Cir. 2006) ("[L]abeling an area 'high-crime' raises special concerns of racial, ethnic, and socioeconomic profiling."); *Montero-Camargo*, 208 F.3d at 1138 ("The citing of an area as 'high-crime' requires careful examination by the court, because such a description, unless properly limited and factually based, can easily serve as a proxy for race or ethnicity."). There is research demonstrating that the reported rate of crime in a particular geographic area is driven not only by the actual incidence of criminal conduct in that area, but also by law enforcement's choices regarding where and how to conduct enforcement activities. *See* Sandra G. Mayson, *Bias in*, *Bias Out*, 128 Yale L.J. 2218, 2253 (2019) ("Blacks are more likely than others to be arrested in almost every city for almost every type of crime. Nationwide, black people are arrested at higher rates for crimes as serious as murder and assault, and as minor as loitering and marijuana possession."); *see also* K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 Geo. J. Legal Ethics 285, 298 (2014) ("It is the police who choose what areas to target, who respond to calls, and who make the initial decision whether to make an arrest or issue an informal warning when minor misconduct occurs."). My concern is especially acute in this case because Officer Whitley "did not observe [defendant] engage in any type of behavior that is consistent with [the criminal] activity" thought to occur with greater frequency in the area where he was apprehended. *United States v. Beauchamp*, 659 F.3d 560, 570 (6th Cir. 2011).

¶ 39 I have similar concerns regarding the majority's reliance on the fact that "the traffic stop took place late at night." It is correct that this Court has previously held the time of night when a stop occurs to be "an appropriate factor for a law enforcement officer to consider in formulating a reasonable suspicion." *State v. Watkins*, 337 N.C. 437, 442 (1994). Yet we have also recognized a difference between being present late at night in a place where it is expected people might be found at that hour and being present late at night somewhere where one's presence is anomalous. Thus, in *Watkins*, we distinguished between a defendant "standing in an open area between two apartment buildings . . . in Greensboro, an urban area, shortly after midnight" and a defendant who was observed "proceeding slowly on a dead-end street of locked businesses at 12:50 a.m. in an area with a high incidence of property crime." *Id.* The latter circumstance was indicative of reasonable suspicion while the former was not. There must be some other objective basis from which to infer that the individual is travelling late at night for a nefarious purpose and is not just a parent heading home to tuck his or her children in after a late-night shift.

¶ 40 In this case, there is no evidence indicating Johnson's presence or behavior was unusual or alarming for the place and hour. There is no evidence that individuals who drive down Central Avenue late at night are disproportionately likely to be armed and dangerous. Nor is there any evidence that individuals who possess guns and present a danger to law enforcement officers tend to travel at night. *Cf. United States v. Williams*, 808 F.3d 238, 249 (4th Cir. 2015) ("This record does not make an evidentiary connection between nocturnal travel and drug trafficking . . . . Absent such a connection, that the traffic stop of [the defendant] occurred at about 12:37 a.m. does not contribute to a reasonable, articulable suspicion for extending the otherwise-completed traffic stop . . . ."). Accordingly, I would hold that neither the location nor the time of the traffic stop contribute to a reasonable suspicion that Johnson was armed and dangerous under *Terry*.

2. Nervousness

¶ 41 We have previously held that nervousness can be "an appropriate factor to consider when determining whether a basis for a reasonable suspicion exists." *State v. McClendon*, 350 N.C. 630, 638 (1999). But nervousness only supports an officer's reasonable suspicion when it is something "more than ordinary nervousness." *Id.* at 639. "This Court has expressly determined that *general nervousness* is not significant to reasonable suspicion analysis because many people become nervous when stopped by a [law enforcement officer]." *State v. Reed*, 373 N.C. 498, 515 (2020) (cleaned up) (emphasis added) (quoting *State v. Pearson*, 348 N.C. 272, 276 (1998)). We have treated nervousness as supporting an officer's reasonable suspicion when the defendant "was fidgety and breathing rapidly, sweat had formed on his forehead, he would sigh deeply, and he would not make eye contact with the officer," but we also explained that when "the nervousness of the defendant [is] not remarkable . . . it d[oes] not support a reasonable suspicion." *McClendon*, 350 N.C. at 639.

¶ 42 None of the twenty-four findings of fact contained in the trial court's order on the motion to suppress included any reference to Johnson's alleged nervousness. While the trial court was not required by statute to reduce all its findings to writing, it goes beyond the scope of appellate review to accord deference to a supposed fact based solely on the officer's observations of the witness's demeanor, when the trial court itself made no such finding. Silence by the trial court is not endorsement of the witness' veracity nor does it give the appellate court any guidance as to the weight to accord that testimony.

¶ 43 Finally, even if it is proper to consider evidence not incorporated into any of the trial court's express findings of fact, the record does not sup-

port the conclusion that Johnson was unusually or remarkably nervous. The only evidence attesting to Johnson's level of nervousness is Officer Whitley's testimony that he "seemed very nervous and to the point of where, as you can imagine, his heart's beating, but it seems like his heart is beating out of his chest a little bit. He was very nervous. . . . you could see his heart rising in his chest." However, Johnson did not exhibit any physical symptoms of anything other than an ordinary response to an understandably stressful situation. He did not act in an inexplicable or aberrant manner, he did not appear disoriented or disheveled, and he did not do anything other than respond to Officer Whitley's questions appropriately and intelligibly. Absent any evidence that Johnson was inordinately nervous, Officer Whitley's bare assertion that Johnson was "very nervous" in no way contributes to the reasonable suspicion that he was armed and dangerous.

¶ 44 Other courts have expressed skepticism regarding the probative value of an officer's observation that the defendant was nervous during a traffic stop. *See*, *e.g.*, *United States v. Fernandez*, 18 F.3d 874, 879 (10th Cir. 1994) ("We have repeatedly held that nervousness is of limited significance in determining reasonable suspicion and that the government's repetitive reliance on the nervousness of either the driver or passenger as a basis for reasonable suspicion 'in all cases of this kind must be treated with caution.' " (cleaned up) (quoting *United States v. Millan-Diaz*, 975 F.2d 720, 722 (10th Cir. 1992))). And with good reason. Common sense tells us it is not at all surprising that an individual might look and feel nervous, even "very nervous," when interacting with a law enforcement officer in this context. *See*, *e.g.*, *United States v. Beck*, 140 F.3d 1129, 1139 (8th Cir. 1998) ("It certainly cannot be deemed unusual for a motorist to exhibit signs of nervousness when confronted by a law enforcement officer."); *United States v. Wood*, 106 F.3d 942, 948 (10th Cir. 1997) ("It is certainly not uncommon for most citizens—whether innocent or guilty—to exhibit signs of nervousness when confronted by a law enforcement officer."); *State v. Schlosser*, 774 P.2d 1132, 1138 (Utah 1989) ("When confronted with a traffic stop, it is not uncommon for drivers and passengers alike to be nervous and excited and to turn to look at an approaching police officer."). Even physical manifestations of nervousness do not necessarily warrant the inference that an individual is hiding something. *See State v. Anderson*, 258 Neb. 627, 641 (2000) ("Trembling hands, a pulsing carotid artery, difficulty locating a vehicle registration among documents in a glove box, and hesitancy to make eye contact are signs of nervousness which may be displayed by innocent travelers who are stopped and confronted by an officer.").

¶ 45 Our traditional distinction between general nervousness—which does not support an officer's reasonable suspicion—and extreme nervousness—which may support an officer's reasonable suspicion—reflects this reality. The majority's decision to rely upon Johnson's nervousness in this case, based solely upon Officer Whitley's testimony that he observed Johnson's heart "beating out of his chest a little bit," erodes that distinction and turns an entirely understandable physiological response into a ground for conducting a warrantless search.

¶ 46 There are numerous completely innocent reasons why any person might be nervous during a traffic stop. There are also specific reasons why someone who looks like Johnson—a large Black man—might be especially nervous during a traffic stop. Black people are more likely than white people to be pulled over while driving, more likely than white people to be subjected to investigatory stops, and more likely than white people to be shot and killed by law enforcement officers.[1] Any driver who has followed the news in recent years would have learned the names of numerous people of color killed during or after routine traffic stops. These encounters can be fraught under any circumstance and especially so when the driver fears that one false step might cost him his life. Thus, I cannot agree with the majority that Johnson's purported level of apparent nervousness, as described by the officer's testimony in this case, can support a rational inference that he was armed and dangerous.

3. Blading

¶ 47 The majority holds that Officer Whitley's testimony Johnson was "blading [his body] . . . as if he [was] trying to conceal something" contributes to reasonable suspicion under *Terry*. To be precise, this fact—which the trial court did not explicitly find—is based entirely upon Officer Whitley's perception that Johnson did not reach into his center console in the way Officer Whitley believed a driver "typically" would. I do not dispute that "an obvious attempt to hide or to evade the au-

1. *See, e.g.*, Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 Nature Hum. Behav. 736, 736 (July 2020), https://doi.org/10.1038/s41562-020-0858-1 ("We assessed racial disparities in policing in the United States by compiling and analysing a dataset detailing nearly 100 million traffic stops . . . . Our results indicate that police stops and search decisions suffer from persistent racial bias . . . ."); Wesley Lowery, *A Disproportionate Number of Black Victims in Fatal Traffic Stops*, Washington Post (Dec. 24, 2015), https://www.washingtonpost.com/national/a-disproportionate-number-of-black-victims-in-fatal-traffic-stops/2015/12/24/c29717e2-a344-11e5-9c4e-be37f66848bb_story.html (finding that one third of all individuals shot and killed during traffic stops in 2015 were Black, "making the roadside interaction one of the most common precursors to a fatal police shooting of a black person in 2015").

thorities can be a factor in the calculus of reasonable suspicion." *United States v. Woodrum*, 202 F.3d 1, 7 (1st Cir. 2000). However, I disagree with the majority that Officer Whitley's subjective perception that Johnson "bladed" his body contributes to reasonable suspicion in this case.

¶ 48 The significance of Johnson's motion in retrieving his paperwork from the center console of his vehicle lies entirely in the meaning a reasonable officer would ascribe to the motion, not in the motion itself. "[N]ot every slouch, crouch, or other supposedly furtive movement justifies a stop. The proper inquiry is case-specific and context-contingent, and the surrounding circumstances ordinarily will tell the tale." *Id.* (citation omitted). Here, Johnson's body movement is probative only insofar as a reasonable officer would perceive his movement to be an effort to shield a weapon from view. For this reason, it is notable that when Johnson supposedly "bladed" his body to shield the contents of his center console from Officer Whitley's view, there was another officer standing on the other side of the vehicle looking in through the passenger side window. Further, it is not as if Johnson's movements were unnatural or disconnected from the events of that moment. He was a large man reaching across his body while remaining seated in his vehicle. The fact that he lifted his shoulders off the seat to do is not a reason to conclude he was armed and dangerous.

¶ 49 We should be hesitant to rely so completely on the subjective perceptions of an individual officer whose interpretation of a body motion that is not inherently suspicious is the sole basis for the conclusion that Johnson's movements contributed to reasonable suspicion. We should be especially hesitant to do so when the trial court did not enter an express finding of fact that Johnson "bladed" his body. This Court is not a factfinding tribunal, and it stretches both our competence and authority when we "[i]nfer[ ] additional findings, ones that go beyond what the trial court actually found, to rescue an otherwise insufficient ruling of the trial court." *State v. Johnson*, 269 N.C. App. 76, 88–89 (2019) (Murphy, J., dissenting).[2] Further, "an officer's impression of whether a movement was 'furtive' may be affected by unconscious racial biases," which is an additional reason to leave factfinding, which often involves credibility

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2. The majority asserts that it is appropriate to imply facts not expressly found by the trial court because the trial court noted its ruling was "based on the totality of [the] circumstances, *including but not limited to* [the enumerated facts]." Similarly, the majority argues its factfinding endeavor is appropriate because Officer Whitley's testimony was "uncontroverted." But uncontroverted testimony is not the same as an established fact—it is for the trial court to "itself determine what pertinent facts are actually established by the evidence before it." *Coble v. Coble*, 300 N.C. 708, 712 (1980).

determinations, to the trial court. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 578 (S.D.N.Y. 2013).

¶ 50 Even if it is proper to treat Officer Whitley's testimony regarding Johnson's "blading" his body as an express finding of fact, this fact adds little to the reasonable suspicion calculus. *Cf. State v. Johnson*, 2006 WI App 15, ¶ 18, 288 Wis. 2d 718, 709 N.W.2d 491, *aff'd*, 2007 WI 32, 299 Wis. 2d 675, 729 N.W.2d 182 (concluding that the defendant's "furtive" movements did not support reasonable suspicion he was armed and dangerous because "[t]he officers pulled [the defendant] over for traffic violations . . . and not for a crime[,]" and the officers "had no prior contacts with [the defendant] that would suggest that he would be armed or otherwise dangerous"). This Court has never before recognized "blading" as a behavior which gives rise to the reasonable inference that an individual is armed and dangerous. In the only other Court of Appeals decision previously recognizing "blading" as a contributing factor under *Terry*, the defendant "bladed" his body in such a way as to prevent the arresting officer from viewing his hip, where a firearm is often carried, immediately after making eye contact with the officer. *State v. Malachi*, 264 N.C. App. 233, 238, *appeal dismissed*, 372 N.C. 702 (2019). In that case, there was no other reason for the defendant to move his body in that manner. Furthermore, the officer in that case testified about the basis for his suspicion including training he received that a person with a gun often turns his hip to hide the weapon. *See Malachi*, 264 N.C. App. at 237-38. Finally, officers had received an anonymous tip that someone wearing a red shirt and black pants had put a gun in his waistband. *Id.*, at 234. By contrast, in this case, there was no tip, there was no testimony regarding the officer's training, and most importantly, Johnson was moving his body to accomplish an apparent, noncriminal purpose. Indeed, courts in other jurisdictions have concluded that movements which are contextually appropriate and not inherently suspect do not contribute to the reasonable suspicion analysis. *Cf. United States v. Hood*, 435 F. Supp. 3d 1, 8 (D.D.C. 2020) (rejecting the government's "blading" argument because "the positioning of [the defendant's] body seems consistent with an individual who was crossing a street at a diagonal from north to south"). Therefore, I would not consider Johnson's alleged "blading" significant in the reasonable suspicion analysis.

4. Prior record

¶ 51 The majority finds probative Officer Whitley's testimony that he believed Johnson was "armed and dangerous" after he reviewed Johnson's criminal record and discerned a "trend in violent crime." I would conclude this finding is unsupported by competent evidence in the record

and thus cannot contribute to the reasonable suspicion analysis in this case.

¶ 52 At the suppression hearing, Officer Whitley could not recall the dates of the entries he viewed in Johnson's record, whether those entries documented charges or convictions, or the total number of charges or convictions Johnson's record contained. He did recall that that the dates of these entries "started somewhere around 2003 to the 2009 mark." In 2009, it might have been reasonable to conclude, based on this evidence, that Johnson's criminal record indicated a "trend in violent crime." In 2017, when the stop occurred, eight years had passed since Johnson had been charged or convicted of *any* crime, let alone a violent one. Notwithstanding this lengthy gap, the majority concludes Johnson's criminal record supports the reasonable belief he was armed and dangerous in 2017.

¶ 53 A trend implies some accounting for recent events. Otherwise, it would be correct to say that the Seattle Supersonics have demonstrated a "trend in winning basketball games," even though they ceased to exist around the same time as Johnson's last conviction. By concluding that it would be reasonable for an officer to ignore the eight-year period during which Johnson maintained a clean record immediately preceding the traffic stop, the majority suggests that no matter how far back in time an individual's prior charges and convictions occurred, no matter how successful that individual has been in re-entering society, it is reasonable for an officer to believe that an individual with a prior record is a threat. At a minimum, we should make clear that "the age of [a defendant's] convictions is a factor to consider in determining their relevance" in the *Terry* analysis to avoid lending the impression that once an individual has been arrested or convicted of some crime, he is marked as presumptively dangerous for life. *United States v. Scott*, 818 F.3d 424, 431 (8th Cir. 2016); *see also United States v. Falso*, 544 F.3d 110, 122 (2d Cir. 2008) (holding with respect to warrant application based in part on 18-year-old conviction that "even if [the defendant's] prior conviction were relevant to the analysis, it should have only been marginally relevant because the conviction was stale").

¶ 54 Under these circumstances—where the defendant's last conviction occurred eight years prior to the traffic stop and there is no indication the defendant continued to engage in criminal activity in the intervening years—I disagree with the majority that Johnson's criminal record supports the reasonable belief he was armed and dangerous at the time of the traffic stop, "[s]tanding alone" or otherwise. I also note that prior convictions are not evenly distributed among all segments of the popula-

tion and that the distribution of convictions does not necessarily track meaningful distinctions in the frequency or severity of criminal conduct engaged in by members of different racial or ethnic groups. *See, e.g.*, *Terry v. United States*, 141 S. Ct. 1858, 1865 (2021) ("Under [federal] law, crack cocaine sentences were about 50 percent longer than those for powder cocaine. Black people bore the brunt of this disparity." (citation omitted)); *Mandala v. NTT Data, Inc.*, 975 F.3d 202, 220 (2d Cir. 2020) ("As the statistics show, there are significant racial disparities in arrest, conviction, and incarceration rates in this country."). Absent further clarification from this Court regarding the significance of an individual's prior criminal record, I worry that our decision today will allow historic racial disparities in policing to perpetuate ongoing ones.

¶ 55 One of the fundamental principles of our common law jurisprudence is that we punish acts, not an individual merely because of his or her status. *See, e.g.*, *Robinson v. California*, 370 U.S. 660 (1962) (holding a California law making it illegal to be a drug addict unconstitutional because the mere status of being a drug addict was not an act and thus not criminal.). The majority's conclusion that Johnson's prior criminal record contributes to reasonable suspicion—which treats his more recent, lengthier period of non-involvement with the criminal justice system as irrelevant—conveys the unmistakable impression that "felon" is a lifelong status which renders an individual's choices and behavior irrelevant. Moreover, the majority's reasoning contributes to a legal reality in which an individual's felony conviction is used to justify according an entire class of people diminished constitutional protections, going well beyond the legal debilities imposed by our constitution and statutes on individuals who have been convicted of a felony offense.

5. Raising hands

¶ 56 The majority notes that its conclusion there was reasonable suspicion to search Johnson's vehicle is in no way predicated on the fact that Johnson placed his hands up in the air when he was stopped by Officer Whitley. I wholeheartedly agree that Johnson's conduct in this respect should be given no probative weight in the *Terry* analysis. I would also go a step further and resolve the "real or perceived conundrum" that arises when the State claims that a defendant's raising his hands when surrendering to a law enforcement officer is evidence supporting a reasonable suspicion that the defendant is armed and dangerous.

¶ 57 The very obvious problem with this claim is that raising one's hands in this manner is an entirely natural way for one person to signal to another that they mean no harm. Indeed, police officers will often or-

der an individual suspected of being armed and dangerous to raise his hands, and the individual's failure to do so would certainly contribute to reasonable suspicion under *Terry*. *See United States v. Soares*, 521 F.3d 117, 121 (1st Cir. 2008) (concluding there was reasonable suspicion where the defendant "refused repeated orders to remain still and keep his hands in [the officer's] view"). At the same time, courts have held that it contributes to reasonable suspicion when a defendant moves his hands out of view of the arresting officer. *See United States v. Johnson*, 212 F.3d 1313, 1316–17 (D.C. Cir. 2000) (concluding that the defendant's "shoving down" motions with his hands were motions "which a reasonable officer could have thought were actually suggestive of hiding (or retrieving) a gun"). If raising one's hands contributes to reasonable suspicion, and failing to raise one's hands contributes to reasonable suspicion, then there is always reasonable suspicion.

¶ 58 The concurrence treats Johnson's hand raising as the majority treats every other fact it believes contributes to reasonable suspicion—according to the concurrence, while raising one's hands may sometimes be an innocent gesture, it takes on talismanic significance when considered "in the totality of the circumstances." The assertion is that "[l]ike other movements, which may be innocent standing alone, with the proper testimony the act of raising one's hands can be a factor to support an officer's reasonable suspicion." But the "proper testimony" referred to here is only the officer's subjective belief that the conduct was suspicious. This is not what the law requires. To protect Fourth Amendment rights this Court must ask whether the officer can articulate a reasonable, objective basis for his suspicion. Allowing "the proper testimony" to magically transform innocent acts into suspicious ones makes those rights illusory. As we recently stated in *Reed*,

> An officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000). An obvious, intrinsic element of reasonable suspicion is a law enforcement officer's ability to articulate the objective justification of his or her suspicion. . . . [We cannot] conveniently presuppose a fundamental premise which is lacking here in the identification of reasonable, articulable suspicion: the suspicion must be articulable as well as reasonable.

Reed, 373 N.C. at 514. Today's decision fails to adhere to this recent precedent.

¶ 59 The majority pays lip service to our previously stated "concern about the inclination of the [State] toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity." *State v. Nicholson*, 371 N.C. 284, 291 n.4 (2018) (quoting *United States v. Foster*, 634 F.3d 243, 248 (4th Cir. 2011)). But the Fourth Amendment requires us to avoid "plac[ing] undue weight on [the arresting officer's] subjective interpretation of the facts rather than focusing on how an objective, reasonable officer would have viewed them." *Nicholson*, 371 N.C. at 291–92. In this case, the only "evidence" linking Johnson's hand motion to a risk of dangerousness was Officer Whitley's testimony that "typically when people [raise their hands in this manner], sometimes it can mean that they have a gun." We should not blindly acquiesce to one officer's subjective interpretation, which runs contrary to common sense and which makes the individuals most likely to experience trepidation when interacting with law enforcement more likely to be deemed suspicious because of their efforts to mitigate the risk of an encounter turning violent. Absent specific evidence illustrating why a hand gesture commonly understood to convey that the individual making the gesture means no harm should instead be understood as evidence that the individual is a threat, I would hold that this hand gesture does not contribute to reasonable suspicion under *Terry*.

II. Conclusion

¶ 60 Johnson did everything he was supposed to do when he was stopped by police officers. When he saw flashing lights in his rearview mirror, he pulled over "fairly immediately." When an officer approached his vehicle, he placed his hands up and out of the driver side window to show that he was unarmed. When the officer asked him why his license plate did not match the registration for his vehicle, he explained that he had purchased the vehicle earlier that day and reached into his center console to retrieve corroborating paperwork, including a bill of sale. When the officer asked him to step out of his vehicle, he stepped out of his vehicle. When the officer asked him to consent to a frisk for weapons, he consented. The officer found nothing suspicious on his person.

¶ 61 Under *Terry*, our analysis is supposed to focus on the behavior of each individual defendant under the circumstances of each individual case, but in this case nothing Johnson did mattered. Rather than hold the State to its burden under the Fourth Amendment, the majority reasons that the whole of the evidence supporting reasonable suspicion is greater than the sum of the parts. In doing so, the majority converts a generalized hunch into individualized suspicion, eroding the Fourth Amendment rights of all North Carolinians in the process. The majority

also ignores, and may well exacerbate, issues relating to racially disparate policing, issues which have been forthrightly examined by many courts confronted with similar kinds of *Terry* claims. Therefore, respectfully, I dissent.

Justice HUDSON joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
FABIOLA ROSALES CHAVEZ

No. 184A20

Filed 13 August 2021

Conspiracy—jury instructions—conspirators—plain error analysis—no prejudice shown

In a trial for conspiracy to commit first-degree murder, where the trial court erred by instructing the jury that defendant could be found guilty if he conspired with "at least one other person" without naming the only co-conspirator listed in the conspiracy indictment, there was no plain error because there was no reasonable probability the jury would have reached a different result absent the error given the overwhelming evidence of defendant's guilt. The decision of the Court of Appeals reaching the opposite conclusion, without a prejudice analysis being conducted, was reversed.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 270 N.C. App. 748 (2020), finding no error in part, vacating and new trial in part, and remanding a judgment entered on 29 November 2018 by Judge Joseph N. Crosswhite in Superior Court, Mecklenburg County. Heard in the Supreme Court on 18 May 2021.

Joshua H. Stein, Attorney General, by Asher Spiller, Assistant Attorney General, for the State-appellant.

Marilyn G. Ozer for defendant-appellee.

BARRINGER, Justice.

¶ 1 Defendant was convicted of attempted first-degree murder, conspiracy to commit first-degree murder, and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant appealed to the Court of Appeals, which held in a divided opinion, as relevant to this appeal, that the trial court committed plain error by incorrectly instructing the jury on the conspiracy to commit first-degree murder charge.[1] *State v. Chavez*, 270 N.C. App. 748, 761–62 (2020). The dissent disagreed, concluding, among other things, that defendant "cannot carry her burden to show any prejudice under the standard of review of plain error to warrant a new trial." *Id.* at 771 (Tyson, J., dissenting). After careful review, we reverse the decision of the Court of Appeals as to this issue. As to the other issues which were not brought forward to this Court, the decision of the Court of Appeals remains undisturbed.

I. Factual and Procedural Background

¶ 2 Hugo Avila Martinez (Martinez)[2] was renting an apartment to defendant until he told her to leave on 21 August 2016 due to defendant "having problems with rent." Following Martinez's conversation with defendant, defendant slapped him in the face, and Martinez filed a police report. Despite the altercation that occurred, Martinez allowed defendant to remain in the apartment. Martinez later evicted defendant sometime before 21 September 2016.

¶ 3 On 21 September 2016, defendant, along with Carlos Manzanares (Manzanares)[3] and an unidentified man, broke into Martinez's home. Defendant was armed with a machete while the two other men were armed with a hammer. When the defendant and the two men entered Martinez's house, Martinez was asleep in his bed with his girlfriend, Maria Navarro (Navarro) and her 16-month-old baby. Navarro testified that the three perpetrators entered Martinez's bedroom and defendant immediately announced to Martinez that, "Nobody makes fun of me, and I'm here to kill you." Martinez got up from the bed and asked defendant

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1. The Court of Appeals also found no error related to issues of ineffective assistance of counsel and supposed hearsay. Neither of these issues were raised in the appeal to this Court.

2. The Court of Appeals' opinion lists the victim's name as Roberto Hugo Martinez but the warrants, indictment, and his statement to police lists his name as Hugo Avila Martinez. We will refer to the victim as the name recorded in those documents.

3. Although Maria Navarro, one of the State's main witnesses, referred to Manzanares throughout her testimony as the "man in the yellow shirt" and the "guy that stayed," she positively identified the person depicted in the State's Exhibit 8 as the "man in the yellow shirt," which was confirmed to be a photograph of Manzanares by the responding police.

"what's wrong with you?" Defendant then threw the machete at Martinez and Martinez attempted to defend himself. Manzanares and the other man then proceeded to beat Martinez and continually struck him in the head with the machete and the hammer.

¶ 4 Navarro further testified that while Manzanares and the other man were beating Martinez, defendant told Navarro that she was going to kill Navarro and Navarro's baby. Defendant retrieved the machete and began attacking Navarro and her baby with the machete. Navarro was cut several times trying to protect her baby. Defendant also hit Navarro in the head with the hammer. After beating Martinez unconscious and seeing that defendant was attacking Navarro, Manzanares detained defendant and instructed Navarro to grab her baby and leave or else defendant would kill her.

¶ 5 After Navarro was able to escape from defendant, she called 9-1-1. Defendant and Manzanares followed Navarro. Once they caught up with Navarro, defendant instructed Manzanares to kill Navarro for calling the police. However, after Manzanares could not find Navarro's cellphone to verify whether she had called the police, defendant continued to grab and pull Navarro while saying "I'm going to kill you." Manzanares intervened, saying "no you're not going to [kill Navarro] . . . you're not going to do that because you told me, we were here for something else," which then led defendant to abandon her attempt to kill Navarro and Navarro's baby. Defendant fled the scene by way of a nearby pedestrian path. The responding police officer testified that when he arrived on the scene, he found Navarro "covered in blood" and Martinez unresponsive with a "heavy laceration to his head."

¶ 6 On 3 October 2016, defendant was indicted on two counts of attempted first-degree murder, one count of conspiracy to commit first-degree murder, two counts of assault with a deadly weapon with intent to kill inflicting serious injury, and one count of first-degree burglary. On 26 November 2018, the State dismissed one count of attempted first-degree murder, the first-degree burglary charge, and one count of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant was subsequently found guilty of attempted first-degree murder, conspiracy to commit first-degree murder, and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant gave oral notice of appeal.

¶ 7 Before the Court of Appeals, defendant argued that the trial court "(1) erred by denying [d]efendant's motion to dismiss the conspiracy charge; (2) plainly erred by instructing the jury, and accepting its ver-

dict of guilty, on the offense of conspiracy to commit first-degree murder; and (3) plainly erred by admitting hearsay evidence that violated [d]efendant's right to confrontation." *Chavez*, 270 N.C. App. at 751. The Court of Appeals rejected defendant's arguments as to issues one and three, *id.* at 763–64, but in a divided opinion concluded that the trial court plainly erred by instructing the jury on the conspiracy to commit first-degree murder charge, *id.* at 761–62. The majority reasoned that because the indictment "named only Manzanares as [d]efendant's co-conspirator," the evidence presented at trial supported a finding that [d]efendant conspired with Manzanares and another unidentified male." *Id.* at 760. However, the jury instructions instructed that a conspiracy could be found if "the defendant and *at least one other person* entered into an agreement," *id.* at 760. Accordingly, the majority held that "[d]efendant's fundamental right to be informed of the accusations against [her]" was violated. *Id.* at 761 (citing N.C. Const. Art. I, sec. 23).

¶ 8 In contrast, the dissent reasoned that "[d]efendant does not and cannot show 'that the erroneous jury instruction was a fundamental error—that the error had a probable impact on the jury verdict' and was so prejudicial to be awarded a new trial." *Id.* at 767 (Tyson, J., dissenting) (quoting *State v. Lawrence*, 365 N.C. 506, 518 (2012)). The dissent asserted that not only did the majority fail to conduct a prejudice analysis, but defendant cannot demonstrate prejudice based on the "overwhelming and uncontroverted evidence" against her. *Id.* at 768 (Tyson, J., dissenting).

¶ 9 The State appealed pursuant to N.C.G.S. § 7A-30(2) (2019). Based on the dissent, the State raised one issue on appeal to this Court: "[d]id the Court of Appeals err in granting defendant a new trial on the charge of conspiracy to commit murder based on an instructional error where there was overwhelming evidence of defendant's guilt?" The alleged error was that "the trial court . . . failed to identify [d]efendant's co-conspirator by name in the jury instructions."

¶ 10 At trial, the jury was instructed as follows, and without objection from defendant:

> The defendant has been charged with conspiracy to commit murder. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt. First; that the defendant and at least one other person entered into an agreement. Second; that the agreement was to commit murder. Murder is the unlawful killing of another with

> malice. And third; that the defendant and at least one other person intended that the agreement be carried out at the time it was made. The State is not required to prove that the murder was committed.

The majority in the Court of Appeals concluded that the jury instructions were "not in accord, with both the indictment and evidence presented at trial, and thus the trial court's instruction was error." *Chavez*, 270 N.C. at 761 (cleaned up).

II. Standard of Review

¶ 11 If in a criminal case an issue was not preserved by objection at trial and was not deemed preserved by rule or law the unpreserved error is reviewed only for plain error. *See* N.C. R. App. P. 10(a)(4). To obtain plain error review, a "defendant must specifically and distinctly contend that the alleged error constitutes plain error. Furthermore, plain error review in North Carolina is normally limited to instructional and evidentiary error." *State v. Lawrence*, 365 N.C. 506, 516 (2012). (cleaned up). Defendants "bear the heavier burden of showing that [an] error rises to the level of plain error." *Id.*

> [T]he plain error rule ... is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental error*, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

Lawrence, at 516–17 (alterations in original) (quoting *State v. Odom*, 307 N.C. 655, 660–61).

III. Analysis

¶ 12 The issue before us on appeal is whether the Court of Appeals erred by not conducting a prejudice analysis after finding the trial court erred in its instruction as to the charge of conspiracy for first-degree murder and whether if such analysis occurred, can defendant show prejudice

considering the overwhelming and uncontroverted evidence against her. Upon careful review of this case, we conclude that defendant has failed to demonstrate prejudice because the State presented overwhelming and uncontroverted evidence of defendant's guilt at trial. Accordingly, the Court of Appeals erred by failing to perform the required prejudice analysis required for plain error review.

¶ 13 Where there is highly conflicting evidence in a case, an error in the jury instructions *may* tilt the scales and cause the jury to convict a defendant. *See State v. Tucker*, 317 N.C. 532, 540 (1986) (emphasis added). In situations where the instructional error had a probable impact on the jury's finding that the defendant was guilty, a defendant can show plain error. *See id*. In contrast, where the evidence against a defendant is "overwhelming and uncontroverted[, a] defendant cannot show that, absent the error, the jury probably would have returned a different verdict." *Lawrence*, 365 N.C. at 519.

¶ 14 Defendant cannot show plain error because the evidence presented by the State that defendant formed a conspiracy with Manzanares to commit first-degree murder was overwhelming and uncontroverted.

> A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. To constitute a conspiracy[,] it is not necessary that the parties should have come together and agreed in express terms to unite for a common object: A mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense. The conspiracy is the crime and not its execution. Therefore, no overt act is necessary to complete the crime of conspiracy. As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed.
>
> . . . The existence of a conspiracy may be established by direct or circumstantial evidence. . . . However, direct proof of the charge [conspiracy] is not essential and for such is rarely obtainable. It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy.

State v. Gibbs, 335 N.C. 1, 47–48 (1993) (cleaned up).

¶ 15 Based on Navarro's uncontroverted testimony, defendant and Manzanares arrived at Martinez's apartment together in the middle of the night, awakening Martinez and Navarro. After defendant, armed with a machete, declared "I'm here to kill you" and threw the machete at Martinez, Manzanares began hitting and kicking Martinez, rendering Martinez unable to defend himself. Shortly thereafter, Manzanares began using a hammer to repeatedly hit Martinez in the head. Navarro escaped from the house, but both defendant and Manzanares eventually caught up with her. Furthermore, after Manzanares and defendant tracked down Navarro with her baby outside and defendant told Navarro she was going to kill her and Navarro's child, Manzanares told defendant that he would not let defendant kill Navarro because defendant had told him that that they were there for "something different" and Manzanares stated he was "not going to mess with a mother and a child." Given the overwhelming evidence of a conspiracy between defendant and Manzanares to kill Martinez, we conclude there is not a reasonable probability that the jury would have returned a different verdict had Manzanares been identified in the jury instructions as defendant's co-conspirator rather than a mere instruction that an agreement must be reached with at least one other person. *See State v. Fletcher*, 370 N.C. 313, 325 (2017) (" '[I]n giving jury instructions,' however, 'the court is not required to follow any particular form,' as long as the instruction adequately explains 'each essential element of the offense.' ") (quoting *State v. Walston*, 367 N.C. 721, 731 (2014)).

¶ 16 Moreover, the State's evidence focused on defendant and Manzanares's interactions and their agreement to murder Martinez. The State's closing argument also focused entirely on establishing that defendant conspired with Manzanares. The State argued to the jury during closing arguments that "defendant and at least one other person entered into an agreement. In this case that's [Manzanares], the guy in the yellow shirt. That the agreement was to commit murder." The State later reiterated that defendant "formed an agreement with at least one person, that guy (indicating image of [Manzanares] on screen), to kill [Martinez]." This further supports that there is not a reasonable probability that the jury would have returned a different verdict had Manzanares been identified in the jury instructions as defendant's co-conspirator.

IV. Conclusion

¶ 17 To demonstrate that a trial court committed a plain error, a defendant must show "that after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was

guilty.' " *Lawrence*, 365 N.C. at 518 (quoting *Odom*, 307 N.C. at 660). In this case, given that the evidence of defendant's guilt of the conspiracy to commit first-degree murder charge was "overwhelming and uncontroverted," *id.* at 519, defendant cannot show that the error had a probable impact on the jury's finding that she was guilty. Accordingly, we reverse the decision of the Court of Appeals. As to the other issues which were not brought forward to this Court, the decision of the Court of Appeals remains undisturbed.

REVERSED.

STATE OF NORTH CAROLINA
v.
JOHN FITZGERALD AUSTIN

No. 461A20

Filed 13 August 2021

1. Judges—impermissible expression of opinion—in presence of jury—preservation—standard of review

Defendant's argument that the trial court improperly expressed an opinion on the evidence in violation of N.C.G.S. §§ 15A-1222 and 15A-1232 while instructing the jury was preserved by operation of law due to the mandatory nature of the statutory prohibitions, and thus the alleged error was subject to review for prejudicial error pursuant to N.C.G.S. § 15A-1443(a).

2. Judges—impermissible expression of opinion—in presence of jury—prejudice analysis—jury instructions and evidence

In a trial for assault on a female, even assuming that the trial court violated N.C.G.S. §§ 15A-1222 and 15A-1232 by improperly expressing its opinion during jury instructions that defendant assaulted the victim, defendant could not show prejudice where the trial court's instructions as a whole made clear that only the jury could make the factual determination of whether defendant assaulted the victim and where the State's evidence satisfied the elements of the crime.

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, 273 N.C. App. 565, 849 S.E.2d 307 (2020), finding no error after appeal from a judgment entered on 8 May 2019 by Judge Todd Burke in Superior Court, Forsyth County. Heard in the Supreme Court on 17 May 2021.

Joshua H. Stein, Attorney General, by Chris D. Agosto Carreiro, Assistant Attorney General, for the State-appellee.

Jarvis John Edgerton, IV for defendant-appellant.

BERGER, Justice.

¶ 1 On May 8, 2019, a Forsyth County jury found defendant John Fitzgerald Austin guilty of assault on a female and habitual misdemeanor assault. That same day, defendant pleaded guilty to attaining habitual felon status, and he was sentenced to 103 to 136 months in prison. Defendant appealed, arguing that the trial court impermissibly expressed an opinion during jury instructions concerning facts to be decided by the jury. A divided panel of the Court of Appeals upheld defendant's conviction. *State v. Austin*, 273 N.C. App. 565, 849 S.E.2d 307 (2020). Defendant appeals to this Court pursuant to N.C.G.S. § 7A-30(2).

I. Factual and Procedural Background

¶ 2 On January 6, 2018, Claudette Little and Scheherazade Bonner went to a Winston-Salem night club. Shortly after they arrived, Little received a phone call from defendant. Little and defendant were in a dating relationship at the time. Little testified that defendant called her because defendant did not believe her about her location.

¶ 3 Approximately thirty minutes later, defendant arrived at the night club with David Harris. Defendant asked Little to leave with him, but Little refused. Defendant left the night club around 1:30 a.m. on January 7, 2018. Little later left the night club with Bonner and Willis Williams and returned home. Defendant was not at the home when they arrived. Both Bonner and Williams subsequently left Little's residence, and Little went to sleep.

¶ 4 Little was then awakened by defendant standing over her and yelling at her. Defendant assaulted Little multiple times, demanded that Little take off her clothes, and ordered her to perform oral sex on him. When defendant went to sleep, Little put on her clothes and ran out of the apartment. Little made contact with her daughter by phone and met

her daughter on the side of the road. Little's daughter testified that her mother was not properly dressed for a cold January morning.

¶ 5 That same day, Little and her daughter went to the magistrate's office and sought a warrant against defendant for assault on a female. Defendant was subsequently indicted for assault on a female, habitual misdemeanor assault, and attaining habitual felon status.

¶ 6 On May 6, 2019, defendant's matter came on for trial. Following the presentation of the evidence, the trial court instructed the jury on the charges of assault on a female and habitual misdemeanor assault. During the initial instruction on the charge of assault on a female, the trial court stated, in part:

> For you to find the defendant guilty of this offense, the State must prove three [things] beyond a reasonable doubt:
>
> First, that the defendant intentionally assaulted the alleged victim. It has been described in this case by the prosecuting witness that the defendant hit her upon her head, that he hit her on her arms, about her body.
>
> You are the finders of fact. You will determine what the assault was, ladies and gentlemen. The Court is not telling you what it is, I'm just giving you a description. And there was also testimony by the witness that the defendant asked her to perform, by force, another act, which could be considered an assault. But you will determine what the assault was. I'm not telling you what it is. And if what I'm saying is the evidence and your recollection is different from what I say, you still should rely upon your recollection of the evidence, as to what the assault is that has been testified to in this case.

¶ 7 The next day, following a request from the jury, the trial court reinstructed the jury on the charge of assault on a female:

> You requested specifically the substantive instructions for assault on a female and habitual misdemeanor[ ] assault.
>
> Ladies and gentlemen, I will define, again, first. An assault does not necessarily have to involve contact,

> it could be putting someone in fear or imminent apprehension of contact, threatening contact. . . . In this case the particular assault has been described as hitting the prosecuting witness, Ms. Claudette Little, about her body multiple times. Yesterday I mentioned some other act based upon the testimony at the trial, that she stated that she was forced to perform. But for purposes of this trial, you do not have to consider that, just that it is alleged that she was hit about her body multiple times. Whether that—whatever part of the body that may be, head, face, torso, arms, legs, that will be for you to determine as you are the finders of fact.

¶ 8 Defendant did not object to any of the trial court's jury instructions at trial. Defendant was found guilty of assault on a female and habitual misdemeanor assault, and he pleaded guilty to attaining habitual felon status.

¶ 9 In the Court of Appeals, defendant argued that the trial court had improperly expressed its opinion during jury instructions that an assault had occurred. *Austin*, 273 N.C. App. at 568, 849 S.E.2d at 310. The Court of Appeals found no error and upheld defendant's conviction. *Id.* at 575, 849 S.E.2d at 314. Based on a dissenting opinion, defendant appealed to this Court, arguing that the trial court's comments were improper expressions of opinion which prejudiced defendant. We disagree.

II. Standard of Review

¶ 10 **[1]** Initially, we note that both parties failed to cite the proper standard of review in their briefs. Defendant contends that we should utilize a de novo standard of review, relying on a Court of Appeals' opinion in *Staton v. Brame*, 136 N.C. App. 170, 523 S.E.2d 424 (1999), a civil case that bears no relation to the issues in this case. The State argues that the appropriate standard of review is plain error. However, plain error review is available under Rule 10(a)(4) only when a defendant specifically argues plain error for an unpreserved instructional or evidentiary error. N.C. R. App. P. 10(a)(4); *see generally State v. Lawrence*, 365 N.C. 506, 723 S.E.2d 326 (2012).

¶ 11 Rule 10 of the North Carolina Rules of Appellate Procedure provides, in part:

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely

> request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion. Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted *or which by rule or law was deemed preserved* or taken without any such action, including, but not limited to, whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, may be made the basis of an issue presented on appeal.

N.C. R. App. P. 10(a)(1) (emphasis added).

¶ 12 Thus, pursuant to Rule 10(a)(1), an alleged error may only be preserved by either a party's timely objection or by operation of rule or law. Rule 10 "generally require[s] that parties take some action to preserve an issue for appeal." *State v. Meadows*, 371 N.C. 742, 746, 821 S.E.2d 402, 405 (2018) (citing N.C. R. App. P. 10(a)(1)). However, when a party fails to note a timely objection to an alleged error, yet later raises the issue on appeal, we must determine whether the alleged error is deemed preserved by operation of rule or law. *See* N.C. R. App. P. 10(a)(1).

¶ 13 A statute will automatically preserve an issue for appellate review if the statute "either: (1) requires a specific act by a trial judge; or (2) leaves no doubt that the legislature intended to place the responsibility on the judge presiding at the trial[.]" *In re E.D.*, 372 N.C. 111, 121, 827 S.E.2d 450, 457 (2019) (cleaned up).

¶ 14 Section 15A-1222 and Section 15A-1232 of the General Statutes of North Carolina specifically prohibit a trial court judge from expressing an opinion during trial and when instructing the jury. Accordingly, "[w]henever a defendant alleges a trial court made an improper statement by expressing an opinion on the evidence in violation of N.C.G.S. §§ 15A-1222 and 15A-1232, the error is preserved for review without objection due to the mandatory nature of these statutory prohibitions." *State v. Duke*, 360 N.C. 110, 123, 623 S.E.2d 11, 20 (2005) (citation omitted).

¶ 15 When an alleged statutory violation by the trial court is properly preserved, either by timely objection or, as in this case, by operation

of rule or law, we review for prejudicial error pursuant to N.C.G.S. § 15A-1443(a). *See Lawrence*, 365 N.C. at 512, 723 S.E.2d at 330 (citing N.C.G.S. § 15A-1443(a) and stating that "if the [preserved] error relates to a right not arising under the United States Constitution, . . . review requires the defendant to bear the burden of showing prejudice.").

¶ 16 N.C.G.S. § 15A-1443(a) provides,

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

N.C.G.S. § 15A-1443(a) (2019).[1]

¶ 17 When reviewing alleged improper expressions of judicial opinion under this standard, we utilize a totality of the circumstances test to determine whether the trial court's "comments cross[ed] into the realm of impermissible opinion." *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995). Pursuant to N.C.G.S. § 15A-1443(a), a defendant must also show that the comments had such a prejudicial effect that there is a reasonable possibility of a different result absent the error.[2]

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1. While the right to a fair trial does implicate constitutional concerns, defendant's argument is based upon statutory violations of N.C.G.S. §§ 15A-1222 and 15A-1232. Therefore N.C.G.S. § 15A-1443(a) applies and not N.C.G.S. § 15A-1443(b).

2. We have applied the prejudicial error standard set forth in N.C.G.S. § 15A-1443(a) in a variety of cases and have consistently held that judicial error does not automatically warrant a new trial unless the defendant shows the error was prejudicial by demonstrating a reasonable possibility that, absent the error, a different result would have been reached. *See State v. Corey*, 373 N.C. 225, 237, 835 S.E.2d 830, 838 (2019) (holding that trial court's failure to comply with N.C.G.S. § 15A-1231(b) before submitting the issue of whether an aggravating factor existed in the case was not materially prejudicial under N.C.G.S. § 15A-1443(a)); *State v. Mumma*, 372 N.C. 226, 242, 827 S.E.2d 288, 298–99 (2019) (holding that trial court's error in allowing the jury to review graphic photographs of the murder victim over the defendant's objection was not prejudicial error under N.C.G.S. § 15A-1443(a)); *State v. Malachi*, 371 N.C. 719, 821 S.E.2d 407 (2018) (holding that trial court's error in instructing the jury that it could find the defendant guilty of possession of a firearm based on constructive possession did not prejudice the defendant under N.C.G.S. § 15A-1443(a)); *State v. Starr*, 365 N.C. 314, 319, 718 S.E.2d 362, 366 (2011) (holding that the trial court's denial of the jury's request to review trial transcript did not prejudice the defendant under N.C.G.S. § 15A-1443(a)).

See, *e.g.*, *Larrimore*, 340 N.C. at 155, 456 S.E.2d at 808; *State v. Anthony*, 354 N.C. 372, 402, 555 S.E.2d 557, 578 (2001); *State v. Berry*, 235 N.C. App. 496, 508, 761 S.E.2d 700, 708 (2014), *rev'd per curiam*, 368 N.C. 90, 773 S.E.2d 54 (2015).

III. Analysis

¶ 18 **[2]** On appeal, defendant argues that the trial court violated N.C.G.S. §§ 15A-1222 and 15A-1232 by improperly expressing its opinion during jury instructions and that this violation requires a new trial. Section 15A-1222 states, "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C.G.S. § 15A-1222 (2019). Section 15A-1232 states, "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." N.C.G.S. § 15A-1232 (2019). Accordingly, when read together, the plain language of the statues makes it improper for a trial judge to insert his opinion into any portion of the trial, including jury instructions.

¶ 19 Moreover, N.C.G.S. §§ 15A-1222 and 15A-1232 also impose "[t]he duty of absolute impartiality . . . on the trial judge." *State v. Best*, 280 N.C. 413, 417, 186 S.E.2d 1, 4 (1972) (citing N.C.G.S. § 1-180 (repealed in 1977 and superseded by N.C.G.S. §§ 15A-1222 and 15A-1232)); *see State v. Hewett*, 295 N.C. 640, 643–44, 247 S.E.2d 886, 888 (1978) (recognizing the implicit embodiment of N.C.G.S. § 1-180 in N.C.G.S. §§ 15A-1222 and 15A-1232). However, while this duty prohibits any expression of judicial opinion at trial, not every "impropriety by the trial judge . . . result[s] in prejudicial error." *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985).

¶ 20 "A remark by the court is not grounds for a new trial if, when considered in the light of the circumstances under which it was made, it could not have prejudiced defendant's case." *State v. King*, 311 N.C. 603, 618, 320 S.E.2d 1, 11 (1984). "[A]n alleged improper statement will not be reviewed in isolation, but will be considered in light of the circumstances in which it was made." *State v. Jones*, 358 N.C. 330, 355, 595 S.E.2d 124, 140 (2004) (quoting *State v. Weeks*, 322 N.C. 152, 158, 367 S.E.2d 895, 899 (1988)). "The bare possibility . . . that an accused may have suffered prejudice from the conduct or language of the judge is not sufficient to overthrow an adverse verdict." *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10–11 (1951) (citing *State v. Jones*, 67 N.C. 285 (1872)).

¶ 21 Here, during the trial court's initial instruction to the jury for the assault on a female charge, the trial court stated:

> You are the finders of fact. You will determine what the assault was, ladies and gentlemen. The Court is not telling you what it is, I'm just giving you a description. . . . But you will determine what the assault was. I'm not telling you what it is. And if what I'm saying is the evidence and your recollection is different from what I say, you still should rely upon your recollection of the evidence, as to what the assault is that has been testified to in this case.

¶ 22 The trial court subsequently also instructed the jury:

> The law requires the presiding judge to be impartial. You should not infer from anything I have done or said that the evidence is to be believed or disbelieved, that a fact has been proved or what your findings ought to be. It is your duty to find the facts and to render a verdict reflecting the truth.

¶ 23 After a request by the jury, the trial court provided the following instruction:

> Ladies and gentlemen, I will define, again, first. An assault does not necessarily have to involve contact, it could be putting someone in fear or imminent apprehension of contact, threatening contact. But the facts of this case have demonstrated that the—there was actual contact, that's a touching of some form that is nonconsensual and unwanted by the other party. In this case the particular assault has been described as hitting the prosecuting witness, Ms. Claudette Little, about her body multiple times. . . . But for purposes of this trial, you do not have to consider that, just that it is alleged that she was hit about her body multiple times. Whether that—whatever part of the body that may be, head, face, torso, arms, legs, that will be for you to determine as you are the finders of fact.

¶ 24 Further, the trial court again instructed on the charge of assault on a female at the jury's request. During this instruction, the trial court stated the following:

> And just for you—I already told you this, no matter what I said, it's for you to determine what happened, not me. The facts are not what the attorneys say. The facts are not what I say. You determine what happened in this case. I'm just merely describing what has been alleged, and that is that the defendant is accused of hitting the prosecuting witness about her body multiple times.

¶ 25 Even if we assume the trial court violated the statutory prohibitions against the expression of opinion, defendant cannot show a reasonable possibility of a different result.

¶ 26 Here, for the charge of assault on a female, the State was required to prove that (1) defendant intentionally assaulted Little, (2) Little was a female person, and (3) defendant was a male person at least eighteen years of age. N.C.G.S. § 14-33(c)(2) (2019). Little testified in detail at trial concerning defendant's criminal conduct. Little testified that defendant wrapped a belt around his hand and struck her several times in her head, face, and arm. The State entered into evidence photographs which showed numerous bruises to Little's face and arm. In addition, the State also presented evidence through the testimony of other witnesses which corroborated Little's testimony. Specifically, testimony from Bonner and Little's daughter corroborated Little's timeline of events leading up to and following the assault.

¶ 27 The State presented evidence at trial which satisfied the elements of the predicate assault, and the trial court's instruction made clear that the jury alone was responsible for making this determination. After reviewing the totality of the circumstances including the instructions provided by the trial court and the evidence presented at trial, we conclude that defendant received a fair trial free from prejudicial error, and the decision of the Court of Appeals is affirmed.

AFFIRMED.

Justice EARLS dissenting.

¶ 28 When the presiding judge speaks during a trial, we presume the jury listens. As the most visible representative of our legal system, "[t]he trial judge occupies an exalted station." *State v. Carter*, 233 N.C. 581, 583 (1951). To eliminate the risk that a jury will convict (or fail to convict) a defendant based upon its perception of the judge's opinion of what the evidence proves (or does not prove)—rather than the jury's own

examination of the evidence presented by the parties—North Carolina law prohibits a trial judge from "express[ing] during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C.G.S. § 15A-1222 (2019); *see also* N.C.G.S. § 15A-1232 (2019) ("In instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved . . . ."). The majority in this case fails to give proper weight to this statutory mandate by refusing to engage meaningfully in a prejudice analysis and instead ignoring any impact the judge's instructions had on the jury.

¶ 29 The defendant here, John Fitzgerald Austin, did not object to the trial judge's improper expressions of opinion at the time they were communicated to the jury. However, as the majority correctly explains, Austin's claim that the trial judge impermissibly expressed an opinion in violation of N.C.G.S. §§ 15A-1222 and 15A-1232 is preserved by operation of law. Where I depart from the majority is in its treatment of the merits of Austin's claim. I would hold that the trial judge violated N.C.G.S. §§ 15A-1222 and 15A-1232 by impermissibly communicating to the jury his opinion regarding the events underlying Austin's conviction and that Austin was prejudiced thereby.

¶ 30 The majority assumes without deciding that the trial judge "violated the statutory prohibitions against the expression of opinion."[1] However, we should have no difficulty concluding from the transcript of the trial in this case that the trial judge erred in phrasing instructions to the jury which presupposed the veracity of the complaining witness's allegation that Austin assaulted her, a fact necessary to support Austin's conviction for the offense of assault on a female. Recognizing the seriousness of the error is an important part of assessing whether the error was prejudicial.

¶ 31 The trial judge improperly communicated his opinion that this alleged fact had been proven on no less than three occasions. Moreover, these were not statements made in passing, but rather all were made

1. In a recent article, one scholar argued that the practice of disposing of cases by finding no prejudice, without examining the merits of a criminal defendant's underlying claim that his or her procedural rights were violated, both "seriously diminishes the incentives of trial judges, prosecutors, and relevant organizational and systemic entities to abide by procedural law" and "stymies the vital process of norm clarification." Justin Murray, *Policing Procedural Errors in the Lower Criminal Courts*, 89 Fordham L. Rev. 1411, 1430 (2021). Although I do not doubt that all actors in our judicial system are doing their level best to rigorously adhere to all procedural requirements intended to ensure that criminal defendants are treated fairly, I share Professor Murray's concern that too frequently disposing of cases in this manner leaves these actors—and criminal defendants—bereft of important guidance regarding the scope of the procedural rights afforded to defendants by the people of North Carolina through our Constitution and statutes.

during jury instructions when the jury's focus was exclusively on the trial judge. First, the trial judge informed the jury that its task was to "determine *what the assault was*, ladies and gentlemen." (Emphasis added.) Second, the trial judge explained to the jury that "*the facts of this case have demonstrated that the—there was actual contact*, that's a touching of some form that is nonconsensual and unwanted by the other party." (Emphasis added.) Third, the trial judge instructed the jury that "it is alleged that [the complaining witness] was hit about her body multiple times. Whether that—*whatever part of the body that may be*, head, face, torso, arms, legs, that will be for you to determine as you are the finders of fact." (Emphasis added.) Each of these statements presumes Austin actually assaulted the complaining witness. And because the only three facts necessary to sustain a conviction under N.C.G.S. § 14-33(c)(2) are (1) that the victim was female, (2) that the perpetrator was a male person at least 18 years of age, and (3) that the male perpetrator assaulted the female victim, N.C.G.S. § 14-33(c)(2) (2019), these statements effectively communicated the trial judge's opinion that Austin was guilty as charged.

¶ 32 Whether Austin actually assaulted the complaining witness as that witness alleged was a question for the jury to decide on the basis of the evidence presented at trial. An appropriate instruction would have informed the jury of its obligation to determine *if* Austin had assaulted the complaining witness. Instead, the trial judge's comments communicated that there was no disputing that Austin had committed an assault and, by extension, that there was no other verdict the jury could reach but to find Austin guilty. Even if the State's evidence was uncontroverted, it was still for the jury to decide if the State had proven beyond a reasonable doubt that Austin violated N.C.G.S. § 14-33(c)(2), not the trial judge.

¶ 33 In addition to arguing that the trial judge's statements were not improper, the State also contends that even if they were, any improper expression of judicial opinion was "cured" by the delivery of instructions properly charging the jury with deciding Austin's guilt or innocence. The majority concludes that any allegedly improper expression of opinion could not be prejudicial in part because "the trial court's instruction made clear that the jury alone was responsible for making th[e] determination" of Austin's guilt. However, a boilerplate recitation of the jury's ultimate responsibility to decide which facts have been proven does not erase the prejudicial effect of the trial judge repeatedly instructing the jury that an assault has occurred, a key fact in this case. The question of whether a trial judge has properly instructed the jury on the jury's role as the factfinder in a criminal trial is distinct from the

question of whether the trial judge has improperly weighed in by communicating his or her view of what the facts are. Even if the jury knows it is its responsibility alone to find the facts, the risk is that it will discharge this responsibility improperly influenced by the understanding that the trial judge believes the defendant is guilty.

¶ 34 The majority does not cite any case law in its cursory analysis of the trial judge's allegedly improper expressions of opinion. Our precedents make clear that the trial judge's statements in this case violated N.C.G.S. §§ 15A-1222 and 15A-1232. In the cases where we have rejected a defendant's claim that a trial judge violated N.C.G.S. §§ 15A-1222 and 15A-1232, we have held that the trial judge's comments could not be understood as expressions of opinion when read in context. We examined the totality of the circumstances and concluded the trial judge did not improperly express an opinion. We did not conclude an error was not prejudicial merely because "the State presented evidence at trial which satisfied the elements of the predicate assault, and the trial court's instruction made clear that the jury alone was responsible for making this determination."

¶ 35 For example, in *Young*, the trial judge instructed the jury that "[t]here is evidence in this case which tends to show that the defendant confessed that he committed the crime charged in this case." 324 N.C. at 494. The defendant claimed that the trial judge's "instructions concerning evidence 'tending to show' that he had 'confessed' to the crime charged, together with its subsequent statement that he was accused of first degree murder, amounted to an expression of opinion on the evidence in violation of the statutes." *Id.* at 495. We disagreed, explaining that "[t]he use of the words 'tending to show' or 'tends to show' in reviewing the evidence does not constitute an expression of the trial court's opinion on the evidence." *Id.* We also explained that the use of the term "confessed" "did not amount to an expression of opinion by the trial court that the defendant in fact had confessed." *Id.* at 498. Instead, we reasoned that the portions of the jury instructions the defendant challenged, when read in context, were not improper expressions of opinion because they "made it clear that, although there was evidence tending to show that the defendant had confessed, the trial court left it entirely for the jury to determine whether the evidence showed that the defendant in fact had confessed." *Id.*

¶ 36 Similarly, in other cases, we have held that the trial judge did not communicate an opinion when the challenged language was read in context, not that the trial judge's improper expression of opinion was remedied by a subsequent clarification or the existence of some evidence

proving the elements of the charged offense. Thus, in *State v. Meyer*, we concluded that the trial judge's explanation during the sentencing phase of a capital trial that an alleged aggravating circumstance "applies equally to both murders" did not improperly suggest the aggravating factor had been proven because, read in context, the trial judge was "merely reiterat[ing] its previous admonition that 'the law as to both of the counts is generally the same since you will be considering the same aggravating and mitigating circumstances.' " 353 N.C. 92, 107 (2000).

¶ 37 Indeed, this case is largely indistinguishable from decisions in which we have held that a trial judge prejudicially erred in conveying his or her opinion regarding how the jury should resolve an important factual issue. For example, in *State v. McEachern*, we held that the trial judge erred when he asked the prosecuting witness in a rape case whether she was "in the car when you were raped." 283 N.C. 57, 59–62 (1973). We reasoned that although the trial judge did not explicitly state an opinion regarding the defendant's commission of the alleged criminal offense, the way the trial judge framed the inquiry communicated this view because it "[a]ssumed that defendant had raped [the complaining witness]." *Id.* at 62. In *State v. Oakley*, we held that the trial judge erred when he asked a witness if the witness had "tracked *the defendant* to [a] house," despite the witness testifying only that he tracked some unknown individual to the house. 210 N.C. 206, 211 (1936) (emphasis added). Although the trial judge immediately clarified that he "didn't mean to say the defendant," we reasoned that the question improperly revealed a belief regarding an issue of such critical importance to the jury's deliberations that an immediate clarification was insufficient to guarantee the defendant a fair trial. *Id.*

¶ 38 As in *McEachern* and *Oakley*, the trial judge in this case assumed the existence of a fact which had not yet been decided by the jury and, in doing so, illustrated for the jury his opinion that the State had met its burden of proving an essential fact beyond a reasonable doubt.

¶ 39 I would also conclude that the trial judge's impermissible expressions of opinion prejudiced Austin. In examining whether the trial judge's violations of N.C.G.S. §§ 15A-1222 and 15A-1232 were prejudicial, we should consider (1) how suggestive the trial judge's comments were, (2) how important the issue on which the trial judge expressed an opinion was to the jury's ultimate determination of guilt, and (3) the strength of the evidence supporting the defendant's conviction. In this case, all three factors indicate the trial judge's comments were extremely prejudicial.

¶ 40 First, the trial judge's comments implicitly, but unmistakably, informed the jury that in the trial judge's opinion, the complaining witness's narrative of events was true and there was no question as to whether Austin had assaulted her. Second, the comments addressed the sole disputed factual predicate the State needed to prove in order to obtain Austin's conviction. Third, the evidence of Austin's guilt—while uncontroverted—was not overwhelming. The only direct evidence the State presented at trial was the complaining witness's testimony, which was not entirely consistent with the statements she initially provided to law enforcement. The State also presented testimony from acquaintances of the complaining witness who, in broad strokes, corroborated the timeline of events on the night Austin purportedly committed the assault but who did not witness any part of the alleged altercation, and the State presented a photograph of the witness's injuries which she took herself, purportedly at some unspecified time after the assault occurred. Although this evidence was not directly called into dispute, it is not so convincing as to exclude the possibility that the alleged assault either did not occur or did not unfold in the manner the complaining witness described. The majority's statement of facts describes a violent sexual offense, yet Austin was tried for misdemeanor assault on a female. This is precisely the kind of case, dependent on the testimony of a single witness, where a trial judge's communication of his belief in the defendant's guilt can tip the scales for the jury.

¶ 41 "Jurors entertain great respect for [the trial judge's] opinion, and are easily influenced by any suggestion coming from him [or her]." *Carter*, 233 N.C. at 583. In this case, the trial judge repeatedly conveyed his opinion that Austin perpetrated an assault on the complaining witness. Given just how suggestive the trial judge's statements were—and given that the statements cut to the core of the State's case against Austin—I conclude that the trial judge's expressions of opinion both violated N.C.G.S. §§ 15A-1222 and 15A-1232 and had such a prejudicial effect that there is a reasonable possibility of a different result absent the error. Accordingly, I respectfully dissent.

STATE OF NORTH CARLOLINA
v.
SCOTT DAVID ALLEN

No. 115A04-3

Filed 13 August 2021

1. Constitutional Law—effective assistance of counsel—summary dismissal of claims—factual disputes—evidentiary hearing required

Where defendant's post-conviction claims that he received ineffective assistance of counsel in his trial for first-degree murder, for which defendant was convicted and sentenced to death, raised factual disputes, the trial court erred by summarily dismissing those claims because defendant presented facts that, if true, would entitle him to relief. Defendant presented evidence that his counsel's decision not to investigate the crime scene evidence, from which different interpretations could be drawn, was not a reasonable strategic choice, and that he was prejudiced by being deprived of the opportunity to rebut the main witness's account of how the victim was killed. The matter was remanded for an evidentiary hearing with instructions for the trial court, if it concluded counsel's performance was deficient, to consider how any deficiencies prejudiced defendant when considered both individually and cumulatively.

2. Constitutional Law—false and misleading testimony—State's witness—MAR claim

Defendant was not entitled to post-conviction relief (after being convicted and sentenced to death for first-degree murder) on his claim that the State violated his constitutional rights by knowingly presenting false testimony through the main prosecution witness, because even assuming the claim was not procedurally barred for having been raised on direct appeal, there was nothing in the record to show the State knew the witness's testimony was false.

3. Constitutional Law—Brady violation—materiality—additional prior convictions of prosecution witness

Defendant was not entitled to post-conviction relief (after being convicted and sentenced to death for first-degree murder) on his claim that the State committed a *Brady* violation by failing to turn over a complete criminal record of a prosecution witness prior to trial, because the omitted prior convictions were not material. The

jury was already informed of the witness's prior convictions for more serious crimes, and, for the murder being prosecuted, that the witness had initially provided false statements to law enforcement and had been charged as an accessory after the fact.

4. Criminal Law—post-conviction relief—short-form indictment —first-degree murder—issue procedurally barred

Defendant's post-conviction claim that a short-form indictment was insufficient to confer jurisdiction on the trial court for his first-degree murder trial was procedurally barred where he raised the issue on direct appeal.

5. Constitutional Law—courtroom restraints—issue raised in MAR—record insufficient—evidentiary hearing required

On defendant's post-conviction claim that his constitutional rights were violated when he was shackled during his trial for first-degree murder (for which he was convicted and sentenced to death), the trial court erred by summarily dismissing the issue as procedurally barred. Since the record was devoid of information establishing that defendant was actually restrained in the courtroom, that the shackles were visible to the jury, and that defense counsel was aware that the restraints were visible to the jury, an evidentiary hearing was required to develop the necessary factual foundation before the claim could be resolved.

6. Criminal Law—post-conviction relief—access to medical records—limited evidentiary hearing—dismissal of claim

The trial court properly dismissed defendant's post-conviction claim seeking relief (after being convicted of first-degree murder) for his counsel being denied access to certain prior treatment records of the main prosecution witness. The trial court's conclusion, made after a limited evidentiary hearing, that defendant could not demonstrate prejudice—because the records did not indicate the witness had a relevant mental health condition and they did not include evidence of substance abuse not already disclosed by the witness at trial—was supported by its findings of fact, which were in turn supported by evidence.

7. Constitutional Law—effective assistance of counsel—murder trial—sentencing phase

The trial court properly dismissed defendant's post-conviction ineffective assistance of counsel claims pertaining to the sentencing phase of his first-degree murder trial where, after the trial court conducted an evidentiary hearing, its findings were supported by

evidence and in turn supported its conclusion that defense counsel's performance was not deficient and, even if it was, defendant could not demonstrate he suffered prejudice.

Justice BERGER dissenting.

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

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review orders dismissing defendant's claims asserted in his motion for appropriate relief entered on 22 August 2016, 8 January 2018, and 6 February 2019 by Judge V. Bradford Long in Superior Court, Montgomery County. Heard in the Supreme Court on 26 April 2021.

Joshua H. Stein, Attorney General, by Nicholaos Vlahos, Assistant Attorney General, for the State-appellee.

Olivia Warren and Michael L. Unti for defendant-appellant.

EARLS, Justice.

¶ 1 This case involves numerous post-conviction claims raised by defendant Scott David Allen, who was found guilty of the first-degree murder of Christopher Gailey and sentenced to death in Montgomery County in 2003. Allen challenged his conviction and sentence on direct appeal, but this Court unanimously found no error. *State v. Allen*, 360 N.C. 297, 321 (2006). The Supreme Court of the United States denied certiorari. *Allen v. North Carolina*, 549 U.S. 867 (2006). Subsequently, Allen filed a motion for appropriate relief (MAR) in Superior Court, Montgomery County (MAR court), in July 2007. Six years later, and before the MAR court ruled on his MAR, Allen filed a supplemental motion for appropriate relief (SMAR) amending some of his previous claims and adding two additional claims. The MAR court's dismissal of these claims forms the basis of defendant's petition to this Court.

¶ 2 Of the twelve total claims raised in Allen's MAR and SMAR, five of them directly relate to his allegation that his trial attorneys rendered unconstitutionally ineffective assistance of counsel (IAC) during the guilt-innocence phase of his trial by failing to investigate, develop, and utilize various sources of exculpatory evidence. The evidence Allen presented in support of these claims includes affidavits from acquaintances

of Allen and the State's primary witness, Vanessa Smith, implicating Smith in Gailey's murder, as well as a report from a crime scene expert concluding that in light of the physical evidence discovered at the scene of Gailey's death, Smith's account of Gailey's killing was "unfathomable." Notwithstanding this evidence and the centrality of Smith's testimony to Allen's conviction, the MAR court dismissed Allen's guilt-innocence phase IAC claims without conducting an evidentiary hearing to resolve disputed issues of fact.

¶ 3 Based on well-established precedent, we conclude that Allen is entitled to an evidentiary hearing on his guilt-innocence phase IAC claims. Allen has "present[ed] assertions of fact which will entitle [him] to . . . relief . . . if resolved in his favor." *State v. McHone*, 348 N.C. 254, 258 (1998). Therefore, under the statutory framework governing post-conviction review of criminal convictions in North Carolina, the MAR court was obligated to conduct an evidentiary hearing prior to ruling on his MAR and SMAR claims, because "some of his asserted grounds for relief required the [MAR] court to resolve questions of fact." *Id.* (interpreting N.C.G.S. § 15A-1420(c)(1)). Accordingly, we vacate the portions of the MAR court's order summarily dismissing Allen's guilt-innocence phase IAC claims and remand to the MAR court to conduct a full evidentiary hearing.

¶ 4 In addition, we hold that the trial court erred in summarily ruling that Allen's claim alleging he was impermissibly shackled in view of the jury was procedurally barred. On this claim, we vacate the relevant portion of the MAR court's order and remand for an evidentiary hearing to obtain the facts necessary to determine whether his claim is procedurally barred and, if not, whether it has merit. We affirm the MAR court's disposition of all other claims raised in Allen's MAR and SMAR.

I. Factual Background

A. Gailey's death and Allen's trial.

¶ 5 In 1998, Allen escaped from a North Carolina Department of Corrections work release program. Shortly after fleeing, he reunited with Smith, with whom he had maintained an on-again, off-again romantic relationship. The couple drifted from hotel to hotel, living off settlement proceeds Smith received after her father's death. Allen and Smith regularly purchased and used large quantities of illegal drugs together. To evade detection, Allen obtained a friend's birth certificate and driver's license issued by the State of Washington. While travelling through Colorado, Allen became romantically involved with another woman, and Allen and Smith split up. The former couple returned to North Carolina

separately in the spring of 1999. That summer, they began living together in a mobile home owned by a friend, Robert Johnson, near the Uwharrie National Forest. Various friends and acquaintances lived in the mobile home while Smith and Allen resided in it, including Gailey, Allen's friend and sometimes drug dealer.

¶ 6 Sometime during the afternoon of 9 July 1999, Allen, Smith, and Gailey entered the Uwharrie National Forest. At some point that evening, somebody shot and killed Gailey. His body was later found by a passerby driving an all-terrain vehicle. Smith eventually told law enforcement Allen killed Gailey to steal his money and drugs. Both Allen and Smith were charged with murder.

¶ 7 Approximately two weeks before Allen was brought to trial, Smith—who by that time had spent approximately twenty-three months in jail—entered into an agreement with the State. In exchange for her testimony against Allen, the State would drop the murder charges against her, and she would plead guilty to a lesser offense. At trial, Smith testified that Allen was the sole person responsible for Gailey's death and that Allen acted in cold blood. According to Smith, Allen assassinated Gailey by shooting him from behind, unprovoked, as they walked along a path in the woods.

¶ 8 Because Allen did not testify, Smith provided the sole narrative of the events directly precipitating Gailey's death. As we explained in our decision resolving Allen's direct appeal, Smith was "a witness with less-than-perfect credibility." *Allen*, 360 N.C. at 306. She was a chronic heavy drug user who admitted to smoking marijuana shortly before Gailey's death. She was involved in a tumultuous romantic relationship with Allen which he had recently broken off. She accused Allen of Gailey's murder only after confronting him in Denver, Colorado, where Allen had reunited with a different ex-girlfriend. She testified at the trial pursuant to a deal with the State which significantly reduced her potential criminal liability.

¶ 9 According to Smith's account of events, on 9 July 1999, Allen told her and Gailey he had stashed weapons in a cabin in the Uwharrie National Forest, which he thought they could recover and trade for money and cocaine. The trio left together in Gailey's truck to retrieve the weapons sometime in the afternoon, while it was still light out. The party began walking along a path through the forest. Gailey was carrying a duffel bag and a .45-caliber handgun. Allen carried a sawed-off shotgun. During the walk, Gailey and Allen used powder cocaine. Smith smoked marijuana. Smith testified that after at least an hour of walking, the path narrowed,

and the three proceeded single file with Gailey leading the way, followed by Allen and then Smith.

¶ 10 At some point, Allen allegedly turned around, shoved Smith to the ground, and then without provocation began shooting at Gailey with the shotgun. Smith did not see Allen shoot Gailey, but she recounted hearing multiple gunshots. Smith and Allen then waited for "seven or eight hours" in a nearby cabin for Gailey to die. While they were waiting, Allen would periodically crawl towards Gailey's body and throw rocks at him to ascertain whether Gailey was still alive. When Allen and Smith finally left the cabin, they heard Gailey empty his .45-caliber handgun.

¶ 11 Allen and Smith left the forest together in Gailey's truck. Smith retrieved Gailey's wallet and their belongings from the mobile home. The two then drove to Shallotte and then to Albemarle in search of cocaine. However, by this point, Smith's memory had begun to deteriorate due to her drug use.

¶ 12 According to multiple witnesses, Smith and Allen ended up at a party at the home of one of Smith's friends, where they encountered a man named Jeffrey Lynn Page, who would later testify at Allen's trial. According to Page, who had never previously met Allen, Allen admitted that he had just shot a man in the Uwharrie National Forest and was looking to offload the dead man's truck. Allen told Page he had thrown rocks at Gailey's body to confirm he was dead because Allen knew Gailey was armed. Page bought Allen's truck at well below market value and then flipped it to a South Carolina junk dealer for a profit. Like Smith, Page was also charged in connection with Gailey's death—he was indicted for being an accessory after the fact to Gailey's murder—and testified at Allen's trial pursuant to an agreement with the State.

¶ 13 Sometime after selling Gailey's truck, Allen returned to Denver. Smith testified that one of her former romantic partners, who she reunited with shortly after Gailey's death, loaned her money and a car to travel to Denver[1] where she was able to track down Allen. Allen and Smith fought. Smith returned to North Carolina. Upon her return, Smith went to law enforcement to accuse Allen of murdering Gailey.

¶ 14 Law enforcement officers who examined the crime scene discovered the following evidence:

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1. The former romantic partner subsequently filed a police report and testified at Allen's trial that rather than loaning Smith the money and her car, Smith stole both items.

- A .45-caliber semi-automatic handgun between Gailey's feet, loaded with a magazine containing five live rounds, and one spent .45-caliber shell casing jammed in the receiver;
- A number of live rounds of .45-caliber ammunition next to Gailey;
- A magazine containing live rounds several feet from Gailey's head;
- A black t-shirt draped over a rock with another smaller rock on top of it, approximately four feet from Gailey's body;
- A nylon handgun holster;
- Five expended shotgun shells;
- A hunting knife located on top of a duffel bag;
- A yellow container with $1,944.00 in cash on Gailey's body.

According to the State's forensic pathologist, Gailey died from two gunshot wounds, one to the back of his right shoulder from close range and another to his right knee from a further distance. In the pathologist's opinion, Gailey probably lost consciousness "within a matter of minutes" of sustaining his injuries, and it was "extremely unlikely" Gailey survived for more than an hour or two after he was shot.

¶ 15 The State's case rested primarily on the testimony of Smith and Page. No fingerprint, DNA, or forensic evidence connecting Allen to the crime scene was ever produced, nor was the alleged murder weapon—Allen's sawed-off shotgun—ever located. The jury was instructed on the offense of first-degree murder and the lesser included offenses of second-degree murder and voluntary manslaughter. During closing argument, the State emphasized Smith's testimony that Allen had thrown rocks at Gailey's body while they waited for hours for Gailey to die in seeking to persuade the jury to convict on a theory of malice, premeditation, and deliberation. Eschewing Smith's initial theory that Allen murdered Gailey for his money, the State argued in closing that Allen killed Gailey "to keep him from ratting [Allen] out . . . [and] to keep [Allen] from being arrested for his year-long rampage." The jury found Allen guilty of first-degree murder.

¶ 16 During the sentencing phase, the State submitted three aggravating circumstances to the jury: (1) the murder was committed for the purpose of avoiding or preventing a lawful arrest; (2) the murder was committed for pecuniary gain; and (3) the murder was especially hei-

nous, atrocious, or cruel. Allen's trial counsel submitted one statutory mitigating circumstance and fourteen non-statutory mitigating circumstances. The jury determined the State had proven all three aggravating circumstances beyond a reasonable doubt. Allen established only two non-statutory mitigating circumstances—that he had been deeply affected by the death of his grandfather and that Allen's death would have a detrimental impact on his family. The jury found the mitigating circumstances insufficient to outweigh the aggravating circumstances and that the aggravating circumstances, when considered with the mitigating circumstances, were sufficiently substantial to call for the imposition of the death penalty. Allen was sentenced to death.

B. Allen's MAR and SMAR claims.

¶ 17 Allen filed his initial MAR on 2 July 2007. In his MAR, Allen asserted the following ten claims:

- Claim I: The State knowingly presented false and misleading evidence at trial in violation of Allen's rights under the Fourteenth Amendment to the Constitution of the United States.
- Claim II: Allen's trial counsel provided IAC during the guilt-innocence phase by failing to investigate and call defense witnesses who could have provided exculpatory evidence.
- Claim III: Allen's trial counsel provided IAC during the guilt-innocence phase by failing to effectively cross-examine the State's witnesses.
- Claim IV: The State failed to produce exculpatory material before trial in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).
- Claim V: The trial court lacked jurisdiction to try, convict, and sentence Allen because the State's indictment for first-degree murder was fatally deficient.
- Claim VI: Allen's trial counsel rendered IAC during both the guilt-innocence and the sentencing phases of his trial by failing to object to the State's improper statements during closing arguments.
- Claim VII: Allen's trial counsel rendered IAC during the sentencing phase by failing to present testimony from a mental health expert.
- Claim VIII: Allen's trial counsel rendered IAC during the sentencing phase by failing to investigate and present available mitigation evidence.

- Claim IX: Allen's trial counsel rendered IAC during the sentencing phase by failing to adequately prepare Allen's witnesses to testify.
- Claim X: Allen's trial counsel rendered IAC based upon the cumulative effect of his counsel's various errors during both the guilt-innocence and sentencing phases of his trial.

In support of his MAR, Allen submitted statements and affidavits from individuals who interacted with Allen, Gailey, and Smith before and after Gailey's death, as well as from Allen's friends and family members. Allen also submitted affidavits from two mental health experts, Dr. John F. Warren III, a forensic psychologist, and Dr. Kristine M. Herfkens, a neuropsychologist.

¶ 18 On 19 September 2013, Allen filed his SMAR. In his SMAR, Allen supplemented and amended various claims he initially raised in his MAR based upon new affidavits and statements elicited during additional post-conviction investigation. Allen again submitted affidavits from acquaintances of Smith's who cast doubt on her version of events—including an affidavit from Smith's former boyfriend stating that Smith told him she had been the one who developed and carried out the plan to jump Gailey and take his cocaine and cash. Of particular note, Allen submitted an affidavit and report prepared by Gregory McCrary (the McCrary Report), a former agent with the Federal Bureau of Investigation, who examined the evidence law enforcement found at the crime scene and determined it was inconsistent with Smith's account of an unprovoked execution. Instead, McCrary concluded the evidence reflected a physical confrontation which had devolved into a shootout between Allen and Gailey.

¶ 19 Allen's SMAR also contained two new claims:

- Claim XI: Allen's trial counsel rendered IAC during the guilt-innocence phase by failing to investigate evidence implicating a third party in Gailey's murder.
- Claim XII: Allen was impermissibly shackled in the presence of the jury without the trial court conducting a hearing or entering findings of fact as to the need for restraints.

Allen sought a new trial and sentencing hearing or, in the alternative, an evidentiary hearing on his MAR and SMAR claims.

¶ 20 In response, the State answered and moved for summary dismissal of all claims. On 17 May 2016, the MAR court sent the parties

a Memorandum of Ruling asking the parties to draft proposed orders disposing of Allen's MAR and SMAR claims. Ultimately, the MAR court issued three separate orders.

¶ 21 The first order—the "Order Summarily Dismissing Certain Claims of Defendant's Motion for Appropriate Relief and Supplemental Motion for Appropriate Relief"—summarily dismissed Claims I, II, IV, V, VI, X, XI, and XII in their entirety and certain subparts of Claim III.[2] The second order concerned the trial court's decision to deny Allen access to some of Smith's sealed mental health and substance abuse treatment records during trial. In this order, the MAR court provided for a "limited evidentiary hearing" to determine if Allen had presented sufficient evidence of prejudice to warrant a full evidentiary hearing. After conducting this limited evidentiary hearing, the MAR court dismissed these sub-claims in its "Order Granting State's Motion to Dismiss Claims 3H, 3J, 3K and a Portion of 3I of Defendant's Supplemental Motion for Appropriate Relief." The third order—the "Order on State's Summary Denial Motion on Claims VII, VIII, and IX"—granted Allen an evidentiary hearing on his claims alleging IAC during the sentencing phase of his trial. After completing this full evidentiary hearing, the MAR court dismissed these claims in its "Order Granting State's Motion to Dismiss Claims [VII], [VIII], and [IX] of Defendant's Motion for Appropriate Relief and Supplemental Motion for Appropriate Relief."

¶ 22 On appeal, Allen challenges the MAR court's disposition of every claim raised in his MAR and SMAR. On the claims the MAR court summarily denied or denied after the limited evidentiary hearing—Claims I, II, III, IV, V, VI, X, XI, and XII—Allen asks us to vacate the orders dismissing those claims and remand for a full evidentiary hearing. On the claims the MAR court denied after a full evidentiary hearing—Claims VII, VIII, and IX—Allen seeks a reversal of the order dismissing those claims and a remand for a new sentencing proceeding. The State opposes and asks this Court to affirm the MAR court's orders dismissing all claims. We hold that the MAR court erred in summarily dismissing Allen's guilt-innocence phase IAC claims, as well as his impermissible shackling claim. We affirm the portions of the MAR court's orders dismissing all other claims.

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2. The MAR court and the parties use numbers and Roman numerals interchangeably throughout the proceedings below. For consistency, we use Roman numerals when referring to Allen's claims throughout this opinion.

II. Analysis

¶ 23 Our examination of the MAR court's disposition of Allen's MAR and SMAR claims necessarily begins with the statutes governing post-conviction review. Under N.C.G.S. § 15A-1420, a capital defendant who files an MAR within the appropriate time period "is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit." N.C.G.S. § 15A-1420(c)(1) (2019). When a capital defendant has properly filed an MAR, the trial court "must determine, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact." *Id.* If the defendant's MAR and supporting materials create disputed issues of fact, then the MAR court is obligated to conduct an evidentiary hearing to resolve any disputed facts unless "the trial court can determine that the defendant is entitled to no relief even upon the facts as asserted by him." *McHone*, 348 N.C. at 257.[3] By contrast, when a defendant's MAR "presents only questions of law, including questions of constitutional law, the trial court *must* determine the motion without an evidentiary hearing." *Id.*

¶ 24 Thus, our analysis of Allen's challenge to the MAR court's summary dismissal of certain claims differs from our analysis of Allen's challenge to the MAR court's dismissal of other claims after conducting an evidentiary hearing. We review the MAR court's summary dismissal de novo to determine whether the evidence contained in the record and presented in Allen's MAR—considered in the light most favorable to Allen—would, if ultimately proven true, entitle him to relief. *McHone*, 348 N.C. at 258 ("Under subsection (c)(4), read in pari materia with subsection (c)(1), (c)(2), and (c)(3), an evidentiary hearing is required unless the motion presents assertions of fact which will entitle the defendant to no relief *even if resolved in his favor*.") (emphasis added); s*ee also State v. Jackson*, 220 N.C. App. 1, 6 (2012) ("[T]he ultimate question that must be addressed in determining whether [an MAR] should be summarily

3. When a non-capital defendant files an MAR pursuant to N.C.G.S. § 15A-1414(a)(1), which must be filed within ten days after entry of judgment, the trial court is not required to conduct an evidentiary hearing. Instead, as provided under N.C.G.S. § 15A-1420(c)(2), "[a]n evidentiary hearing is not required *when the motion is made in the trial court pursuant to [N.C.G.S. §] 15A-1414*, but the court *may* hold an evidentiary hearing if it is appropriate to resolve questions of fact." N.C.G.S. § 15A-1420(c)(2) (2019) (emphases added). Because Allen is a capital defendant who did not file his MAR pursuant to N.C.G.S. § 15A-1414, the trial court lacks discretion to refuse to conduct an evidentiary hearing if his MAR and supporting materials created disputed factual issues which, if resolved in his favor, would entitle him to relief.

denied is whether the information contained in the record and presented in the defendant's [MAR] would suffice, if believed, to support an award of relief.").[4] If answering this question requires resolution of any factual disputes, N.C.G.S. § 15A-1420(c)(1) requires us to vacate the summary dismissal order and remand to the MAR court to conduct an evidentiary hearing. *McHone*, 348 N.C. at 259 ("This Court is not the appropriate forum for resolving issues of fact . . . .").[5] At this stage, the MAR court is entitled to summarily dismiss claims that are irrelevant (e.g., claims that even if proven true, would not entitle the defendant to relief) and claims that are without any apparent evidentiary basis (e.g., unsupported assertions). When the factual allegations would entitle the defendant to relief if true, and the defendant's filings provide some evidentiary basis for the allegations, then the MAR court must conduct an evidentiary hearing to determine the facts necessary to resolve the claim on its merits. However, if the MAR court has already conducted an evidentiary hearing, our role is "to determine . . . whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Matthews*, 358 N.C. 102, 105–06 (2004) (quoting *State v. Stevens*, 305 N.C. 712, 720 (1982)). The MAR court's factual findings are "binding upon the [defendant] if they [a]re supported by evidence," even if the evidence is "conflicting," *Stevens*, 305 N.C. at 719–20, but the MAR court's conclusions of law are always reviewed de novo, *State v. McNeill*, 371 N.C. 198, 220 (2018).

¶ 25 We proceed by applying this legal framework to Allen's claims as follows: First, we review the portions of the MAR court's order summarily dismissing Allen's claims alleging he received IAC during the guilt-innocence phase of his trial. Second, we review the other claims

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4. To be clear, the MAR court only views the evidence presented in a defendant's MAR in the light most favorable to the defendant when making the initial determination as to whether the facts alleged by the defendant would entitle the defendant to relief if proven true. Nothing in this opinion alters the undisputed premise that the defendant ultimately bears the burden of proving by a preponderance of the evidence "the existence of the asserted ground for relief." N.C.G.S. § 15A-1420(c)(6).

5. The dissent erroneously states that "this Court did not remand *McHone* for an evidentiary hearing." *But see McHone*, 348 N.C. at 258–60 ("[D]efendant also contends in the present case that he was entitled to an evidentiary hearing before the trial court ruled on his motion for appropriate relief as supplemented because some of his asserted grounds for relief required the trial court to resolve questions of fact. We find this contention to have merit. . . . The trial court erred in denying defendant's supplemental motion without an evidentiary hearing. . . . [W]e reverse the trial court's order denying defendant's motion for appropriate relief and remand this case to that court for further proceedings."). Moreover, *McHone* is not the only authority for the disposition in this case. The MAR statute itself makes it clear that an evidentiary hearing is required in these circumstances.

addressed in the summary dismissal order which do not directly allege IAC. Third, we review the order dismissing certain subparts of Claim III relating to the trial court's refusal to grant Allen access to Smith's treatment records entered after the MAR court conducted a "limited evidentiary hearing." Finally, we review the order dismissing Allen's claims alleging IAC during the sentencing phase of his trial entered after the MAR court conducted a full evidentiary hearing.

A. Ineffective assistance of counsel during the guilt-innocence phase.

¶ 26 **[1]** Allen's argument that his attorneys rendered IAC during the guilt-innocence phase of his trial encompasses multiple interrelated claims. Because these claims substantially overlap both factually and legally—and because the MAR court disposed of these claims in a single summary dismissal order—we consider them together. Specifically, in this section, we consider in their entirety Claim II (trial counsel's failure to investigate and call certain witnesses), Claim VI (trial counsel's failure to object to improper statements during closing arguments), Claim X (cumulative prejudice arising out of trial counsel's multiple instances of deficient performance), and Claim XI (trial counsel's failure to investigate evidence of a third party's guilt). We also consider the subparts of Claim III (trial counsel's failure to effectively cross-examine the State's witnesses) which the MAR court resolved without conducting an evidentiary hearing. Although addressed in the same order, we separately address the claims which do not predominantly concern Allen's IAC allegations, namely Claim I (the State knowingly presented false and misleading evidence), Claim IV (the State failed to disclose exculpatory evidence before trial), Claim V (the trial court lacked jurisdiction because Allen's indictment was fatally deficient), and Claim XII (Allen was impermissibly shackled in view of the jury).

¶ 27 This Court has "expressly adopt[ed]" the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), as the "uniform standard to be applied to measure ineffective assistance of counsel under the North Carolina Constitution" and the Sixth Amendment to the Constitution of the United States. *State v. Braswell*, 312 N.C. 553, 562–63 (1985). Under the first prong of the *Strickland* test, a defendant must "establish that counsel's performance was deficient." *State v. Todd*, 369 N.C. 707, 710 (2017). To prove deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Under the second prong of the *Strickland* test, the "defendant must demonstrate that the deficient performance prejudiced [his] defense." *Todd*, 369 N.C. at 710–11. To prove prejudice, "[t]he defendant must show that there is

a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

¶ 28 We begin by examining Allen's assertion that his trial counsel unreasonably failed to investigate the crime scene evidence, which is contained within Claim III as supplemented and amended in his SMAR. This portion of Claim III is substantially based upon the evidence contained in the McCrary Report. McCrary was retained by Allen's post-conviction counsel to independently assess the evidence discovered by law enforcement at the scene of Gailey's death. Based upon his analysis of the crime scene evidence, McCrary concluded that portions of Smith's testimony were incompatible with the physical evidence and, in his judgment, "unfathomable." According to McCrary, the crime scene evidence "refute[s] Ms. Smith's assertion that Mr. Gailey was assassinated in cold blood, never having got his gun out." Instead, in McCrary's opinion, "the totality of the evidence at the [crime] scene is more consistent with a dispute that deteriorated into a gunfight and significantly contradicts and discredits Ms. Smith's story."

¶ 29 Allen alleges his trial counsel were deficient for failing to obtain information regarding the inconsistencies between Smith's testimony and the crime scene evidence prior to trial. In Allen's view, counsel's failure to adequately investigate the crime scene prejudiced his case in at least two ways. First, it deprived him of the opportunity to choose to present testimony based upon the crime scene evidence which would have directly rebutted Smith's account of Gailey's death. Second, it deprived his counsel of the capacity to effectively cross-examine Smith on the discrepancies between her account and the physical evidence. The MAR court did not conduct an evidentiary hearing on this claim, and Allen seeks only a remand for an evidentiary hearing. Therefore, the question at this stage is not whether Allen has proven that he received IAC. Instead, the question is whether he has stated facts which, if proven true, would entitle him to relief. We conclude that he has.

¶ 30 An attorney can render IAC by failing to conduct an adequate investigation of the physical evidence of a crime. *See, e.g.*, *Elmore v. Ozmint*, 661 F.3d 783, 864 (4th Cir. 2011) ("Because [the defendant] lawyers' investigation into the State's forensic evidence never started, there could be no reasonable strategic decision either to stop the investigation or to forgo use of the evidence that the investigation would have uncovered."). Here, Allen has presented evidence which could support factual findings which could, in turn, establish a successful IAC claim. He has presented

evidence supporting his contentions that (1) counsel were aware of the importance of the crime scene evidence before trial but unreasonably failed to follow up on these "red flags," *Rompilla v. Beard*, 545 U.S. 374, 392 (2005); (2) counsel did not perform an independent investigation of the crime scene evidence; (3) counsel's conduct was unreasonable when judged against prevailing professional norms in capital cases, including those outlined in the American Bar Association's guidelines; and (4) counsel's unreasonable failure to investigate was prejudicial. Given the centrality of Smith's testimony to the State's case, if each of these factual contentions were proven to be true, Allen would be entitled to a new trial. *See, e.g.*, *Elmore*, 661 F.3d at 870 ("Though perhaps the jury would have yet believed the [State's witnesses], there is a reasonable probability that the jury would have doubted the [witnesses'] account" had defense counsel presented contradictory forensic evidence); *Rompilla*, 545 U.S. at 376 ("The undiscovered . . . evidence, taken as a whole, might well have influenced the jury's appraisal of [the defendant's] culpability, and the likelihood of a different result had the evidence gone in is sufficient to undermine confidence in the outcome actually reached . . . ." (cleaned up) (first quoting *Wiggins v. Smith*, 539 U.S. 510, 538 (2003); then quoting *Strickland*, 466 U.S. at 694)). Thus, the MAR court erred in summarily dismissing Allen's guilt-innocence IAC claims.

¶ 31 The MAR court's reasoning in support of its decision to summarily dismiss these claims is critically flawed. According to the MAR court, Allen's counsel's failure to consult with or present testimony from a crime scene expert resulted from a "sound tactical decision." This "sound tactical decision" purportedly reflected the reasonable trial strategy of "focus[ing] on the doubt created by Smith's gaps in memory, addiction and use of controlled substances on the date of Gailey's death, and failure to maintain a cohesive timeline, rather than attempting to prove Defendant's innocence through the use of a crime scene analyst."

¶ 32 It is correct that in considering an IAC claim, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. However, this presumption is rebuttable. Once a defendant presents evidence rebutting the presumption of reasonableness, the court is not at liberty to invent for counsel a strategic justification which counsel does not offer and which the record does not disclose. *See Wiggins*, 539 U.S. at 526–27 (rejecting "strategic" reasons that "the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence [as] resembl[ing] more [of] a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing").

¶ 33 In this case, Allen has presented direct evidence indicating his trial counsel's decision not to adequately investigate the crime scene—and their resulting decision not to present evidence derived from an adequate investigation or use such evidence to impeach Smith's testimony—was not a reasonable strategic choice. His SMAR included an affidavit from one of his two trial attorneys explicitly stating that he "do[es] not recall [either himself or Allen's other attorney] making any strategic decisions to limit the cross-examination of the State's witnesses, including Vanessa Smith." This directly undercuts the MAR court's presently unsupported theory that counsel's failure to investigate resulted from a "tactical decision" to focus on Smith's lack of credibility due to her drug use.[6] If it is true that trial counsel's "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment," then counsel's performance was deficient. *Wiggins*, 539 U.S. at 526.

¶ 34 Even if trial counsel chose to pursue a "strategy" of focusing on Smith's lack of credibility, counsel's failure to adequately investigate the crime scene could still be unreasonable. *Strickland*, 466 U.S. at 690–91 ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."). With the benefit of insights gleaned from the crime scene, counsel could have directly contradicted Smith's account of Gailey's death with tangible, extrinsic evidence, a tactic which would only serve a strategy centered around attacking Smith's credibility. To answer the question of whether Allen's counsel made a reasonable strategic judgment in foregoing a thorough investigation of the crime scene, the MAR court needed to resolve factual issues, a task our statutes do not permit it to undertake in these circumstances without first conducting an evidentiary hearing.

¶ 35 Alternatively, the MAR court rested its conclusion that Allen's counsel was not deficient on the following brief statement Allen made during a colloquy with the trial court regarding his rights as a criminal defendant:

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6. The dissent advances the curious and novel position that because Allen's trial counsel had represented other capital defendants without rendering IAC and had not been disciplined by the State Bar, Allen could not have received IAC at his trial or sentencing proceeding. The dissent cites no relevant authority for that proposition. The State never made this argument and we reject this contention. Obviously, the adequacy of an attorney's representation in one trial does not establish the adequacy of an attorney's representation in a different trial, nor does the IAC claim require that an attorney have been disciplined by the State Bar in order to demonstrate ineffective assistance. *See, e.g.*, *Strickland*, 466 U.S. at 687 (explaining that to prove IAC, a defendant must "show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense").

> THE COURT: Knowing that you have the right to present evidence and you have the right not to, what is your desire about presenting evidence in this case?
>
> MR. ALLEN: Well, I don't know anything. I don't know what happened, so I have nothing to contribute to it.

According to the MAR court, this statement proves that "defense counsel['s] decision not to call any witnesses [during] the guilt[-innocence] phase of Defendant's trial was a tactical decision that was made after consultation with Defendant." Even if this perfunctory exchange could possibly support the conclusion that counsel's choices were strategic, it does not necessarily disprove Allen's contention that counsel's "tactical decision" was unreasonable, nor his argument that counsel could not reasonably make such an important "tactical decision" without first conducting an adequate investigation of the crime scene evidence.

¶ 36 The State's arguments in support of the MAR court's order are also unpersuasive. The State appears to argue that even if Allen's counsel were deficient, Allen could not have been prejudiced because the crime scene evidence in no way detracted from the State's overwhelming evidence of guilt. To begin with, Allen need not present evidence which, if believed, would entirely exculpate him of all criminal conduct relating to Gailey's killing. Allen was convicted of first-degree murder, which made him eligible to receive the death penalty. Yet the trial court also instructed on lesser included offenses for which he would not have been eligible to receive the death even if he were convicted. If counsel's conduct resulted in Allen being convicted of first-degree murder rather than second-degree murder or voluntary manslaughter, then Allen was prejudiced.

¶ 37 Regardless, the State's argument that Allen cannot prove prejudice rests on two erroneous premises. First, the State contends the McCrary Report cannot support Allen's IAC claim because it failed to account for the State's evidence indicating Allen shot Gailey "in the back at close range with a shotgun." This assertion is belied by the text of the McCrary Report, which explicitly acknowledges the State's medical examiner's conclusion that Gailey was shot from "quite close, within a matter of a foot or so" and also from "several yards away." McCrary's conclusion that "the totality of the evidence at the [crime] scene is more consistent with a dispute that deteriorated into a gunfight" reflects his interpretation of *all* of the crime scene evidence, including the evidence the State relied upon in support of Allen's conviction.

¶ 38 Second, the State argues that because there was evidence indicating Allen shot Gailey "in the back at close range with a shotgun," no rational juror could possibly conclude that Allen committed anything other than first-degree murder. As the State bluntly puts it, "[s]hooting someone in the back at close range with a shotgun is not a gunfight, it is premeditated and deliberated murder." This argument incorrectly suggests that Allen's intent has been established as a matter of law by the manner of Gailey's death. The State disregards more than a century of precedent explaining that "[w]hether an act is the result of premeditation and deliberation is a fact to be found by the jury, and not a conclusion of law to be drawn by the court." *State v. Daniels*, 134 N.C. 671, 674 (1904).

¶ 39 While the jury could have inferred that Allen acted with premeditation and deliberation based upon "the distance from which the shot was fired and . . . the weapon and ammunition used," *State v. Reece*, 54 N.C. App. 400, 406 (1981), these facts would not have precluded Allen from persuading the jury to draw a different inference, *see State v. Walker*, 332 N.C. 520, 533 (1992) (concluding that the "nature of the killing, a contact shot to the temple, *indicates* a premeditated and deliberate act of homicide . . . [which] *support[s] a reasonable inference*" of intent (emphases added)). The nature of Gailey's wounds is not necessarily inconsistent with the alternative theory propounded by McCrary of a drug-fueled confrontation that turned fatal, a theory Allen alleges is supported by physical evidence from the crime scene, such as the evidence demonstrating Gailey fired his weapon and the unexplained presence of a hunting knife.[7]

¶ 40 As described above, in addition to his argument based upon counsel's purported failure to adequately investigate the crime scene evidence, Allen raises other related IAC claims challenging other aspects of his trial counsel's performance during the guilt-innocence phase of his trial. Having already determined that the MAR court erred in summarily denying one of Allen's IAC claims, we need not address his other claims here without the benefit of a more fully developed factual record. Applying the two-prong *Strickland* test, we conclude that Allen has presented evidence supporting his contention that his attorneys provided IAC during the guilt-innocence phase of his trial, creating factual disputes which, if resolved in his favor, would entitle him to relief. At a minimum, he is entitled to further develop these claims during an

7. Further, if the evidence could only support the conclusion Allen had committed first-degree murder, the trial court would have had no reason to instruct on the lesser included offenses of second-degree murder and voluntary manslaughter, neither of which requires the State to prove the killing was committed with premeditation and deliberation.

evidentiary hearing. *Todd*, 369 N.C. at 712 (remanding for an evidentiary hearing because "the record before th[e] Court [was] not thoroughly developed regarding defendant's appellate counsel's reasonableness, or lack thereof, in choosing not" to pursue an argument).

¶ 41 Accordingly, we vacate the relevant portions of the MAR court's order summarily dismissing Allen's guilt-innocence IAC claims. Because "an evidentiary hearing *is required unless* the motion presents assertions of fact which will entitle the defendant to no relief even if resolved in his favor, or the motion presents only questions of law, or the motion is made pursuant to N.C.G.S. § 15A-1414," *McHone*, 348 N.C. at 258 (emphasis added), we remand to the MAR court to conduct an evidentiary hearing. At the evidentiary hearing, the MAR court will determine whether Allen's counsel were deficient and, if so, whether counsel's deficient performance was prejudicial.

¶ 42 If the MAR court reaches the question of prejudice, the MAR court must examine whether any instances of deficient performance at discrete moments in the trial prejudiced Allen when considered both individually and cumulatively. We reject the MAR court's erroneous conclusion that cumulative prejudice is unavailable to a defendant asserting multiple IAC claims. We have previously acknowledged cumulative prejudice IAC claims, *see, e.g.*, *State v. Thompson*, 359 N.C. 77, 121–22 (2004) (recognizing cumulative prejudice argument but dismissing IAC claim on other grounds), as has the United States Supreme Court in *Williams v. Taylor*, 529 U.S. 362, 396–98 (2000). Therefore, we adopt the reasoning of the unanimous Court of Appeals panel which recently concluded that "because [IAC] claims focus on the reasonableness of counsel's performance, courts can consider the cumulative effect of alleged errors by counsel." *State v. Lane*, 271 N.C. App. 307, 316, *review dismissed*, 376 N.C. 540 (2020), *review denied*, 851 S.E.2d 624 (N.C. 2020).[8] To be clear, only instances of counsel's deficient performance may be aggregated to prove cumulative prejudice—the cumulative prejudice doctrine is not an invitation to reweigh all of the choices counsel made throughout the course of representing a defendant.

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8. Our decision to recognize cumulative prejudice claims is based upon our own interpretation of *Strickland* and IAC doctrine, and is in accord with numerous federal and state appellate decisions (including the recent decision by our Court of Appeals), none binding on this Court, but which we find persuasive. *See, e.g.*, *Williams v. Washington*, 59 F.3d 673, 681 (7th Cir. 1995) ("In making this showing [of prejudice], a petitioner may demonstrate that the cumulative effect of counsel's individual acts or omissions was substantial enough to meet *Strickland's* test."); *Rodriguez v. Hoke*, 928 F.2d 534, 538 (2d Cir. 1991) ("Since [the defendant's] claim of ineffective assistance of counsel can turn on the cumulative effect of all of counsel's actions, all his allegations of ineffective assistance

¶ 43 We next address the portions of the "Order Summarily Dismissing Certain Claims of Defendant's Motion for Appropriate Relief and Supplemental Motion for Appropriate Relief" disposing of Claims I, IV, V, and XII.

1. Knowing presentation of false and misleading evidence.

¶ 44 **[2]** In Claim I of his MAR and SMAR, Allen alleges that the State violated his constitutional rights by allowing Smith to testify in a manner the State knew to be false and misleading. In support of his claim, Allen relies principally on post-conviction affidavits from individuals whose account of events surrounding Gailey's death differ from and conflict with Smith's recollection. The MAR court determined this claim was procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(3), which provides in relevant part that it is "grounds for the denial of a motion for appropriate relief, including motions filed in capital cases . . . [if u]pon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so." In the alternative, the MAR court concluded this claim was meritless.

¶ 45 On direct appeal, Allen alleged that the State presented two portions of Smith's testimony which it knew to be false and misleading. *Allen*, 360 N.C. at 305. He argued that the State knew Smith's account of waiting hours for Gailey to die and hearing Gailey "empty his gun out" as she left the Uwharrie National Forest was false and misleading in light of the medical examiner's testimony that Gailey could not have survived more than a brief time after being shot. *Id.* We rejected this claim, noting the "difference between the knowing presentation of false testimony and knowing that testimony conflicts in some manner." *Id.*

¶ 46 Assuming without deciding that Claim I is not procedurally barred—and even if the facts alleged in his supporting affidavits were proven to be true—the same distinction we recognized on direct appeal controls our disposition of Allen's MAR claim. We must again conclude that "nothing in the record tends to show the [State] knew [Smith's] testimony was

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should be reviewed together."); *Ewing v. Williams*, 596 F.2d 391, 395 (9th Cir. 1979) ("[E]ven where, as here, several specific errors are found, it is the duty of the Court to make a finding as to prejudice, although this finding may either be 'cumulative' or focus on one discrete blunder in itself prejudicial."); *State v. Clay*, 824 N.W.2d 488, 500 (Iowa 2012) ("[W]e [ ] look to the cumulative effect of counsel's errors to determine whether the defendant satisfied the prejudice prong of the *Strickland* test."); *State v. Thiel*, 2003 WI 111, ¶ 4, 264 Wis. 2d 571, 581, 665 N.W.2d 305, 311 ("We conclude that counsel's performance was deficient in several respects and that the cumulative effect of the deficiencies prejudiced [the defendant's] defense to an extent that it undermines our confidence in the outcome of the trial.").

false." *Id.* at 306. Thus, Allen cannot meet his burden of proving that the State "knowingly and intentionally used" false and misleading testimony "to obtain his conviction." *State v. Williams*, 341 N.C. 1, 16 (1995). Accordingly, we affirm the portion of the MAR court's order summarily dismissing Claim I.

2. Failure to produce exculpatory material before trial in violation of **Brady v. Maryland.**

¶ 47 **[3]** In Claim IV of his MAR, Allen alleges that the State violated his constitutional rights as established in *Brady v. Maryland*, 373 U.S. 83 (1963). To establish a successful *Brady* claim, a defendant must prove that the State withheld evidence which would have been "favorable" to the defendant, either as impeachment evidence or exculpatory evidence, and that the evidence was "material," meaning "there is a 'reasonable probability' of a different result had the evidence been disclosed." *State v. Williams*, 362 N.C. 628, 636 (2008) (quoting *State v. Berry*, 356 N.C. 490, 517 (2002)).

> A defendant's burden . . . is more than showing that withheld evidence might have affected the verdict, but less than showing that withheld evidence more likely than not affected the verdict. When we consider whether there was a reasonable probability that the undisclosed evidence would have altered the jury's verdict, we consider the context of the entire record.

State v. Best, 376 N.C. 340, 349 (2020) (cleaned up) (quoting *United States v. Agurs*, 427 U.S. 97, 112 (1976)), *petition for cert. filed*, No. 20-1608 (U.S. May 18, 2021).

¶ 48 The basis for Allen's *Brady* claim was that the State provided an incomplete account of Page's criminal record prior to putting him on the stand to testify. Although the State did convey information regarding other of Page's prior criminal convictions, the State failed to disclose Page's two prior criminal convictions for misdemeanor injury to personal property.

¶ 49 We are persuaded that Allen cannot prove these omitted prior convictions were "material" within the meaning of *Brady*. When Page testified, the jury was made aware of the fact that Page had previously been convicted of other, more serious crimes, that he had been charged as an accessory after the fact to Gailey's murder, and that he had initially made false statements to law enforcement regarding his interactions with Allen. Informing the jury that Page had also committed two other

minor crimes could not have meaningfully altered the jury's perception of Page's credibility as a witness. Under these circumstances, where the withheld information is substantially similar to information properly disclosed to counsel and presented to the jury, we conclude that Allen cannot "show[ ] that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

3. The trial court's jurisdiction to try, convict, and sentence Allen.

¶ 50 **[4]** In Claim V of his MAR, Allen alleges that his short-form indictment was constitutionally improper for failing to fully state the elements of first-degree murder and the aggravating circumstances to be submitted to the jury. Allen raised this exact claim on direct appeal, which we denied, explaining that this Court has "consistently ruled short-form indictments for first-degree murder are permissible under . . . the North Carolina and United States Constitutions." *Allen*, 360 N.C. at 316. Since Allen's direct appeal, there has been no retroactively effective change in the applicable law. Accordingly, we affirm the portion of the MAR court's order summarily dismissing this claim on the ground that it is procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(2).

4. Impermissible shackling in view of the jury.

¶ 51 **[5]** In Claim XII of his SMAR, Allen alleged that he was impermissibly shackled in view of the jury without justification, in violation of his constitutional rights. In support of his claim, Allen produced an affidavit from one juror stating that she "know[s] that . . . Allen had some type of shackles or restraints on during the trial" and an affidavit from an alternate juror stating that he "noticed . . . Allen's appearance and demeanor in the courtroom . . . [and] saw that he had tattoos on his body and that he was wearing leg irons." In addition, Allen's post-conviction counsel disclosed to the MAR court that a different juror "told post-conviction investigators that [Allen] was shackled and 'there were deputies all around him' " but refused to sign an affidavit. The State argued, and the MAR court agreed, that Allen's claim was procedurally barred under N.C.G.S. § 15A-1419(a)(3). In the alternative, the MAR court concluded that even if Allen's shackling claim was not procedurally barred, it was meritless.

¶ 52 Under both the North Carolina Constitution and the Constitution of the United States, a defendant may not be visibly shackled in the courtroom in the presence of the jury unless there is a special need for restraints specific to the defendant. *See State v. Tolley*, 290 N.C. 349, 367–68

(1976); *see also Deck v. Missouri*, 544 U.S. 622, 626 (2005) ("The law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of a special need."). Mirroring this constitutional rule, North Carolina law permits a trial court to order a defendant restrained in the courtroom only when doing so is "reasonably necessary to maintain order, prevent the defendant's escape, or provide for the safety of persons," and only after the trial court "[e]nter[s] in the record out of the presence of the jury and in the presence of the person to be restrained and his counsel, if any, the reasons for" imposing the restraints. N.C.G.S. § 15A-1031 (2019). The defendant must also be afforded an opportunity to be heard on the matter, and the trial court must instruct the jurors "that the restraint is not to be considered in weighing evidence or determining the issue of guilt." *Id.*; *see also Sigmon v. Stirling*, 956 F.3d 183, 202 (4th Cir. 2020) (noting the "longstanding" constitutional requirement "for the trial court to articulate a reason for [imposing] visible restraints on the record"). Typically, adherence to this mandatory statutory procedure ensures that evidence of a defendant's shackling appears in the record and transcript of trial, enabling the defendant to challenge the trial court's decision to impose restraints on direct appeal.

¶ 53 In this case, however, there is no evidence in the record and transcript suggesting Allen was restrained at all during trial. The trial court did not enter factual findings as would have been required prior to ordering Allen shackled pursuant to N.C.G.S. § 15A-1031. The record and transcript do not reflect that Allen entered an objection or otherwise noted that he was restrained in a manner visible to the jury at any point during trial. The record and transcript reflect that Allen did not request and the trial court did not give a jury instruction that his appearance in restraints was not to be considered as evidence of his guilt.

¶ 54 Consistent with the logic of our decision in *State v. Hyman*, 371 N.C. 363 (2018), we conclude that the MAR court erred in summarily dismissing Allen's shackling claim as procedurally barred. We reject the State's invitation to construe N.C.G.S. § 15A-1419(a)(3) broadly as a general prohibition on post-conviction review of any claim not raised on direct appeal. Instead, we agree with Allen that a claim is not procedurally barred when the record on appeal is completely silent as to dispositive facts necessary to prove or disprove the claim. Because the record does not reveal the information necessary to determine whether Allen's claim is procedurally barred, the MAR court erred in summarily concluding that Allen was "in a position to adequately raise the ground or issue underlying the [MAR claim]" on direct appeal within the meaning of N.C.G.S. § 15A-1419(a)(3).

¶ 55 In *Hyman*, we held that a defendant was not procedurally barred from raising an IAC claim on post-conviction review, even though he had not raised the claim on direct appeal. *Hyman*, 371 N.C. at 383. In that case, the defendant's IAC claim challenged his attorney's failure to withdraw from representing him during trial. *Id.* at 381. The attorney worked at a law firm that had previously represented a witness who was testifying at the defendant's trial and whose testimony inculpated the defendant. *Id.* at 367–68. During cross-examination, an exchange between counsel and the inculpating witness suggested that the witness had previously conveyed a different account of the events in question than the one the witness was offering at trial. *Id.* at 372. The defendant argued that his attorney should have withdrawn from the representation and testified regarding the content of this alleged prior conversation. *Id.* at 367.

¶ 56 In concluding that the *Hyman* defendant's claim was not procedurally barred, we explained that in order to prove that his attorney rendered IAC, the defendant was required to prove numerous facts, including that (1) the alleged pretrial conversation between the witness and the defendant's attorney had indeed occurred; (2) the witness made statements inconsistent with his trial testimony during said conversation; (3) the attorney did not have a strategic reason for failing to withdraw from representing the defendant; and (4) the testimony the attorney would have been able to deliver would have benefitted the defendant. *Id.* at 384–85. We reasoned that because "[t]he record developed at trial did not contain any information *affirmatively tending to show*" any of those facts, the record did not "contain[ ] sufficient information to permit the reviewing court to make all the factual and legal determinations necessary to allow a proper resolution of the claim in question." *Id.* at 383–84 (emphasis added). We thus held that the procedural bar set forth in N.C.G.S. § 15A-1419(a)(3) did not apply. *Id.* at 385.

¶ 57 This reasoning requires us to hold that the MAR court erred in summarily concluding that Allen's shackling claim was procedurally barred. To assess Allen's shackling claim, three threshold facts must first be established. First, Allen must show that he was indeed shackled in the courtroom. Second, he must establish that the shackles were visible to the jury. Third, he must establish whether or not his trial counsel was aware that he was shackled in a way that was visible to the jury in the courtroom. Only when these facts have been established is it possible for a reviewing court to ascertain (1) whether or not the claim is procedurally barred, and (2) whether or not the trial court imposed restraints under circumstances which undermined the fairness of the defendant's

trial and the validity of its outcome.[9] *See State v. Holmes*, 355 N.C. 719, 729 (2002) (holding that where shackles are not visible to the jury, "the risk is negligible that the restraint undermined the dignity of the trial process or created prejudice in the minds of the jurors by suggesting that defendant is a dangerous person").

¶ 58 The record and transcript from Allen's trial are devoid of any information which would allow a court to resolve these central factual questions. If Allen had brought his claim on direct appeal, the only way a reviewing court could assess his claim would be by guessing or presuming answers. This is precisely the kind of circumstance in which further factual development is necessary to reach an informed judgment of a defendant's claim. As *Hyman* illustrates, given the affidavits Allen filed which indicate he may be able to prove the facts necessary to prevail on his claim, the proper course is to analyze Allen's shackling claim after an evidentiary hearing to determine the central facts at issue, rather than ruling without receiving the necessary facts.

¶ 59 The State argues that we should ignore the impossibility of resolving Allen's claim on the existing record because the insufficiency of the record purportedly results from Allen's own failure to supply at trial or on appeal the necessary information. Yet this presumes that either Allen or his trial counsel possessed all of the information required to perfect the record on appeal. Even though Allen and his counsel would have known whether Allen was shackled at trial, they may not have known whether his shackles were visible to the jury or whether, in the absence of a hearing on the matter, he was legally compelled to be shackled in the courtroom. More facts are needed to ascertain whether Allen was in an adequate position to raise this claim on direct appeal.

¶ 60 The State argues in the alternative that Allen is precluded from raising his shackling claim on post-conviction review because he failed to object to his purported shackling at trial. This argument misses

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9. We do not have before us the question of whether counsel's failure to object to the imposition of visible restraints could form the basis of an IAC claim. *See, e.g.*, *Roche v. Davis*, 291 F.3d 473, 483 (7th Cir. 2002) (concluding that a capital defendant's counsel was deficient under *Strickland* because "not only did counsel fail to object to [the defendant's] shackling, he also failed to ensure that [the defendant's] shackles would not be visible to the jury while [the defendant] was sitting at counsel's table during the entire trial"); *Jackson v. Washington*, 270 Va. 269, 280 (2005) (concluding that "counsel's failure to object to [the defendant] being compelled to stand trial before the jury in jail clothes" rendered IAC). We leave it to the MAR court in the first instance to determine whether Allen should be permitted to again amend his MAR to include an allegation that he received IAC based upon a failure to object to his alleged shackling in view of the jury.

the mark. Subsection 15A-1419(a)(3) contains no language restricting post-conviction review to claims that were preserved at trial. Indeed, claims preserved at trial can always be brought on direct appeal and the statute would, construed in this way, effectively prevent post-conviction review of all claims. The legislature did not include any language suggesting that a defendant's failure to object at trial triggers application of the procedural bar. We reject the State's invitation to read into the statute an extra-textual requirement the legislature understandably did not see fit to include.

¶ 61 We have previously rejected and continue to disclaim any interpretation of N.C.G.S. § 15A-1419(a)(1)–(4) which imposes "a general rule that any claim not brought on direct appeal is forfeited on state collateral review." *State v. Fair*, 354 N.C. 131, 166 (2001) (quoting *McCarver v. Lee*, 221 F.3d 583, 589 (4th Cir. 2000), *cert. denied*, 531 U.S. 1089 (2001)). The rule is not that any claim not litigated on direct appeal cannot be brought in post-conviction proceedings. The rule is that such claims may be brought unless one or more of the procedural bars set forth in the relevant statutes applies and is not waived. On the present record, we are unable to conclude that Allen was "in a position to adequately raise the ground or issue underlying" his shackling claim on direct appeal but failed to do so. N.C.G.S. § 15A-1419(a)(3).

¶ 62 Having examined the facts and circumstances of Allen's shackling claim, we conclude that the trial court erred in summarily dismissing Allen's claim as procedurally barred because the record does not contain facts necessary to a fair resolution of the claim. Because Allen has presented sufficient evidence which would entitle him to an evidentiary hearing in the event that he can demonstrate his claim is not procedurally barred, we vacate the portion of the MAR court's order summarily dismissing Claim XII of his SMAR and remand to the trial court to conduct an evidentiary hearing to determine whether his shackling claim is procedurally barred and whether the claim has merit. *See McHone*, 348 N.C. at 258. At the hearing, as an initial matter, Allen will have the burden of proving by a preponderance of the evidence (1) that he was shackled, (2) that he was shackled in the courtroom in the presence of, and in a manner visible to, the jury, and (3) whether his counsel knew he was impermissibly shackled in the courtroom and in the view of the jury.

B. Claims regarding trial counsel's access to Smith's medical records.

¶ 63 **[6]** At trial, Allen's counsel sought access to records produced during Smith's stay at the Black Mountain Treatment Center in October 1993,

as well as records from a period of involuntary commitment she experienced in Stanley County. The trial court granted the order but provided that when the documents were produced, the court would review them in camera to determine whether they should be disclosed to counsel. After conducting this review, the trial court released only the records of Smith's involuntary commitment. The trial court withheld all records obtained from the Black Mountain Treatment Center on the grounds that they contained no evidence indicating Smith suffered from any pertinent mental health conditions (e.g., conditions which would affect her credibility as a witness), nor any evidence indicating substance abuse issues distinct from what Smith herself had admitted to at trial.

¶ 64 In his SMAR, Allen supplemented Claim III of his original MAR to include additional subclaims relating to the trial court's refusal to disclose the Black Mountain Treatment Center records.[10] While the precise nature and scope of the subclaims in Claim III vary, each is predicated on Allen's antecedent argument that the trial court violated his constitutional rights by failing to release the records to his counsel after conducting only an in camera review.[11]

¶ 65 After determining that Allen was not procedurally barred from pursuing these subclaims, the MAR court conducted a "limited evidentiary hearing to determine if Defendant suffered any sufficient prejudice to warrant a full evidentiary hearing on SMAR sub-claims 3H, 3J, 3K and that portion of sub-claim 3I that relates to the *in camera* examination of the sealed mental health and substance abuse records of State's trial witness Vanessa Smith." At this hearing, Allen presented testimony from Dr. Warren, one of his mental health experts. Dr. Warren testified that although Smith was not formally diagnosed with any pertinent mental health conditions at the Black Mountain Treatment Center, the records contained evidence that she suffered from borderline and antisocial personality disorders. He explained that he based his conclusion on the

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10. Although these allegations are contained within a broader claim alleging IAC during the guilt-innocence phase of trial, the MAR court conducted an evidentiary hearing solely on these subclaims.

11. Subclaim 3H contends that defendant's trial counsel were rendered ineffective by the trial court's unconstitutional refusal to reveal the Black Mountain Treatment Center records; Subclaim 3J contends that the trial court impermissibly refused Allen the opportunity to conduct voir dire of Smith and Dr. Warren regarding the importance of the records prior to the trial court's determination not to release the records to Allen; Subclaim 3K contends that Allen should have been allowed to submit extrinsic evidence of Smith's unreliability contained in the records; and the relevant portion of Subclaim 3I contends that Allen's counsel were ineffective because they cross-examined Smith without knowledge of the information contained in the records.

varying and conflicting statements Smith made to staff which were contained within the records, as well as the staff's description of Smith as "spiritually bankrupt," which he asserted was a term of art used by mental health professionals to refer to an individual who suffers from certain mental illnesses. The parties subsequently submitted post-hearing briefs. Ultimately, the MAR court entered an order containing numerous findings of fact in support of its conclusion of law that Allen "has failed to establish that he suffered any sufficient prejudice to warrant a full evidentiary hearing on [SMAR Subclaims 3H, 3J, 3K and the relevant portion of 3I]." The MAR court dismissed these subclaims.

¶ 66 There were two bases for the MAR court's conclusion that Allen could not have been prejudiced by the trial court's refusal to convey Smith's Black Mountain Treatment Center records. First, the MAR court found that the records were "bereft of any evidence to support an Axis II Personality B Complex Array diagnosis" and that Dr. Warren's attestations to the contrary were "wholly unpersuasive." Second, the MAR court found that Allen was permitted to "vigorously cross-examine Smith regarding her extensive abuse of several controlled substances, her abuse of alcohol, her early departure from a drug treatment facility, and several other topics meant to impugn her credibility."

¶ 67 We read the MAR court's findings of fact collectively as determining that (1) the Black Mountain Treatment Center records did not contain evidence indicating Smith suffered from a pertinent mental health condition, and (2) the records did not contain evidence regarding Smith's substance abuse that meaningfully differed from the information Smith herself disclosed to the jury during her testimony. In the MAR court's view, because the records did not supply an alternative basis for impeaching Smith's credibility (evidence of a pertinent mental health condition)—and because the other information the records contained was largely duplicative of Smith's testimony (evidence of her substance abuse disorders)—Allen could not have been prejudiced by the trial court's failure to release the records.

¶ 68 We reiterate that when the MAR court has entered findings of fact in support of its conclusions of law, our review is limited to "determin[ing] whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *Stevens*, 305 N.C. at 720. Our inquiry does not change when, as in this case, the MAR court chooses to bifurcate its proceedings and first conducts a limited evidentiary hearing on a single potentially dispositive issue, as opposed to immediately conducting a full evidentiary hearing on all issues associated

with a claim.[12] Examining the MAR court's findings of fact, we conclude that they are supported by the evidence, that the findings support the MAR court's conclusions of law, and that the conclusions of law in turn justify the order dismissing these subclaims.

¶ 69 Although Dr. Warren asserted that the treatment records contained information tending to show Smith suffered from a pertinent mental health condition, the MAR court was entitled to disbelieve his testimony. The MAR court's contrary inference is supported by the contents of the records themselves, which do not contain any reference to or diagnosis of any pertinent mental health disorder, even though Smith was examined by multiple physicians. Similarly, although the records contained information illustrating the severity and persistence of Smith's substance abuse issues, the transcript of Smith's cross-examination at trial supports the trial court's finding that the jury was already aware of the extent of her history of chronic substance abuse issues and that the medical records would have merely been cumulative documentation of an uncontested fact. These findings support the conclusion that Allen "has failed to establish that the trial court's withholding of the Black Mountain [Treatment Center] Records from his trial counsel and the State violated any of his constitutional rights or deprived Defendant of a fair trial." Accordingly, we affirm the Order Granting State's Motion to Dismiss Claims 3H, 3J, 3K, and a Portion of 3I of Defendant's Supplemental Motion for Appropriate Relief.

C. Ineffective assistance of counsel during the sentencing phase.

¶ 70 **[7]** Allen raised three distinct IAC claims regarding the sentencing phase of his trial. First, in Claim VII, Allen argued that his trial counsel were ineffective for failing to elicit testimony from a mental health expert to explain the significance of lay witness testimony and other evidence presented to the jury at sentencing. Second, in Claim VIII, Allen argued that his trial counsel were ineffective for failing to adequately

12. Allen does argue that the MAR court erred by conducting a limited evidentiary hearing, instead of a full evidentiary hearing. However, Allen does not provide support for his contention that in conducting a limited hearing, the MAR court "deprived Allen of a full opportunity to support his factual allegations that he was entitled to a new trial." Nor does he identify how the limited evidentiary hearing—and the MAR court's subsequent request for post-hearing briefs and its allowance of the further offer of proof from Allen's post-conviction counsel regarding the records from another mental health expert, Dr. Herfkens—purportedly fell short of what is required under N.C.G.S. § 15A-1420(c)(1)–(4). Accordingly, we find no merit in his contention that the MAR court's handling of these subclaims violated his constitutional rights.

investigate and present available mitigation evidence, including by failing to meet with and present testimony from various friends, family members, and acquaintances of Allen. Third, in Claim IX, Allen argued that his trial counsel were ineffective for failing to adequately prepare witnesses to testify during the sentencing hearing. In dismissing each of these claims, the MAR court concluded as a matter of law that Allen's counsel were not deficient and that even if they were deficient, any deficient performance could not have been prejudicial.

¶ 71 The familiar two-part *Strickland* test also applies in examining Allen's sentencing-phase IAC claims. However, because the MAR court conducted an evidentiary hearing, our review of these claims is again limited to "determin[ing] whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *Matthews*, 358 N.C. at 105–06 (quoting *Stevens*, 305 at 720). Here, evidence in the record supports the MAR court's findings of fact on each claim. These findings in fact in turn support the conclusion of law that Allen did not receive IAC at sentencing.

¶ 72 Regarding Claim VII, we find dispositive the MAR court's finding of fact that in retaining two mental health experts who attempted to examine Allen and investigate his mental health by interviewing other sources, Allen's trial counsel

> made a reasonable investigation into Defendant's mental health and background, but Defendant's reluctance to complete psychological testing and refusal to fully comply with Dr. Warren's evaluation, coupled with the lack of evidence that Defendant suffered from a mental health disorder that would assist in his defense, led to [the experts] not being called as . . . mental health expert[s] at Defendant's capital sentencing proceeding. Under these circumstances, any decision trial counsel made not to call a mental health expert at Defendant's capital sentencing proceeding was reasonable.

A defendant's reluctance to cooperate with a mental health professional during sentencing does not absolve counsel of its duty to adequately investigate relevant mitigating circumstances. However, where the record contains no evidence tending to suggest the defendant suffers from a pertinent mental health condition and defendant's counsel has retained a mental health expert who diligently attempted to elicit

relevant information from both the defendant and the defendant's acquaintances, we cannot say that "no competent attorney" would fail to present evidence from the mental health expert at sentencing. *Premo v. Moore*, 562 U.S. 115, 124 (2011) (explaining that whether "no competent attorney would think a [foregone trial strategy] would have failed . . . is the relevant question under *Strickland*").

¶ 73 Regarding Claim VIII, we note the MAR court's finding that the additional witnesses Allen claims his counsel failed to present testimony from

> either (1) did not know Defendant very well, (2) had substantial character flaws that would have weakened Defendant's mitigation case, (3) would present only cumulative evidence, (4) did not present valid mitigating evidence, or (5) did not fit the mitigation strategy trial counsel chose to pursue at sentencing.

This finding is both supported by evidence in the record and is sufficient to sustain the conclusion that counsel's failure to call these witnesses could not have been prejudicial.

¶ 74 Finally, regarding Claim IX, the findings of fact support the conclusion of law that Allen cannot prove prejudice. We affirm the MAR court's conclusion that Allen failed to meet his "burden of proving by a preponderance of the evidence" that the "nature and extent of the testimony that" the testifying witnesses would have offered had they been better prepared for sentencing could reasonably have altered the outcome of his sentencing proceeding. *Hyman*, 371 N.C. at 386. Accordingly, we affirm the order dismissing Allen's claims alleging IAC during the sentencing phase.

III. Conclusion

¶ 75 We hold that the MAR court erred in summarily dismissing Allen's guilt-innocence phase IAC claims without an evidentiary hearing. Because Allen has presented evidence which, if proven true would entitle him to relief, Allen is entitled to an evidentiary hearing in accordance with the mandate of N.C.G.S. § 15A-1420(c)(1) and *McHone*, 348 N.C. at 258. We also hold that the MAR court erred in dismissing Allen's shackling claim as procedurally barred without conducting an evidentiary hearing to establish facts without which the claim could not fairly be resolved. Therefore, we vacate the portions of the MAR court's orders summarily dismissing Claims II, VI, X, XI, XII and the portions of Claim III not addressed during the limited evidentiary hearing, and we remand

to the MAR court to conduct an evidentiary hearing. We affirm the MAR court's order dismissing Allen's other claims and subclaims.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Justice BERGER dissenting.

¶ 76 *State v. McHone* is the anchor to the majority's claim that it is compelled to remand this case to the trial court for an evidentiary hearing. Contrary to the majority's assertions, this Court did not remand *McHone* for an evidentiary hearing but rather for findings of fact based on materials contained in the record. *See State v. McHone*, 348 N.C. 254, 259, 499 S.E.2d 761, 764 (1998). *McHone*, in clear and unambiguous language, "*remand[ed] this case to that court in order that it may make findings of fact*, *inter alia*, as to whether defendant or defendant's counsel was served with a copy of the original proposed order." *Id.* (emphasis added). It is only by virtue of the majority's gross misreading of *McHone* that the stunning leap can be made from this language to the requirement of an evidentiary hearing in every motion for appropriate relief.

¶ 77 In addition, the majority claims that *McHone* compels review of motions for appropriate relief "in the light most favorable to the defendant." As discussed further herein, this language cannot be found in *McHone*, N.C.G.S. § 15A-1420, or the official commentary to that section.

¶ 78 The trial court here set forth detailed findings that Claims I, II, IV, V, VI, X, XI, and XII in defendant's motions for appropriate relief were without merit, and therefore, defendant was not entitled to an evidentiary hearing. In doing so, the trial court performed the gatekeeping function contemplated by the plain language of N.C.G.S. § 15A-1420(c) and discussed in *McHone*. The majority opinion, however, strips trial court judges of this important gatekeeping function. As a result, trial courts will now be forced to spend precious time and resources conducting evidentiary hearings on meritless post-conviction motions.

¶ 79 In addition, the majority breathes life into defendant's newly asserted claim that he was impermissibly shackled during his trial which occurred nearly eighteen years ago. The trial court correctly found that defendant's newly imagined claim was procedurally barred. The majority, however, grants defendant an evidentiary hearing even though there is no evidence that defendant was shackled during his trial, defendant never objected to being shackled at trial, and defendant failed to argue that he was impermissibly shackled in his original appeal.

¶ 80 Furthermore, the majority brings a new form of prejudice into North Carolina's jurisprudence on ineffective assistance of counsel claims: cumulative prejudice. Never has a cumulative prejudice standard been enunciated by this Court in this context, even though we frequently have addressed *Strickland* and ineffective assistance of counsel claims. At least here, however, the majority acknowledges that their "decision to recognize cumulative prejudice claims is based upon our own interpretation of *Strickland* and IAC doctrine[.]"

¶ 81 Because the majority misreads our precedent, misinterprets a straightforward statute, effectively rewrites post-conviction procedure by eliminating no-merit determinations by our trial courts, establishes a new standard by which any question of fact raised in a motion for appropriate relief would require a full evidentiary hearing, and introduces cumulative prejudice into our ineffective assistance of counsel jurisprudence, I respectfully dissent.

I. N.C.G.S. § 15A-1420 and *McHone*

¶ 82 Criminal defendants are not entitled to an evidentiary hearing on every claim set forth in a motion for appropriate relief. *See* N.C.G.S. § 15A-1420(c) (2019).

¶ 83 The majority misreads the unique procedural scenario in *McHone* to support its position that any factual dispute entitles a defendant to an evidentiary hearing. This Court in *McHone* did not grant the defendant an evidentiary hearing as the majority imagines. *McHone*, 348 N.C. at 259, 499 S.E.2d at 764. In *McHone*, the defendant made an oral supplemental motion for appropriate relief related to an order entered in a prior hearing on a motion for appropriate relief. *Id.* at 258, 499 S.E.2d at 763. The defendant contended that the State had engaged in ex parte contact with the trial court when it submitted a proposed order denying the prior motion for appropriate relief without forwarding a copy to defense counsel. *Id.* The defendant asserted that the ex parte communication violated his due process rights. *Id.* The State did not counter that allegation in the trial court. *Id.*

¶ 84 However, in response to the defendant's petition for a writ of certiorari with this Court, the State submitted an affidavit with a certified mail return receipt showing that the proposed order had been forwarded to defense counsel, countering the allegation raised by the defendant with conflicting evidence. *Id.* at 259, 499 S.E.2d at 763–64.

¶ 85 Thus, in *McHone*, the defendant made a meritorious claim in the trial court that his due process rights had been violated. The trial court,

without the benefit of the affidavit provided to this Court concerning service of the proposed order, only had before it the defendant's allegations concerning the purported ex parte communication. There was, therefore, a factual question, i.e., whether there was an ex parte communication concerning the order that could only be resolved at that time through hearing evidence from the State and the defendant. If the trial court had been presented with the affidavit from the State concerning service, the factual question could have been resolved without an evidentiary hearing.

¶ 86 This Court acknowledged that the trial court was not obligated to conduct an evidentiary hearing and remanded the case to the trial court, not for an evidentiary hearing but for the entry of findings of fact. *Id.* at 259, 499 S.E.2d at 764. The affidavit provided by the State in its response to the defendant's petition would allow the factual question to be resolved without an evidentiary hearing. The majority simply misapprehends what took place in *McHone*. This Court remanded the case to the trial court, not for an evidentiary hearing, but for entry of findings of fact. *See id.* ("This Court is not the appropriate forum for resolving issues of fact, even though the State's affidavit was filed here. We therefore reverse the order of the trial court and *remand this case to that court in order that it may make findings of fact*, *inter alia*, as to whether defendant or defendant's counsel was served with a copy of the original proposed order." (emphasis added)).

¶ 87 Further evidence that *McHone* does not support the majority's claim is found in the plain language of N.C.G.S. § 15A-1420(c), which establishes the framework by which trial courts determine whether an evidentiary hearing is appropriate. That section states:

> (1) Any party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented *unless the court determines that the motion is without merit.* The court must determine, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact. Upon the motion of either party, the judge may direct the attorneys for the parties to appear before him for a conference on any prehearing matter in the case.
>
> (2) An evidentiary hearing is not required when the motion is made in the trial court pursuant to

> G.S. 15A-1414, but the court may hold an evidentiary hearing if it is appropriate to resolve questions of fact.
>
> (3) The court must determine the motion without an evidentiary hearing when the motion and supporting and opposing information present only questions of law. The defendant has no right to be present at such a hearing where only questions of law are to be argued.
>
> (4) If the court cannot rule upon the motion without the hearing of evidence, it must conduct a hearing for the taking of evidence, and must make findings of fact. The defendant has a right to be present at the evidentiary hearing and to be represented by counsel. A waiver of the right to be present must be in writing.
>
> (5) If an evidentiary hearing is held, the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion.
>
> (6) A defendant who seeks relief by motion for appropriate relief must show the existence of the asserted ground for relief. Relief must be denied unless prejudice appears, in accordance with G.S. 15A-1443.
>
> (7) The court must rule upon the motion and enter its order accordingly. When the motion is based upon an asserted violation of the rights of the defendant under the Constitution or laws or treaties of the United States, the court must make and enter conclusions of law and a statement of the reasons for its determination to the extent required, when taken with other records and transcripts in the case, to indicate whether the defendant has had a full and fair hearing on the merits of the grounds so asserted.

N.C.G.S. § 15A-1420(c) (emphasis added).

¶ 88 The official commentary to this section further clarifies that

> [i]t should be noted that the subsections provide for two types of hearings. One is the hearing based upon affidavits, transcripts, or the like, plus matters within the judge's knowledge, to comply with the parties' entitlement to a hearing on questions of law and fact. The

> other is an evidentiary hearing. G.S. 15A-1420(c)(3) provides that if the only question is a question of law then the matter is to be disposed of without an evidentiary hearing. On the other hand, subdivision (4) makes it clear that if it is necessary to take evidence the court must hold an evidentiary hearing at which the defendant has the right to be present and to be represented by counsel, and the judge must make findings of fact. . . .
>
> Pursuant to subsections (c)(5) and (6) the moving party has the burden of proof, by a preponderance of evidence, with regard to facts essential to support the motion. The defendant must show the existence of the ground and substantial prejudice must appear. The definition of prejudice is cross-referenced to G.S. 15A-1443, in the Appeal Article, where the State rule on prejudice and the federal constitutional error rule are set out.

N.C.G.S. § 15A-1420, Official Commentary (2019).

¶ 89 "It is well-established that the 'ordinary rules of grammar apply when ascertaining the meaning of a statute, and the meaning must be construed according to the context and approved usage of the language.' " *State v. Fuller*, 376 N.C. 862, 867, 855 S.E.2d 260, 265 (2021) (cleaned up) (quoting *Dunn v. Pac. Emps. Ins. Co.*, 332 N.C. 129, 134, 418 S.E.2d 645, 648 (1992)). Based on the plain language of N.C.G.S. § 15A-1420(c), trial court judges serve as gatekeepers for meritorious motions for appropriate relief. Subsection 15A-1420(c)(1) clearly states that a defendant is only entitled to a hearing on a motion for appropriate relief if the trial court determines there is merit to the motion. *See* N.C.G.S. § 15A-1420(c)(1) ("The court must determine, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact.") However, a determination of merit alone does not guarantee an evidentiary hearing.

¶ 90 As stated in the official commentary, there are two types of hearings: one in which the trial court makes factual or legal determinations based upon the contents of the motion and supporting evidence; and the other, a full evidentiary hearing. The statute does not demand an evidentiary hearing merely because factual questions are presented in a defendant's motion. Rather, after the trial court has determined that the motion is meritorious, the statute and the official commentary contem-

plate that an evidentiary hearing is to be conducted only when the trial court determines such a hearing is necessary. *See* N.C.G.S. § 15A-1420(c); N.C.G.S. § 15A-1420, Official Commentary. Thus, an evidentiary hearing is only required when a party's motion (1) has merit, and (2) the trial court determines that it cannot resolve the factual questions based on the materials provided by the moving party.

¶ 91 Contrary to the majority's holding, the trial court here was not "obligated to conduct an evidentiary hearing[.]" The majority misreads the statute, skipping the merits determination and eliminating the ability for a trial court to resolve factual issues based upon the materials submitted without an evidentiary hearing. Instead, the majority merges the two inquiries required by the statute into one determination, holding that the statute requires an evidentiary hearing must be conducted "to resolve disputed issues of fact" regardless of merit.

¶ 92 Moreover, the phrase "disputed issues of fact" does not appear in N.C.G.S. § 15A-1420(c) or the official commentary because the statute and official commentary clearly set forth that merit determinations and hearings may be conducted by the trial court to resolve factual issues short of an evidentiary hearing. *See* N.C.G.S. § 15A-1420(c)(1) ("The court must determine, on the basis of these materials and the requirements of this subsection, *whether* an evidentiary hearing is required to resolve questions of fact." (emphasis added)).

¶ 93 Thus, a proper and complete reading of *McHone* clearly sets forth, consistent with the plain language of N.C.G.S. § 15A-1420(c), that a defendant's motion for appropriate relief may be dismissed without an evidentiary hearing on questions of law or fact if the trial court determines that the defendant is entitled to no relief, i.e., that the motion has no merit. The majority's misinterpretation of the statute and gross misreading of *McHone* impermissibly amends N.C.G.S. § 15A-1420(c) and alters the plain language of an otherwise straightforward statute.

II. Standard of Review

¶ 94 The majority's misreading of *McHon*e and N.C.G.S. § 15A-1420(c) also results in its application of an incorrect standard of review. By erroneously stating that the summary dismissal of a MAR is reviewed de novo, the majority ignores our precedent and eliminates all deference owed to the trial court.

¶ 95 The trial court's "findings of fact are binding on this Court if they are supported by competent evidence and may not be disturbed absent an

abuse of discretion. The lower court's conclusions of law are reviewed de novo." *State v. Lane*, 370 N.C. 508, 517, 809 S.E.2d 568, 574 (2018) (cleaned up) (quoting *State v. Gardner*, 227 N.C. App. 364, 365–66, 742 S.E.2d 352, 354 (2013)) (adopting the "analogous standard of review for a denial of a motion for appropriate relief" as the standard of review for denial of a motion for postconviction DNA testing "because the trial court sits as finder of fact in both circumstances."). Moreover, this Court must refrain from reweighing the evidence and should defer to the trial court's findings of fact which are "binding upon the [defendant] if they [a]re supported by the evidence," even if the evidence is conflicting. *State v. Stevens*, 305 N.C. 712, 719–20, 291 S.E.2d 585, 591 (1982) (citations omitted). Critically, where "findings are supported by the evidence in the record . . . it is not the duty of this Court to reweigh the evidence presented to the trial court." *State v. Johnson*, 371 N.C. 870, 881, 821 S.E.2d 822, 831 (2018).

¶ 96 However, the trial court's determination of merit under N.C.G.S. § 15A-1420(c) is reviewed de novo. *See Lane*, 370 N.C. at 517, 809 S.E.2d at 574.

¶ 97 The majority needlessly muddies the water by conflating our review of the trial court's factfinding with our review of the trial court's legal conclusion that a MAR is without merit. In doing so, the majority eliminates the great deference that must be afforded to the trial court's factual determinations. *See State v. Cummings*, 361 N.C. 438, 447, 648 S.E.2d 788, 794 (2007) ("A trial court abuses its discretion if its determination is manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision. In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record." (cleaned up) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) and *Wainwright v. Witt*, 469 U.S. 412, 434 (1985))); *State v. Larrimore*, 340 N.C. 119, 134, 456 S.E.2d 789, 796 (1995) ("According, as we must, great deference to the findings of the trial court, we cannot find error in its findings of facts . . . ." (citations omitted)).

¶ 98 Here, the majority's broad application of de novo review ignores the nuance of our precedent and results in wholesale reweighing of the evidence. The majority further exacerbates this error by also holding that this evidence must be reweighed "in the light most favorable to the defendant[.]" This holding, as with the majority's application of de novo review, is without support in either our General Statutes or our caselaw.

¶ 99 Nowhere in N.C.G.S. § 15A-1420(c) is it stated that the evidence is to be viewed in the light most favorable to the defendant.[1] In fact, N.C.G.S. § 15A-1420(c)(6) states, "[a] defendant who seeks relief by motion for appropriate relief *must show* the existence of the asserted ground for relief." N.C.G.S. § 15A-1420(c)(6) (emphasis added). The official commentary further clarifies that

> [p]ursuant to subsections (c)(5) and (6) the moving party has the burden of proof, by a preponderance of evidence, with regard to facts essential to support the motion. The defendant must show the existence of the ground and prejudice must appear.

N.C.G.S. § 15A-1420, Official Commentary.

¶ 100 The majority contends that *McHone*, 348 N.C. at 258, 499 S.E.2d at 763, supports its "light most favorable to the defendant" language. The entire text of page 258 is set forth as follows:

> [T]he trial court may determine that the motion "is without merit" within the meaning of subsection (c)(1) and deny it without any hearing on questions of law or fact. Defendant's contention that he was entitled to a hearing and entitled to present evidence simply because his motion for appropriate relief was based in part upon asserted denials of his rights under the Constitution of the United States is without merit.
>
> However, defendant also contends in the present case that he was entitled to an evidentiary hearing before the trial court ruled on his motion for appropriate relief as supplemented because some of his asserted grounds for relief required the trial court to resolve questions of fact. We find this contention to have merit. N.C.G.S. § 15A-1420(c)(1) mandates that "[t]he court must determine . . . whether an evidentiary hearing is required to resolve questions of fact." If the trial court "cannot rule upon the motion without the hearing of evidence, it must conduct a hearing

1. Interestingly, the majority creates a standard far lower than summary judgment in civil procedure, even though here a jury has already determined defendant's guilt beyond a reasonable doubt. The invented "in the light most favorable to the defendant" standard for disputed factual issues is astoundingly low. This standard is on par with notice pleading in civil procedure. It will be the rare attorney who fails to meet this standard for his client.

> for the taking of evidence, and must make findings of fact." N.C.G.S. § 15A-1420(c)(4). Under subsection (c)(4), read *in pari materia* with subsections (c)(1), (c)(2), and (c)(3), an evidentiary hearing is required unless the motion presents assertions of fact which will entitle the defendant to no relief even if resolved in his favor, or the motion presents only questions of law, or the motion is made pursuant to N.C.G.S. § 15A-1414 within ten days after entry of judgment.
>
> At the 9 December 1996 hearing, defendant contended for the first time that in August 1996, the State had sent to the trial court a proposed order denying defendant's original motion for appropriate relief without providing defendant with a copy. This matter was not raised or referred to in defendant's original or supplemental motion for appropriate relief. During the 9 December 1996 hearing, the State acknowledged that it did send a proposed order to the trial court and that the trial court signed the State's proposed order dismissing defendant's original motion for appropriate relief. Defendant contended at the 9 December hearing that since neither he nor his counsel were served with a copy of the proposed order, the State had engaged in an improper *ex parte* communication with the trial court in violation of his rights to due process under the state and federal constitutions. Thus, during the 9 December 1996 hearing, defendant orally moved for the first time to have the August 1996 order denying his original motion for appropriate relief vacated because of the *ex parte* contact. The trial court summarily denied that motion and entered its 9 December 1996 order denying defendant's motion for appropriate relief as supplemented.

McHone, 348 N.C. at 257–58, 499 S.E.2d at 763 (second and third alterations in original) (citation omitted) (quoting N.C.G.S. § 15A-1420(c)(1) (1997)). As one can plainly see, there is no language or inference which could be drawn from this passage in *McHon*e that supports the majority's assertion that we view the evidence in the light most favorable to the defendant when reviewing a summary denial of a MAR.

¶ 101 Additionally, the approach implemented by the majority deviates from other areas of our caselaw which mandate that when a party

makes a motion, we view the evidence in the light most favorable to the nonmoving party. *See State v. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005) (stating that when a defendant makes a motion to dismiss, " '[t]he reviewing court considers all evidence in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence.' " (quoting *State v. Garcia*, 358 N.C. 382, 412–13, 597 S.E.2d 724, 746 (2004))); *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) ("When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." (citation omitted)); *State v. James*, 321 N.C. 676, 686, 365 S.E.2d 579, 586 (1988) ("In ruling upon a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom." (citation omitted)).

¶ 102 The majority's improper application of de novo review eliminates the great deference that should be afforded to the trial court's factual determinations, and the majority's improper reweighing of the evidence nullifies the trial court's merit determination under N.C.G.S. § 15A-1420(c). Further, when combined with the majority's assertion that we must view the evidence in the light most favorable to the defendant, the majority runs afoul of the plain reading of N.C.G.S. § 15A-1420(c) by eliminating any burden for the defendant other than providing notice to the State.

III. Ineffective Assistance of Counsel

¶ 103 Defendant filed an MAR and SMAR asserting ineffective assistance of counsel (IAC), among other claims. The trial court found no merit pursuant to N.C.G.S. § 15A-1420 and denied defendant's claims of IAC without an evidentiary hearing. Defendant contends, and the majority agrees, that he was entitled to an evidentiary hearing on his IAC claims.

¶ 104 A defendant's claim for IAC must satisfy the two prongs of *Strickland v. Washington*, 466 U.S. 668 (1984). First, the defendant must show that counsel's performance was deficient. *Id.* at 687. "Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (cleaned up) (quoting *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)), *cert. denied*, 549 U.S. 867 (2006). Second, the defendant must show that counsel's deficient performance was prejudicial to his defense. *Strickland*, 466 U.S. at 692. "Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceed-

ing would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Allen*, 360 N.C. at 316, 626 S.E.2d at 286 (cleaned up) (quoting *Wiggins*, 539 U.S. at 534). When assessing reasonableness, a reviewing court considers "whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688.

¶ 105 Describing the hurdle that defendants must overcome to prevail on an IAC claim, this Court has stated that trial "[c]ounsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. McNeill*, 371 N.C. 198, 218–19, 813 S.E.2d 797, 812 (2018) (alteration in original) (quoting *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001)). Decisions concerning trial strategy "are not generally second-guessed by this Court." *State v. Prevatte*, 356 N.C. 178, 236, 570 S.E.2d 440, 472 (2002), *cert. denied*, 538 U.S. 986 (2003) (citation omitted).

¶ 106 Reading the majority opinion, defendant's brief, and listening to defendant's oral argument, one could easily conclude that defendant's two attorneys were grossly incompetent and ill-equipped to handle a murder trial. In reality, the two attorneys who represented defendant at trial, Carl Atkinson and Pierre Oldham, had represented at least twenty-five capital-eligible defendants prior to their representation of defendant. Neither attorney had ever been disciplined by the State Bar or found to have provided IAC.

¶ 107 Atkinson testified at the evidentiary hearing related to the sentencing phase that he frequently consulted with the Center for Death Penalty Litigation about defendant's case.[2] Atkinson stated that his purpose in "dealing with the Center for Death Penalty Litigation was to get any help [he] could in addressing [defendant's] case." Atkinson discussed potential experts with the capital defender, and Atkinson testified that "every time I needed a recommendation of that nature I went to the Center for Death Penalty Litigation." According to Atkinson, the Center for Death Penalty Litigation "basically believed that [defendant was] likely to be convicted" and that the attorneys should focus on mitigation at sentencing.

¶ 108 Atkinson also attended the "Capital College." According to Atkinson, this was a group of experts from the Center for Death Penalty Litigation

2. The Center for Death Penalty Litigation represents defendant, and they argue that the attorneys who sought their advice were ineffective at trial.

and the Academy of Trial Lawyers who met with attorneys handling capital cases. During four days of meetings, attorneys would "present . . . discovery information, all [the] materials to them," and the experts would "go through a process of developing [the] case." Atkinson presented defendant's case to this group of experts.

¶ 109 In addition, defendant attached to his motion for appropriate relief an affidavit from Oldham. Oldham's affidavit stated, in relevant part, the following:

> 3. After being assigned to the case, [co-counsel] and I pursued discovery from the District Attorney and law enforcement agencies. I recall that from the very beginning, we believed that the chief prosecution witness, Vanessa Smith, who claimed to be an eyewitness to the murder, was not telling the truth in her various statements to law enforcement. I also recall that the State's case was based almost entirely on her testimony.
>
> . . . .
>
> 5. *I do not recall* [co-counsel] and me making any strategic decisions concerning the evidence discussed in Claim II of the MAR and SMAR. For example, *I do not recall* an individual named Troy Spencer contacting either [co-counsel] or me prior to trial. If I had known, however, that he claimed that Vanessa Smith had confessed to planning the murder of Christopher Gailey, and that she had shot and killed him, I would have contacted him, conducted a thorough investigation of his statements, and considered calling him in the guilt phase of the trial.
>
> 6. Although I recall our private investigator looking for Mr. Allen's long-time friend, Christina Fowler, *I do not recall* that he ever found her, or that he learned from her that Scott Allen spent most of the night of the murder at her house. Had [co-counsel] and I known that, we would have conducted additional investigation of the alibi evidence andconsidered calling her as a defense witness in the guilt phase of the trial. *I do not recall* making any strategic decision not to call Ms. Fowler as a witness in either phase of the trial.

> 7. Similarly, *I do not recall* [co-counsel] and me making any strategic decisions to limit the cross-examination of the State's witnesses, including Vanessa Smith. . . . We did not have an expert crime scene analyst to assist our understanding of the crime scene, or to help us use that information to impeach Ms. Smith's story of the crime. . . .
>
> 8. *I have no recollection* of a strategic decision not to call a mental health expert to testify during either phase of the trial. . . .
>
> 9. *I also have no recollection* of making a strategic decision to limit our investigation of possible other suspects in the case. I do not recall the evidence of other suspects set forth in Mr. Allen's Claim XI, and do not recall anything about other individuals with a motive to harm Gailey, or their whereabouts on the night of the murder.

(Emphases added.)

¶ 110 The majority finds that Oldham's affidavit, littered with statements that he does not remember what took place, serves as "direct evidence" that "directly undercuts" the MAR court's finding that counsel made a strategic decision. However, Oldham's affidavit fails to shed *any* light on defendant's claim of ineffective assistance of counsel. The majority nevertheless uses this as the starting point for a chain of assumptions and speculation that it claims provides the factual predicate to an evidentiary hearing. This is in the face of the sworn testimony at trial and defense counsels' reasonable and clearly stated trial strategy of casting doubt on Vanessa Smith's credibility.

¶ 111 Defendant here had the benefit of two experienced attorneys at trial who made the reasonable decision to focus on the credibility of one of the State's witnesses. The attorneys sought advice on strategy and the use of expert witnesses from the Center for Death Penalty Litigation and experts in the field of capital litigation. These experts were confident that defendant would be convicted of capital murder and that defense counsels' best strategy to avoid a death sentence for defendant related to mitigation evidence during the sentencing phase.

¶ 112 Now, nearly eighteen years after his conviction, the Center for Death Penalty Litigation claims the attorneys they coached were ineffective

because they did not consult a crime scene expert. However, as the trial court found:

> 51. Defendant also contends that trial counsel was ineffective for failing to call an expert crime scene analyst to testify regarding alleged discrepancies between Smith's testimony and the physical evidence found at the location of Gailey's murder. (SMAR pp. 12–15) In support of this contention, Defendant presents the affidavit and report of Gregg O. McCrary ("McCrary"), a post-conviction crime scene analyst . . . . However, McCrary's report is based upon the assumption that "[t]he only link between Scott Allen and the murder of Christopher Gailey are the allegations made by Ms. Smith." (SMAR Ex. B of Ex. 41 p. 12) This assumption is faulty as belied by the record.
>
> 52. Several other witnesses corroborated Defendant's involvement in the murder. Absent from McCrary's analysis and report are the trial testimony of Harold Blackwelder ("Blackwelder"), Jeffrey Page ("Page"), and Coy Honeycutt ("Honeycutt"). (*See* SMAR Ex. 41) At Defendant's trial, Blackwelder testified that Defendant and Smith arrived at a cookout . . . on 10 July 1999. (T pp. 1748–49) As soon as Defendant and Smith arrived, Blackwelder went outside and saw a white pickup truck matching the description of Gailey's truck provided by Johnson earlier in the trial. (*See* T p. 1749–50; T pp. 1464–65) . . . .
>
> 53. . . . Defendant told Page that after Defendant shot the fellow, he "heard the boy groaning, and he also stated that he would throw a rock and when that rock would hit the ground the fellow thought that it was him and the fellow had a gun undoubtedly and went to shooting." (T p. 1781). . . . Also, Defendant told Page "that the reason he shot that boy [was] because he thought that boy was going to rat him off because he was an escapee from Troy prison." (T p. 1785) . . . .
>
> 54. . . . [A]ny alleged deficiency of trial counsel and prejudice resulting therefrom regarding counsel's failure to call a crime scene analyst must be viewed

> in light of Defendant's subsequent statements and actions that link him to Gailey's murder.
>
> . . . .
>
> 56. Here, the record supports the conclusion that trial counsels' apparent decision to focus on the doubt created by Smith's gaps in memory, addiction and use of controlled substances on the date of Gailey's death, and failure to maintain a cohesive timeline, rather than attempting to prove Defendant's innocence through the use of a crime scene analyst was a sound tactical decision. In light of the inculpatory statements Defendant made to Page . . . trial counsels' failure to call an expert crime scene analyst to testify was not an objectively unreasonable decision. Additionally, Defendant has failed to show that he suffered any prejudice from trial counsels' failure to call a crime scene analyst because Defendant's statements to Page, possession of Gailey's truck so soon after Gailey's demise, and willingness to sell the truck for a price far below the fair market value all tended to demonstrate evidence of Defendant's guilt. Therefore, Defendant has failed to show that trial counsel deficiently represented Defendant by committing an objectively unreasonable error or that trial counsels' representation so prejudiced the defense as to deprive Defendant of a fair trial whose result was reliable.

¶ 113 These findings of fact were supported by the evidence presented at trial. The majority gives greater weight to the contrary conclusion in the McCrary Report than it does to the sworn testimony provided at trial. In fact, at trial, Blackwelder testified that defendant arrived at a cookout with a white pickup truck matching the description of Gailey's truck. Defendant told Page that he shot someone in the Uwharrie National Forest and "heard the boy groaning, and he also stated that he would throw a rock and when that rock would hit the ground the fellow thought that it was him and the fellow had a gun undoubtedly and went to shooting." Defendant also told Page that "the reason he shot that boy [was] because he thought that boy was going to rat him off because he was an escapee from Troy prison." Page testified that defendant offered to sell him the truck, matching the description of Gailey's, at significantly less than fair market value.

¶ 114 Based upon this evidence presented at trial, we cannot say that the trial court erred in finding that "trial counsels' failure to call a crime scene analyst" was not an objectively unreasonable decision. *See Harrington v. Richter*, 562 U.S. 86, 106–07 (2011) (finding that counsel's decisions to forgo the use of experts can be reasonable because counsel was "entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies."). Accordingly, the trial court did not abuse its discretion by resolving the factual issues based upon the evidence presented by defendant and did not err in determining that defendant's IAC claim was without merit.

¶ 115 It should be noted that the majority states that they considered all of defendant's guilt-innocence claims in their entirety. In reality, the majority only considered the above crime-scene-investigation claim. Rather than addressing defendant's other four claims (Claims III, VI, X, and XI) to determine whether an evidentiary hearing is required, the majority simply states that "[h]aving already determined that the MAR court erred in summarily denying one of [defendant's] IAC claims, we need not address his other claims here[.]" Nowhere in N.C.G.S. § 15A-1420 or our caselaw is it stated that if an evidentiary hearing should have been held on one claim, it must be held on all other claims. It is curious that the majority holds that summary dismissal of defendant's claims was error, yet summarily grants an evidentiary hearing for defendant's claims without analysis and in the face of binding findings of fact by the trial court.

IV. Shackling Claim

¶ 116 In Claim XII of his SMAR, defendant alleged that he was impermissibly shackled in the presence of the jury without justification in violation of his statutory and constitutional rights. In support of his claim, defendant produced information from two jurors and from one alternate juror.

¶ 117 The State argued, and the MAR court agreed, that defendant's claim was procedurally barred under N.C.G.S. § 15A-1419(a)(3) because he was in an adequate position to raise the issue on direct appeal but failed to do so. In the alternative, the MAR court concluded that even if defendant's shackling claim was not procedurally barred, it was meritless.

¶ 118 Under both the North Carolina Constitution and the United States Constitution, a defendant may not be visibly shackled in the courtroom in the presence of the jury unless there is a special need for restraints specific to the defendant. *See State v. Tolley*, 290 N.C. 349, 367, 226 S.E.2d 353, 367 (1976); *see also Deck v. Missouri*, 544 U.S. 622, 626

(2005) ("The law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of a special need."). Consistent with this constitutional rule, N.C.G.S § 15A-1031 permits a trial court judge to order a defendant restrained in court only when doing so is "reasonably necessary to maintain order, prevent the defendant's escape, or provide for the safety of persons[,]" and only then after the judge "[e]nter[s] in the record out of the presence of the jury and in the presence of the person to be restrained and his counsel, if any, the reasons for" imposing the restraints and after giving the defendant an opportunity to be heard on the matter. N.C.G.S. § 15A-1031 (2019). Typically, adherence to this mandatory statutory procedure ensures that evidence of a defendant's shackling appears in the record and transcript of trial, enabling the defendant to challenge the judge's decision to impose restraints on direct appeal.

¶ 119 In this case, there is no evidence in the record or transcript suggesting that defendant was restrained during trial. The trial court did not enter factual findings as would have been required prior to ordering defendant shackled under N.C.G.S § 15A-1031. Defendant did not object or otherwise note that he was restrained in a manner visible to the jury.

¶ 120 Relying principally on our decision in *State v. Hyman*, 371 N.C. 363, 817 S.E.2d 157 (2018), defendant contends that his failure to raise any objection to the purported shackling at trial does not preclude post-conviction review. He argues that the procedural bar does not apply when the record is completely silent as to whether the alleged shackling did or did not occur, because when the record is silent, the defendant is not "in a position to adequately raise the ground or issue underlying the [MAR claim]" within the meaning of N.C.G.S. § 15A-1419(a)(3).

¶ 121 This case is distinguishable from *Hyman*. In *Hyman*, we held that a defendant was not procedurally barred from raising an IAC claim on post-conviction review, even though he had not raised the claim on direct appeal. *Hyman*, 371 N.C. at 385, 817 S.E.2d at 171. The defendant's IAC claim challenged his attorney's failure to withdraw from representing him during trial. *Id.* at 367–68, 817 S.E.2d at 161. The attorney worked at a law firm that had previously represented a witness at the defendant's trial whose testimony inculpated the defendant. *Id.* During cross-examination, an exchange between counsel and the inculpating witness suggested the witness had previously conveyed a different account of the events in question than the one the witness was offering at trial. *Id.* at 365–66, 817 S.E.2d at 160. The defendant argued that his attorney should have withdrawn from the representation and testified

regarding the contents of this alleged conversation. *Id.* at 367–68, 817 S.E.2d at 161.

¶ 122 We explained that in order to prove his attorney rendered IAC, the defendant was required to prove numerous facts, including (1) that the alleged pretrial conversation between the witness and the defendant's attorney had in fact occurred, (2) that during the conversation the witness made statements inconsistent with his trial testimony, (3) that the attorney did not have a strategic reason for failing to withdraw from representing the defendant, and (4) that the testimony the attorney would have been able to deliver would have benefitted the defendant. *Id.* at 384–85, 817 S.E.2d at 170–71. Because "[t]he record developed at trial did not contain any information affirmatively tending to show" any of those facts, we concluded that the record did not "contain[ ] sufficient information to permit the reviewing court to make all the factual and legal determinations necessary to allow a proper resolution of the claim in question." *Id.* at 383–84, 817 S.E.2d at 170. We thus held that the procedural bar provided for in N.C.G.S. § 15A-1419(a)(3) did not apply. *Id.* at 385, 817 S.E.2d at 171.

¶ 123 The distinction between this case and *Hyman* is rooted in a basic difference between an impermissible shackling claim and an IAC claim. To prevail on an impermissible shackling claim, a threshold fact must first be established: that the defendant was shackled at trial. Absent some indication in the record or transcript that the defendant was shackled, it is appropriate to presume that the defendant was not shackled. In the rare case where the defendant is shackled at trial but the shackling is not reflected in the record—because the trial court has failed to adhere to the constitutionally necessary procedural safeguards codified in N.C.G.S § 15A-1031—the defendant possesses all of the information necessary to cure that deficiency, as the defendant knows whether he or she has been subjected to restraints during trial.

¶ 124 By contrast, the same is not true when a defendant brings an IAC claim on direct appeal. On direct appeal, even a fully developed record will generally fail to contain information without which the claim cannot be adjudicated. When that occurs, the defendant is typically not in a position to fill the necessary gaps in the record. Resolving an IAC claim frequently requires information that necessarily is not a part of the record at trial, namely whether trial counsel made a conscious choice to pursue a given strategy, why that strategy was chosen, and whether that choice was reasonable. Thus, "because of the nature of IAC claims, defendants likely will not be in a position to adequately develop many IAC claims on direct appeal." *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001).

¶ 125 When presented with a "prematurely asserted" IAC claim, the court "shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent MAR proceeding." *Id.*; *see also State v. Hyatt*, 355 N.C. 642, 668, 566 S.E.2d 61, 78 (2002) (dismissing without prejudice IAC claim that is "suggested by the record but [is] insufficiently developed for review"); *State v. Watts*, 357 N.C. 366, 378, 584 S.E.2d 740, 749 (2003) (concluding that defendant did not waive IAC claim because "there are evidentiary issues which may need to be developed before defendant will be in a position to adequately raise his potential IAC claim").

¶ 126 However, the nature of shackling claims renders them usually susceptible to direct review. Accordingly, *Hyman* is fully consistent with application of the procedural bar under the circumstances of this case. *See* N.C.G.S. § 15A-1415, Official Commentary (2019) ("It should also be taken into account with the latter consideration that additional finality has been added in G.S. 15A-1419 by making it clear that there is but one chance to raise available matters after the case is over, and if there has been a previous assertion of the error, or opportunity to assert the error, by motion or appeal, a later motion may be denied on that basis."); *see also* N.C.G.S. § 15A-1419, Official Commentary (2019) ("[O]nce a matter has been litigated or there has been opportunity to litigate a matter, there will not be a right to seek relief by additional motions at a later date. Thus, this section provides, in short, that if a matter has been determined on the merits upon an appeal, or upon a post-trial motion or proceeding, there is no right to litigate the matter again in an additional motion for appropriate relief. Similarly, if there has been an opportunity to have the matter considered on a previous motion for appropriate relief or appeal the court may deny the motion for appropriate relief.").

V. Cumulative Error

¶ 127 Next, defendant claims that his alleged IAC claims in his MAR and SMAR amount to cumulative error. The majority rejects our jurisprudence in this area, and the MAR court's conclusion that cumulative error does not apply to IAC claims. While the trial court correctly recognized that such a claim has never been sanctioned by this Court, the majority now proclaims that the "decision to recognize cumulative prejudice claims is based upon our own interpretation of *Strickland* and IAC doctrine."

¶ 128 While the majority cites to *State v. Thompson*, 359 N.C. 77, 604 S.E.2d 850 (2004); *Williams v. Taylor*, 529 U.S. 362 (2000); and *State*

v. Lane, 271 N.C. App. 307, 844 S.E.2d 32 (2020), those cases do not support the proposition that cumulative error applies to IAC claims.

¶ 129 Once again, the majority misreads our precedent. *Thompson* merely reiterated a single argument the defendant was attempting to make and did not recognize nor adopt the defendant's position on cumulative prejudice for IAC claims. *See Thompson*, 359 N.C. at 121–22, 604 S.E.2d at 880. Furthermore, the majority incorrectly asserts that the Supreme Court of the United States recognized cumulative prejudice for IAC claims in *Williams*. In *Williams*, the Supreme Court referred to the cumulation of "the totality of the available mitigation evidence . . . in reweighing it against the evidence in aggravation" and not, as the majority mistakenly asserts, to cumulative error in IAC claims. *Williams*, 529 U.S. at 397–98.

¶ 130 Lastly, the majority employs a North Carolina Court of Appeals case, *Lane*, for the proposition that "courts can consider the cumulative effect of alleged errors by counsel." *Lane*, 271 N.C. App. at 316, 844 S.E.2d at 40. However, Court of Appeals precedent is not binding upon this court. *See State v. Steen*, 376 N.C. 469, 497, 852 S.E.2d 14, 33 (2020) (Earls, J., concurring in result in part and dissenting in part) ("The majority also cites a number of cases from the Court of Appeals; however, 'precedents set by the Court of Appeals are not binding on this Court.' " (quoting *Mazza v. Med. Mut. Ins. Co.*, 311 N.C. 621, 631, 319 S.E.2d 217, 223 (1984))). At no point in our precedent has this Court applied cumulative error to IAC claims, and we should decline to do so now.

VI. Conclusion

¶ 131 For the reasons stated herein, I respectfully dissent.[3]

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

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3. As to those instances where the majority upholds the trial court's order, I concur in the result only.

[378 N.C. 337, 2021-NCSC-89]

STATE OF NORTH CAROLINA
v.
SHANNA CHEYENNE SHULER

No. 187PA20

Filed 13 August 2021

Constitutional Law—right to silence—notice of intent to raise affirmative defense—preemptive impeachment by State—unconstitutional

Defendant's pretrial notice of intent to raise the affirmative defense of duress, given in a methamphetamine trafficking prosecution to comply with N.C.G.S. § 15A-905(c)(1), did not cause the forfeiture of her Fifth Amendment right to silence, and the State should not have been permitted to preemptively impeach her—by asking a police detective whether defendant made any statements about another man who had just been arrested when she handed over the drugs—during its case-in-chief when she had not testified at that point in the trial.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 270 N.C. App. 799 (2020), finding no error after appeal from a judgment entered on 31 October 2018 by Judge William H. Coward in Superior Court, Haywood County. Heard in the Supreme Court on 18 May 2021.

Joshua Stein, Attorney General, by Brent D. Kiziah, Assistant Attorney General for the State-appellee.

W. Michael Spivey for defendant-appellant.

HUDSON, Justice.

¶ 1 Here we must decide whether a criminal defendant forfeits her Fifth Amendment right to silence when she gives pretrial notice of her intent to offer the affirmative defense of duress under N.C.G.S. § 15A-905(c)(1). We conclude that the defendant does not forfeit that right, and that regardless, the State may not preemptively impeach a defendant during its case-in-chief. Accordingly, we reverse and remand to the Court of Appeals.

I. Factual and Procedural Background

¶ 2 On 2 March 2017, Chief of Police Russell Gilliland and Detective Brennan Regner of the Maggie Valley Police Department responded to a reported disturbance at a motel involving people in a Ford Fusion. The officers located the car, approached a man standing next to the car, and learned that the man was Joshua Warren. After determining that there was an outstanding warrant for his arrest, they arrested him and searched him and he was transferred to the detention facility by another officer.

¶ 3 Chief Gilliland and Detective Regner then approached defendant, Shanna Cheyenne Shuler, who was the driver of the car and asked her for identification. They determined that she also had an outstanding warrant for her arrest. The officers asked defendant if she had "anything on her." She was hesitant, but upon being asked again, defendant pulled out a bag "containing a leafy substance." The officers asked again if she had any other substances and warned her that if she arrived at the detention facility in possession of illegal substances she could be charged with additional crimes. She then pulled a "clear baggie of crystal-like substance out of her bra."

¶ 4 Defendant was charged with felony trafficking in methamphetamine and with misdemeanor simple possession of marijuana. Prior to trial, defendant filed a notice of her intent to rely upon the affirmative defense of duress pursuant to N.C.G.S. § 15A-905(c)(1). In its entirety, the notice stated the following:

> Now comes the Defendant, by and through her attorney, Joel Schechet and, in accordance with N.C.G.S. § 15A-905(c), gives notice of the following defense:
>
> 1. Duress

¶ 5 At trial, Detective Regner testified for the State during its case-in-chief. The State asked Detective Regner if defendant made "any statements" about Joshua Warren when she handed over the substances in her possession. Defense counsel objected, and the trial court overruled the objection. Detective Regner then testified: "No, ma'am. She made no—no comment during that one time."

¶ 6 Defense counsel asked for the trial court to excuse the jury and then moved for a mistrial arguing that the State's question had "solicited an answer highlighting [defendant's] silence at the scene." The trial court conducted a voir dire to determine the admissibility of Detective

Regner's testimony. Ultimately, the trial court allowed the State to ask the question again when the jury returned.

¶ 7 After the State's case-in chief, defense counsel gave its opening statement. Defendant then took the witness stand to testify in her own defense. At the close of all the evidence, the trial court instructed the jury on the defense of duress. Ultimately, the jury found defendant guilty of both charges. Defendant appealed to the Court of Appeals.

¶ 8 The Court of Appeals unanimously found no error in the jury's verdicts or in the judgment concluding that because defendant gave notice of her intent to assert the affirmative defense of duress before she testified, the trial court did not err in admitting Detective Regner's testimony of defendant's silence during the State's case-in-chief. *State v. Shuler*, 270 N.C. App. 799, 805 (2020). Defendant petitioned our Court for discretionary review. We allowed her petition on 15 December 2020 to review the single issue presented by defendant in her petition and stated here:

> Did the Court of Appeals err by holding that a defendant who exercises their Fifth Amendment right to silence forfeits that right if they comply with N.C.G.S. § 15A-905(c)(1) and give notice of intent to offer an affirmative defense?

II. Standard of Review

¶ 9 "It is well settled that de novo review is ordinarily appropriate in cases where constitutional rights are implicated." *State v. Diaz*, 372 N.C. 493, 498 (2019) (quoting *Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348 (2001)). Here, defendant's Fifth Amendment right to silence is implicated. Accordingly, we review the decision of the Court of Appeals de novo.

III. Analysis

¶ 10 Defendant argues that the Court of Appeals erred when it held that her compliance with N.C.G.S. § 15A-905(c)(1), which required her to give pre-trial notice of her intent to raise the affirmative defense of duress, resulted in her forfeiting her ability to assert her Fifth Amendment right to silence such that the State could offer evidence of her silence during its case-in-chief. The State argues that the testimony on defendant's silence elicited during its case-in-chief was admissible for the purposes of impeaching defendant's credibility as a witness.

¶ 11 This Court has said, "[t]he primary purpose of impeachment is to reduce or discount the credibility of a witness for the purpose of induc-

ing the jury to give less weight to [her] testimony." *State v. Ward*, 338 N.C. 64, 97 (1994) (quoting *State v. Looney*, 294 N.C. 1, 15 (1978)). At the time of Detective Regner's testimony, defendant's silence could not have achieved the purpose of impeaching defendant's credibility as a witness since defendant had not yet testified. The State cannot preemptively impeach a criminal defendant by anticipating that the defendant will testify because of defendant's constitutional right to decide not to be a witness.

¶ 12 During oral arguments before this Court, the State conceded that it found no authority for the proposition that a defendant may be impeached prior to testifying. Instead, the State argued that we should create an exception to the rule against preemptive impeachment. According to the State, because defendant here "clearly showed" that she intended to testify by giving pre-trial notice of a duress defense, Detective Regner's testimony was admissible for impeachment purposes prior to defendant's testimony. We disagree.

¶ 13 Giving pre-trial notice of a duress defense does not compel a defendant to testify on her own behalf, nor does it "clearly show[ ]" she intended to do so. A criminal defendant retains the right to choose whether or not to testify at all times up until she actually takes the stand. U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."); *see also* N.C. Const. art. I, § 23; N.C.G.S. § 8-54 (2019); *State v. Kemmerlin*, 356 N.C. 446, 481 (2002) ("A criminal defendant may not be compelled to testify . . . ." (quoting *State v. Bayman*, 336 N.C. 748, 758 (1994))). Permitting the State to introduce evidence to impeach defendant's credibility before she takes the stand would invariably put before the jury evidence that is probably prejudicial to defendant. That prejudicial evidence would never become admissible if defendant ultimately decided to invoke her Fifth Amendment right not to testify. The safest means of preventing the eventuality that the jury would hear prejudicial, inadmissible evidence is for this Court to hold that evidence offered to impeach a criminal defendant's credibility as a witness is not admissible until she actually testifies. The State's argument that we can presume from defendant's pretrial notice of her duress defense that defendant "clearly showed" an intent to testify such that impeachment evidence was admissible during the State's case-in-chief does not appropriately recognize or protect the defendant's Fifth Amendment right to choose whether or not to testify. Accordingly, we decline to adopt the State's proposed approach.

¶ 14 The State also argues extensively in its brief that because defendant's silence occurred before she was given the *Miranda* warning, evidence of her silence is admissible to impeach her credibility as a witness.

However, of the cases cited by the State in which evidence of a defendant's silence was admissible for impeachment purposes, the evidence was always used to impeach the credibility of a witness who had taken the stand to testify or to rebut testimony elicited by defense counsel on cross-examination. Because the evidence at issue here was offered to impeach a defendant who had not taken the stand and was not used for the purposes of rebuttal those cases do not apply.[1]

¶ 15 We hold that when defendant gave pre-trial notice of her intent to invoke an affirmative defense under statute, she does not give up her Fifth Amendment right to remain silent or her Fifth Amendment right to not testify, and the State was not permitted to offer evidence to impeach her credibility when she had not testified. Here, at the time the State elicited the impeachment testimony, defendant had not testified and retained her Fifth Amendment right not to do so. Thus, it was error to admit Detective Regner's testimony into evidence.

¶ 16 Defendant properly preserved this error by objecting to it and receiving a ruling from the trial court thereon. Therefore, on appeal, the reviewing court must determine whether such error was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (2019); *State v. Lawrence*, 365 N.C. 506, 512–13 (2012). The Court of Appeals did not address whether the error was harmless, and the parties did not thoroughly brief this issue to our Court. Therefore, we remand to the Court of Appeals to determine whether the erroneously admitted testimony was harmless beyond a reasonable doubt.

IV. Conclusion

¶ 17 In conclusion, we reverse the decision of the Court of Appeals and hold that a defendant does not forfeit their Fifth Amendment right to silence if they comply with N.C.G.S. § 15A-905(c)(1) and give notice of intent to offer an affirmative defense. Furthermore, the State may not preemptively impeach a defendant who has not testified.

REVERSED AND REMANDED.

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1. In one case, *State v. Booker*, 262 N.C. App. 290, 300–03 (2018), defense counsel cross-examined the State's witness about whether he was in contact with the defendant, which "opened the door" and allowed the State to ask the witness on redirect about the defendant's silence and lack of contact with the witness. It is unclear whether the defendant testified in that case and if the State was using the defendant's silence to impeach the witness or defendant herself.

WELLS FARGO BANK, N.A.

v.

FRANCES J. STOCKS, IN HIS CAPACITY AS THE EXECUTOR OF THE ESTATE OF LEWIS H. STOCKS AKA LEWIS H. STOCKS, III, TIA M. STOCKS, AND JEREMY B. WILKINS, IN HIS CAPACITY AS COMMISSIONER

No. 296A19

Filed 13 August 2021

1. Statutes of Limitation and Repose—three years—N.C.G.S. § 1-52(9)—mutual mistake—deed reformation

In an action for reformation of a deed of trust brought by a bank, the cause of action accrued when the bank should have discovered the drafting error (listing the wrong family member as the borrower), and its first opportunity to do so was after the borrower defaulted, even though the document was drafted with the error years earlier. Therefore, the three-year statute of limitations in N.C.G.S. § 1-52(9) applied because the action was to reform the instrument due to mutual mistake, and the bank's action was timely filed within three years of the default and the bank's subsequent investigation of the loan instruments to prepare for foreclosure.

2. Reformation of Instruments—admissions—attempt to contradict by affidavit—summary judgment

In an action by plaintiff bank for reformation of a deed based on mutual mistake, defendant property owner could not use her affidavit to contradict her binding admissions and thereby create an issue of material fact as to the parties' intent for the deed of trust to secure repayment of the promissory note executed during a refinance.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 266 N.C. App. 228, 831 S.E.2d 378 (2019), reversing and remanding an order granting summary judgment for plaintiff entered on 25 April 2018 by Judge Henry W. Hight in Superior Court, Wake County. On 1 April 2020, the Supreme Court allowed plaintiff Wells Fargo Bank, N.A., and defendant Frances J. Stocks' respective petitions for discretionary review of additional issues. Heard in the Supreme Court on 28 April 2021.

The Law Office of John T. Benjamin, Jr., P.A., by John T. Benjamin, Jr., and Jake R. Garris, for plaintiff-appellant.

Howard, Stallings, From, Atkins, Angell & Davis, P.A., by Douglas D. Noreen and Rebecca H. Ugolick, for defendant-appellant Frances J. Stocks.

Janvier Law Firm, PLLC, by Kathleen O'Malley, for defendant-appellee Tia M. Stocks.

NEWBY, Chief Justice.

¶ 1 In this case we determine whether the trial court properly granted summary judgment for plaintiff reforming a deed of trust and allowing foreclosure. We first determine when a cause of action accrues for reformation of a deed of trust based on mutual mistake. Section 1-52(9) of the North Carolina General Statutes provides a three-year statute of limitations for relief based on a mistake, which begins running when the mistake is "discovered." A party "discovers" a mistake when that party knows of the mistake or should have known in the exercise of due diligence. Drafting a deed of trust with a mistake apparent on its face, without more, is insufficient to put a party on notice of a mistake. Here the document was drafted with an error in 2005. The first circumstance that would have led plaintiff to question the drafting of the document happened upon review of the document when default occurred. Thus, the claim accrued after default in January of 2015. As such, plaintiff's action was timely filed on 26 May 2017. Further, there is no genuine issue of material fact as to whether the parties intended the deed of trust to secure the defaulted promissory note. Therefore, plaintiff is entitled to summary judgment. The decision of the Court of Appeals is reversed.

¶ 2 Defendant Tia Stocks[1] is the sole record owner of certain real property located at 1504 Harth Drive in Garner, North Carolina (the Property). The Property has been her primary residence since 2002, when her late father, Lewis Stocks, helped her obtain financing to purchase it. On 22 March 2002, Lewis Stocks executed a limited power of attorney which appointed defendant as his attorney-in-fact to "execut[e] the Settlement Statement and loan documents on [his] behalf to effect the purchase" of the Property. On 27 March 2002, Lewis Stocks, through defendant as his attorney-in-fact, executed a promissory note in the amount of $87,300 to First Union National Bank (First Note). On the same day, defendant, together with Lewis Stocks—again through defendant as his attorney-in-

1. Frances J. Stocks, in his capacity as the executor of the estate of Lewis Stocks, is also named as a defendant. Because he argued in alignment with plaintiff at this Court, we only refer to Tia Stocks as defendant.

fact—executed a deed of trust (First Deed of Trust) to pledge the Property as collateral to secure the First Note. The First Deed of Trust defined the "Borrower" as both defendant and Lewis Stocks. The general warranty deed conveying the Property to defendant and the First Deed of Trust were recorded on 28 March 2002 in the Wake County Registry. Defendant then authorized First Union National Bank to draft monthly payments due under the First Note from a bank account in her name. Defendant made all the monthly payments, and Lewis Stocks, though the only named borrower on the First Note, did not make any payments.

¶ 3 In 2005, Lewis Stocks refinanced the loan with defendant's consent. On 12 January 2005, Lewis Stocks executed a promissory note in the amount of $83,034 to Wachovia Bank, N.A.[2] (Second Note). Like the First Note, the Second Note only defined Lewis Stocks as the "Borrower." Section 4(B) of the Second Note states that the Borrower "will be in Default under this Note . . . if [Borrower] fail[s] to make any payment." Section 5 of the Second Note states that "a separate Security Instrument[ ] on real property . . . described in the Security Instrument and dated the same date as this Note, protects the Note Holder from possible losses that might result." The proceeds of the Second Note were used to satisfy the First Note. On 28 January 2005, Wachovia Bank recorded a Certificate of Satisfaction, cancelling the First Deed of Trust.

¶ 4 On 19 January 2005, only defendant executed a deed of trust (Second Deed of Trust) intending to pledge the Property as collateral to secure the Second Note in the amount of $83,034. According to defendant, Lewis Stocks "called [defendant] into his medical office and told" her she needed to sign the Second Deed of Trust so that he could refinance the loan. No one from Wachovia was present when defendant signed the Second Deed of Trust. Though defendant was not listed as a "Borrower" on the Second Note, the Second Deed of Trust defines the "Borrower" as only defendant. The Second Deed of Trust states that "Borrower is indebted to [Wachovia Bank] in the principal sum of U.S. $83,034.00 which indebtedness is evidenced by Borrower's Note dated 01/12/05." Lewis Stocks, who is the only defined "Borrower" on the Second Note, did not execute the Second Deed of Trust, nor does the Second Deed of Trust list him as a borrower. By omitting Lewis Stocks, the Second Deed of Trust does not effectively reference the Second Note. The Second Deed of Trust was recorded on 4 February 2005 in the Wake County Registry.

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2. Before Lewis Stocks refinanced the loan, First Union National Bank merged with Wachovia Bank, N.A., which then became the holder of the First Note and the beneficiary under the First Deed of Trust.

¶ 5 Wachovia Bank drafted other documents in conjunction with the loan transaction that properly differentiated between Lewis Stocks as the borrower under the Second Note and defendant as the owner of the Property, which was intended to secure the Second Note. These documents included a Homeowner's Insurance Notice and a Clerical Error Authorization form. Defendant then authorized Wachovia Bank to draft monthly installment payments from her bank account and made all the payments due under the Second Note until 2015. Lewis Stocks did not make any payments due under the Second Note.

¶ 6 Lewis Stocks died on 23 May 2014, and defendant stopped making payments several months thereafter. Defendant's last payment to Wells Fargo Bank, N.A.[3] (plaintiff) under the Second Note was made on 13 December 2014, and default under the Second Note occurred in January of 2015. Plaintiff sent defendant a letter on 26 February 2015 stating that the Second Note was in default and that plaintiff may exercise its available rights against the Property. In accordance with its general business practices, plaintiff first referred the account to its attorneys in August of 2016 to commence foreclosure proceedings. While preparing for defendant's appeal of the clerk's non-judicial foreclosure order in January of 2017, plaintiff's counsel discovered that the Second Deed of Trust did not adequately describe the Second Note. After discovering the mistake, plaintiff commenced the present action for reformation and judicial foreclosure on 26 May 2017.

¶ 7 During discovery defendant filed responses to plaintiff's request for admissions, wherein she admitted that: (1) the collateral under the First Deed of Trust and Second Deed of Trust was to be the same; (2) the Property was to serve as collateral for the Second Note; (3) the purpose of the Second Deed of Trust was to secure repayment under the Second Note; (4) she understood the purpose of the Second Deed of Trust when she signed it; and (5) she consented to Lewis Stocks' plan to enter into the refinance transaction. In her admissions, however, defendant also stated that she "understood that by signing the [Second] Deed of Trust, [she] was acting as a surety and that [her] home was acting as collateral for the loan."

¶ 8 Plaintiff thereafter moved for summary judgment, first arguing that the Second Deed of Trust should be reformed to accurately describe the Second Note as the parties intended by stating that "Lewis

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3. On 20 March 2010, Wachovia merged with Wells Fargo Bank, N.A., which then became the holder of the Second Note and the beneficiary under the Second Deed of Trust. For readability, our reference to "plaintiff" includes Wells Fargo and its predecessors-in-interest.

H Stocks is indebted to Lender in the principal sum of U.S. $83034.00 which indebtedness is evidenced by Lewis H Stocks' Note dated 01/12/05 and extensions, modifications and renewals thereof." Plaintiff also argued the Second Deed of Trust should define the "Borrower" as "Tia M Stocks and Lewis H Stocks," as the parties intended. Plaintiff further argued that it properly brought its claim within the applicable three-year statute of limitations.

¶ 9 In response defendant contested whether the parties intended the Second Deed of Trust to secure the Second Note. Defendant submitted the following in her affidavit:

> In 2005, my father (Dr. Lewis H. Stocks) applied for and obtained a second loan from the plaintiff-bank in the amount of $83,034. I was not a party to this loan, did not attend the loan closing, and was completely unaware that my father was obtaining a loan. I never applied for the loan, never signed a promissory note, nor did I receive the proceeds of the loan. I later learned the second loan was used by my father to pay off the first loan he obtained from the plaintiff-bank. In addition to not attending the loan closing, I was never provided with any RESPA documents, Truth-in-Lending documents, or a closing statement (HUD-1). The entire 2005 loan was conducted in secrecy and any documents having to do with the closing of this loan were kept from me. It later became apparent to me that the reason these documents were not made available to me was because the plaintiff-bank and my father wanted to conceal from me the true nature of this loan.

The trial court granted summary judgment in plaintiff's favor.

¶ 10 A divided panel of the Court of Appeals reversed. *Wells Fargo Bank, N.A. v. Stocks*, 266 N.C. App. 228, 236, 831 S.E.2d 378, 384 (2019). The Court of Appeals began its analysis by determining whether the ten-year statute of limitations in N.C.G.S. § 1-47(2) or the three-year statute of limitations in N.C.G.S. § 1-52(9) applies to plaintiff's claim for reformation. *Id.* at 232, 831 S.E.2d at 381. In doing so, the Court of Appeals cited the rule that "where two statutes deal with the same subject matter, the more specific statute *will prevail over* the more general one." *Id.* at 234, 831 S.E.2d at 382 (quoting *Fowler v. Valencourt*, 334 N.C. 345, 349, 435 S.E.2d 530, 532 (1993)). The Court of Appeals agreed with its

prior decision in *Nationstar Mortgage, LLC v. Dean*, which held that N.C.G.S. § 1-47(2) is more specific because it applies to claims involving a sealed instrument. *Stocks*, 266 N.C. App. at 234, 831 S.E.2d at 382 (quoting *Nationstar Mortgage, LLC v. Dean*, 261 N.C. App. 375, 384, 820 S.E.2d 854, 860 (2018)). Thus, the Court of Appeals held that N.C.G.S. § 1-47(2) applies to plaintiff's claim "to the exclusion of [N.C.G.S. §] 1-52(9)." *Stocks*, 266 N.C. App. at 234 n.2, 831 S.E.2d at 382 n.2.

¶ 11 Having decided that N.C.G.S. § 1-47(2) applies, the Court of Appeals then noted that N.C.G.S. § 1-47(2) does not include express language creating a discovery rule. *Stocks*, 266 N.C. App. at 235, 831 S.E.2d at 383. Thus, the Court of Appeals held that plaintiff's claim accrued, and the statute of limitations began to run, when the Second Deed of Trust was executed in January of 2005. *Id.* Because plaintiff filed its claim on 26 May 2017, outside the ten-year statute of limitations period, the Court of Appeals held that N.C.G.S. § 1-47(2) bars plaintiff's claim for reformation.[4] *Id.* As such, and because the unreformed Second Deed of Trust did not secure the Second Note, the Court of Appeals reversed the trial court's grant of summary judgment on plaintiff's claims for reformation and judicial foreclosure. *Id.* at 236, 831 S.E.2d at 384.

¶ 12 The dissent, however, would have applied N.C.G.S. § 1-52(9) to plaintiff's claim. *Id.* at 239–40, 831 S.E.2d at 385 (Arrowood, J., dissenting). The dissent noted that though "a cause of action based on fraud or mistake does not accrue until the aggrieved party discovers the [mistake]," under *Nationstar* such a claim "cannot be brought after ten years even if the underlying fraud or mistake would not have been reasonably discovered during that time." *Id.* at 238, 831 S.E.2d at 385. This interpretation, the dissent argued, contravenes "the importance of protecting defrauded parties, or those injured by a mistake." *Id.* Thus, the dissent concluded that it "runs counter to logic and our case law" to hold that an action for fraud or mistake is barred under N.C.G.S. § 1-47(2) "simply because the document at issue is a sealed instrument." *Id.* at 239, 831 S.E.2d at 385. Plaintiff appealed to this Court based on the dissenting opinion at the Court of Appeals. Plaintiff also filed a petition for discretionary review as to additional issues, which this Court allowed.

¶ 13 This Court reviews appeals from summary judgment de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is proper if "there is no genuine issue as to any material fact

4. Because the Court of Appeals found plaintiff's claim for reformation of the Second Deed of Trust was time-barred, the Court of Appeals did not address defendant's argument that she intended to pledge the Property as a surety for her father's loan.

and . . . any party is entitled to judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2019). "All facts asserted by the [nonmoving] party are taken as true and . . . viewed in the light most favorable to that party." *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 334, 777 S.E.2d 272, 278 (2015) (quoting *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)). Summary judgment is appropriate when the moving party establishes "the lack of any triable issue of fact." *Texaco, Inc. v. Creel*, 310 N.C. 695, 699, 314 S.E.2d 506, 508 (1984) (quoting *Kidd v. Early*, 289 N.C. 343, 352, 222 S.E.2d 392, 399 (1976)).

¶ 14 **[1]** Defendant first argues there is a genuine dispute of material fact as to whether plaintiff filed its claim within the applicable statute of limitations. Whether a cause of action is barred by the statute of limitations is a question of law "when the bar is properly pleaded and the facts are admitted or are not in conflict." *Pembee Mfg. Corp. v. Cape Fear Const. Co., Inc.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985) (citing *Little v. Rose*, 285 N.C. 724, 208 S.E.2d 666 (1974); *Teele v. Kerr*, 261 N.C. 148, 134 S.E.2d 126 (1964)).

¶ 15 "If [a] deed or written instrument fails to express the true intention of the parties, it may be reformed . . . whe[n] the failure is due to mutual mistake of the parties . . . ." *Crawford v. Willoughby*, 192 N.C. 269, 271, 134 S.E. 494, 495 (1926) (citation omitted). N.C.G.S. § 1-52(9) applies to claims "for relief on the ground of . . . mistake," while N.C.G.S. § 1-47(2) applies to claims "[u]pon a sealed instrument or an instrument of conveyance of an interest in real property, against the principal thereto." To determine which statute of limitations applies, we must look to the purpose of the cause of action. If the purpose is to enforce a sealed instrument, then N.C.G.S. § 1-47(2) applies. But when, as here, the action is to reform an instrument because of fraud or mistake, N.C.G.S. § 1-52(9) applies. In *Nationstar*, the Court of Appeals cited the correct principle that the more specific statute controls over the more general statute of limitations. *Nationstar*, 261 N.C. App. at 383, 820 S.E.2d at 860 (citing *Fowler*, 334 N.C. at 349, 435 S.E.2d at 532). Nonetheless, it failed to examine the nature of the cause of action. *Nationstar*, 261 N.C. App. at 384, 820 S.E.2d at 860. Thus, the Court of Appeals' decision in *Nationstar* is overruled.

¶ 16 Under N.C.G.S. § 1-52(9), a "cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." N.C.G.S. § 1-52(9). A party "discovers" the mistake when the "mistake was known or should have been discovered in the exercise of ordinary diligence." *Peacock v. Barnes*, 142 N.C. 215, 218, 55 S.E. 99, 100 (1906). A mistake in the drafting pro-

cess alone is insufficient to place the drafting party on inquiry notice. *See Pelletier v. Interstate Cooperage Co.*, 158 N.C. 403, 407–08, 74 S.E. 112, 113–14 (1912) (citations omitted) (holding "that a party will not be affected with notice of a mistake existent in the deed" that is due to the "mistake of the draughtsman"); *Modlin v. Roanoke R. & Lumber Co.*, 145 N.C. 218, 227, 58 S.E. 1075, 1078 (1907) (citations omitted) (stating "that the registration of the deed, or knowledge of its existence . . . [is] not of itself sufficient notice of" a mistake); *Peacock*, 142 N.C. at 217, 55 S.E. at 101 (holding that erroneous description of land in a recorded deed was insufficient, without more, to put a party on inquiry notice). If an original drafting error were sufficient to place the drafter on notice, the discovery rule would be unnecessary because the statute of limitations would always begin to run on the date of the original error. *See id.* Rather, "there must be facts and circumstances sufficient to put the [drafting party] on inquiry which, if pursued, would lead to the discovery of the facts constituting the [mistake]." *Vail v. Vail*, 233 N.C. 109, 117, 63 S.E.2d 202, 208 (1951) (citations omitted).

¶ 17 Here the cause of action accrued when plaintiff should have discovered the error in the loan documents. The mistake itself, that the Second Deed of Trust refers to defendant as the borrower under the Second Note instead of Lewis Stocks, was a drafting error. Defendant argues the unusual circumstances surrounding the execution of the Second Deed of Trust should have put plaintiff on inquiry notice. Defendant notes that she executed the Second Deed of Trust one week after Lewis Stocks executed the Second Note, in Lewis Stocks' office at his direction, and without a representative from plaintiff present. Moreover, plaintiff drafted other documents that properly differentiated between Lewis Stocks as the borrower and defendant as the Property owner.

¶ 18 These circumstances may have raised a question regarding the execution of the documents. They do not, however, raise a question regarding the drafting. Had plaintiff reviewed the documents after they were executed, as defendant argues plaintiff should have, plaintiff would have found the execution was without error. In other words, since the signature matched the defined borrower on the face of the document, there was no reason to question the drafting of the Second Deed of Trust. As such, these facts and circumstances are insufficient to place plaintiff on inquiry notice of the drafting error.

¶ 19 Further, from March of 2005 to December of 2014, plaintiff received every payment due under the Second Note. Given the timely payments, there was no reason to investigate the loan instruments. Therefore, the

first circumstance that would have led plaintiff to question the validity of the Second Deed of Trust was the January 2015 default and the subsequent foreclosure action. In the exercise of due diligence, the earliest plaintiff should have discovered the drafting mistake was during this time. Having filed the lawsuit on 26 May 2017, the cause of action to reform the Second Deed of Trust was timely filed within the three-year statute of limitations period.

¶ 20 **[2]** Defendant next argues there is a genuine dispute of material fact as to whether the parties intended the Second Deed of Trust to secure repayment of the Second Note. "If [a] deed or written instrument fails to express the true intention of the parties, it may be reformed . . . whe[n] the failure is due to the mutual mistake of the parties . . . ." *Crawford*, 192 N.C. at 271, 134 S.E. at 495 (citations omitted). "The phrase 'mutual mistake' means a mistake common to all the parties to a written instrument and usually relates to a mistake concerning its contents or its legal effect." *State Tr. Co. v. Braznell*, 227 N.C. 211, 214–15, 41 S.E.2d 744, 746 (1947) (quoting *M. P. Hubbard & Co., Inc. v. Horne*, 203 N.C. 205, 208, 165 S.E. 347, 349 (1932)). Facts admitted in a request for admissions under Rule 36 of the North Carolina Rules of Civil Procedure are "conclusively established." N.C.G.S. § 1A-1, Rule 36(b) (2019). Therefore, such facts are "sufficient to support a grant of summary judgment." *Goins v. Puleo*, 350 N.C. 277, 280, 512 S.E.2d 748, 750 (1999) (citing *Rhoads v. Bryant*, 56 N.C. App. 635, 289 S.E.2d 637 (1982)). Moreover, a party's own affidavit "opposing summary judgment does not overcome the conclusive effect of [that party's] previous admissions." *Rhoads*, 56 N.C. App. at 637, 289 S.E.2d at 639.

¶ 21 Here defendant admitted that she understood the Property was to serve as collateral under the Second Deed of Trust to secure repayment of the indebtedness evidenced by the Second Note. Defendant cannot use her affidavit to contradict these binding admissions. Further, defendant's contention that she was acting as a surety for her father's loan does not overcome her admissions that she understood that the purpose of the Second Deed of Trust was to pledge the Property as collateral for the loan under a traditional deed of trust arrangement. *See Skinner v. Preferred Credit*, 361 N.C. 114, 120, 638 S.E.2d 203, 209 (2006) ("A deed of trust is a three-party arrangement in which the borrower conveys legal title to real property to a third party trustee to hold for the benefit of the lender until repayment of the loan." (citing 1 James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 13-1, at 538 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999))). Thus, there is

no genuine dispute of material fact as to whether the parties intended the Second Deed of Trust to secure repayment of the Second Note.

¶ 22 Because there is no genuine issue of material fact as to whether plaintiff's claim was timely filed or whether the Second Deed of Trust was intended to secure repayment of the Second Note, the Second Deed of Trust should be reformed to match the parties' intent. As such, the trial court properly granted summary judgment for plaintiff on its claims for reformation and judicial foreclosure. The decision of the Court of Appeals is reversed.

REVERSED.

ANDERSON CREEK PARTNERS, L.P.;)
ANDERSON CREEK INN, LLC;)
ANDERSON CREEK DEVELOPERS, LLC;)
FAIRWAY POINT, LLC; STONE CROSS,)
LLC D/B/A STONE CROSS ESTATES, LLC;)
RALPH HUFF HOLDINGS, LLC;)
WOODSHIRE PARTNERS, LLC;)
CRESTVIEW DEVELOPMENT, LLC;)
OAKMONT DEVELOPMENT PARTNERS,)
LLC; WELCO CONTRACTORS, INC.;)
NORTHSOUTH PROPERTIES, LLC;)
W.S. WELLONS CORPORATION;)
ROLLING SPRINGS WATER COMPANY, INC.;)
AND STAFFORD LAND COMPANY, INC.)
)
v.) Harnett County
)
COUNTY OF HARNETT)

No. 62P21

<u>ORDER</u>

Plaintiffs' petition for discretionary review is decided as follows: Allowed with respect to Issue Nos. 7 and 8; denied as to Issue Nos. 1-6.

By order of the Court in conference, this the 10th day of August 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13th day of August 2021.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
~~M.C. Hackney~~
~~Assistant~~ Clerk, Supreme Court of
North Carolina

IN RE C.H.

[378 N.C. 353 (2021)]

IN THE MATTER OF	)	
	)	
C.H. & J.H.	)	Currituck County
	)	

No. 176A21

ORDER

Appellees' motions to dismiss respondent-father's appeal are denied. Respondent-father's petition for writ of certiorari is allowed. Respondent-father's motion for a temporary stay of the briefing schedule or, in the alternative, an extension of time to file his initial brief is dismissed as moot. Respondent-father's initial brief will be due thirty (30) days from entry of this order and the remaining briefing will be due according to the North Carolina Rules of Appellate Procedure.

By order of the Court in Conference, this the 10th day of August, 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13 day of August, 2021.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
Clerk

IN THE MATTER OF CUSTODIAL)
LAW ENFORCEMENT RECORDING) From Guilford County
SOUGHT BY CITY OF GREENSBORO)

No. 364PA19

ORDER

In the absence of a brief on behalf of appellee, this Court on its own motion appoints Chris Edwards to appear as court-assigned amicus curiae in the above-captioned appeal. The court-assigned amicus curiae will present arguments in favor of upholding the decision of the Court of Appeals. This Court hereby allows amicus sixty (60) days from the entry of this order to file the brief. The remainder of the briefing schedule will proceed according to Rule 28(h) of the North Carolina Rules of Appellate Procedure.

By order of the Court in Conference, this 23rd day of June, 2021.

Berger, J., recused.

s/Barringer, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of June, 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk

[378 N.C. 355 (2021)]

PF DEVELOPMENT GROUP, LLC	)	
	)	
v.	)	Harnett County
	)	
COUNTY OF HARNETT	)	

No. 63P21

ORDER

Plaintiff's petition for discretionary review is decided as follows: Allowed as to Issue Nos. 7 and 8; denied as to Issue Nos. 1-6.

By order of the Court in conference, this the 10th day of August 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13th day of August 2021.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk

~~M.C. Hackney~~
~~Assistant~~ Clerk, Supreme Court of
North Carolina

STATE v. HARGROVE

[378 N.C. 356 (2021)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Vance County
	)	
MARCUS TYRELL HARGROVE	)	

No. 220P21

ORDER

Defendant's Emergency Petition for Writ of Certiorari to Review Order of Superior Court, Vance County, is allowed; the orders entered by the trial court on 7 May 2021 and 14 June 2021 denying defendant's motions to continue are vacated; and this case is remanded to the Superior Court, Vance County, for the entry of an order allowing a reasonable continuance from the scheduled 2 August 2021 trial date, with the trial court having the discretion to set a new trial date that is at least ninety days after the termination of the current trial proceedings in *State v. Gregory* (Wake County File Nos. 15 CrS 219491, 219559-40, 219654-55), and further proceedings not inconsistent with this order.

By order of the Court in conference, this the 12th day of July 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 12th day of July 2021.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk

~~M.C. Hackney~~
~~Assistant~~ Clerk, Supreme Court of
North Carolina

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

13 AUGUST 2021

17P13-6	State v. Ca'Sey R. Tyler	Def's Pro Se Petition for Writ of Habeas Corpus (COAP19-105)	Dismissed **07/26/2021** **Ervin, J., recused**
20P21	Radiator Specialty Company v. Arrowood Indemnity Company (as Successor to Guaranty National Insurance Company, Royal Indemnity Company, and Royal Indemnity Company of America); Columbia Casualty Company; Continental Casualty Company; Fireman's Fund Insurance Company; Insurance Company of North America; Landmark American Insurance Company; Munich Reinsurance America, Inc., (as Successor to American Reinsurance Company); Mutual Fire, Marine and Inland Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Pacific Employers Insurance Company; St. Paul Surplus Lines Insurance Company; Sirius America Insurance Company (as Successor to Imperial Casualty and Indemnity Company); United National Insurance Company; Westchester Fire Insurance Company; Zurich American Insurance Company of Illinois	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA19-507) 2. Def's (Fireman's Fund Insurance Company) PDR Under N.C.G.S. § 7A-31 3. Defs' (National Union Fire Insurance Company of Pittsburgh, PA, Landmark American Insurance Company, and Zurich American Insurance Company of Illinois) Conditional PDR Under N.C.G.S. § 7A-31 4. Plt's Motion to Admit Jonathan G. Hardin Pro Hac Vice 5. Defs' (Landmark American Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA, and Zurich American Insurance Company of Illinois) Conditional PDR Under N.C.G.S. § 7A-31 6. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed 3. Allowed 4. Allowed **04/14/2021** 5. Allowed 6. Allowed **Berger, J., recused**

Disposition of Petitions for Discretionary Review Under G.S. 7A-31

13 August 2021

27A21	State v. Michael Devon Tripp	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-1286) 2. Def's Petition in the Alternative for Writ of Certiorari to Review Decision of the COA	1. Allowed 2. Dismissed as moot
29P21	The Umstead Coalition; Randal L. Dunn, Jr.; Tamara Grant Dunn; William Doucette; and TORC (a/k/a Triangle Off-Road Cyclists) v. Raleigh Durham Airport Authority and Wake Stone Corporation	Plts' PDR Under N.C.G.S. § 7A-31 (COA20-129)	Denied
32P21-2	State v. Jemar Bell	Def's Pro Se Motion to Review Decision of the COA (COA19-1147)	Dismissed **Berger, J., recused**
34A21	State v. William Brandon Coffey	1. Def's Notice of Appeal Based Upon a Dissent (COA19-445) 2. Def's PDR as to Additional Issues 3. State's Conditional PDR Under N.C.G.S. § 7A-31	1. --- 2. Denied 3. Dismissed as moot
37A21	In the Matter of M.R.J.	Petitioner's Motion for Leave to Amend Record on Appeal	Allowed
44P21-3	Reginald Anthony Falice v. State of North Carolina	Petitioner's Pro Se Motion for Notice of Confirmation & Repudiation	Dismissed
46P21-2	State v. Terry Lynn Best	Def's Pro Se Motion to Review Constitutional Rights	Dismissed **07/23/2021**

Disposition of Petitions for Discretionary Review Under G.S. 7A-31

13 August 2021

47P21	Providence Volunteer Fire Department, Inc., a North Carolina non-profit corporation v. The Town of Weddington, a North Carolina municipal corporation, Peter William Deter, in his individual and official capacity as Mayor, and Wesley Chapel Volunteer Fire Department, Inc., a North Carolina non-profit corporation	Plt's PDR Under N.C.G.S. § 7A-31 (COA19-203)	Allowed
56P21	State v. Rashon Lenard Peay and Jashon Bernard Peay	Def's (Rashon Lenard Peay) PDR Under N.C.G.S. § 7A-31 (COA19-698)	Denied
59A21	In the Matter of C.C.G.	Petitioner's Motion to Supplement the Record on Appeal	Allowed
60P19-2	George Reynold Evans v. State of North Carolina and Ernie Lee, Onslow County District Attorney	1. Petitioner's Pro Se Motion of Appeal for Discretionary Review of Writ of Certiorari (COAP21-66) 2. Petitioner's Pro Se Petition in the Alternative for Writ of Certiorari	1. Dismissed 2. Dismissed

Disposition of Petitions for Discretionary Review Under G.S. 7A-31

13 August 2021

62P21	Anderson Creek Partners, L.P.; Anderson Creek Inn, LLC; Anderson Creek Developers, LLC; Fairway Point, LLC; Stone Cross, LLC d/b/a Stone Cross Estates, LLC; Ralph Huff Holdings, LLC; Woodshire Partners, LLC; Crestview Development, LLC; Oakmont Development Partners, LLC; Wellco Contractors, Inc.; North South Properties, LLC; W.S. Wellons Corporation; Rolling Springs Water Company, Inc.; and Stafford Land Company, Inc. v. County of Harnett	1. Plts' Notice of Appeal Based Upon a Constitutional Question (COA19-533) 2. Plts' PDR Under N.C.G.S. § 7A-31 3. Pacific Legal Foundation and North Carolina Home Builders Association's Conditional Motion for Leave to File Amicus Brief 4. Def's Motion to Dismiss Appeal	1. --- 2. Special Order 3. Allowed 4. Allowed
63P21	PF Development Group, LLC v. County of Harnett	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA19-534) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Pacific Legal Foundation and North Carolina Builders Association's Conditional Motion for Leave to File Amicus Brief 4. Def's Motion to Dismiss Appeal	1. --- 2. Special Order 3. Allowed 4. Allowed
67P21	State v. Marcus Elliott and Tre Montrel Parker	1. Def's (Tre Montrel Parker) Notice of Appeal Based Upon a Constitutional Question (COA20-18) 2. Def's (Tre Montrel Parker) PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. Def's (Marcus Elliott) Notice of Appeal Based Upon a Constitutional Question 5. Def's (Marcus Elliott) PDR Under N.C.G.S. § 7A-31 6. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed 4. --- 5. Denied 6. Allowed

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

13 AUGUST 2021

72P12-2	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
74P21-2	William Jernigan, Jr. v. Judge S. Bray	Plt's Pro Se Motion for Judicial Standards Complaint	Dismissed
85P20	State v. Tony Deshon Jones	Def's PDR Under N.C.G.S. § 7A-31 (COA19-281)	Allowed
93P21	Wilmington Savings Fund Society, FSB, d/b/a/ Christiana Trust, not in its individual capacity, but solely as trustee for BCAT 2014-10TT v. Theresa Hall and Substitute Trustee Services, Inc	1. Def's (Theresa Hall) Motion for Temporary Stay (COA20-176) 2. Def's (Theresa Hall) Petition for Writ of Supersedeas 3. Def's (Theresa Hall) PDR Under N.C.G.S. § 7A-31	1. Allowed **03/08/2021** Dissolved **08/10/2021** 2. Denied 3. Denied
105P21	In the Matter of K.M., K.M.	1. Petitioners' Petition for Writ of Certiorari to Review Decision of the COA (COA19-871) 2. Petitioner's Motion for Temporary Stay 3. Petitioner's Petition for Writ of Supersedeas	1. 2. Allowed **07/14/2021** 3.
107P21	State v. Major Earl Edwards, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA19-615)	Denied
115A04-3	State v. Scott David Allen	1. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Montgomery County 2. Def's Petition in the Alternative for Writ of Mandamus 3. Def's Motion to Seal Motion to Withdraw 4. Def's Motion to Withdraw Counsel and Allow IDS to Appoint Substitute Counsel	1. Allowed **09/25/2019** 2. Denied 3. Allowed **07/12/2021** 4. Allowed **07/12/2021**
118P21	State v. Breanna Regina Dezara Moore	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-85) 2. Def's Motion to Amend PDR	1. Denied 2. Allowed **04/08/2021**

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

13 AUGUST 2021

126P19-2	State v. Gregory Jerome Wynn, Jr.	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-536-2)	Denied
126P20	State v. Isiah Boyd	1. Def's PDR Under N.C.G.S. § 7A-31 (COA19-543) 2. Def's Motion for Judicial Notice	1. Allowed 2. Allowed
130P21	State v. George Timothy Green	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-394) 2. Def's Motion to Strike Portion of PDR	1. Denied 2. Allowed
131P16-20	State v. Somchai Noonsab	1. Def's Pro Se Motion to Entertain Attacks on Discovery Rules 2. Def's Pro Se Motion for Verified Complaint to Amend the Rule of Law 3. Def's Pro Se Motion for Suit of 16 Billion Dollars	1. Dismissed 2. Dismissed 3. Dismissed
132P21	In the Matter of J.N. & L.N.	1. Respondent-Father's Notice of Appeal Based Upon a Constitutional Question (COA20-296) 2. Respondent-Father's PDR Under N.C.G.S. § 7A-31 3. Guardian ad Litem's Motion to Dismiss Appeal 4. Petitioner's Motion to Dismiss Appeal 5. Respondent-Father's Motion to Amend PDR	1. -- 2. Allowed 3. Allowed 4. Allowed 5. Allowed
134P21-2	In the Matter of B.M.P.	1. Respondent-Father's Pro Se Motion to Stay the Mandate Pending a Petition for Writ of Certiorari (COA20-794) 2. Respondent Father's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed **06/28/2021** 2. Denied **06/28/2021**
134P21-3	In the Matter of B.M.P.	1. Respondent-Father's Pro Se Motion to File Amended PDR (COA20-794) 2. Respondent-Father's Pro Se Motion to Stay the Mandate Pending a Petition for Writ of Certiorari 3. Respondent-Father's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed **07/01/2021** 2. Dismissed **07/01/2021** 3. Denied **07/01/2021**

Disposition of Petitions for Discretionary Review Under G.S. 7A-31

13 August 2021

156A17-3	Christopher DiCesare, James Little, and Diana Stone, Individually and on behalf of all others similarly situated v. the Charlotte-Mecklenburg Hospital Authority, d/b/a/ Carolinas Healthcare System	1. Plts' Petition for Writ of Mandamus 2. Plts' Petition in the Alternative for Writ of Certiorari to Review Order of Business Court 3. Plts' Motion to Admit Adam Gitlin, Brendan P. Glackin, Miriam E. Marks, Daniel E. Seltz, and Benjamin E. Shiftan Pro Hac Vice 4. Plts' Motion for Limited Remand 5. Def's Motion to Dismiss Appeal 6. Plts' and Def's Joint Motion to Extend Time and Set Briefing Schedule	1. 2. 3. 4. 5. 6. Allowed **06/15/2021**
161P07-4	State v. Milton E. Lancaster	Def's Pro Se Motion for Grievance Complaint	Dismissed
161P21	State v. Anthony Davis	Def's PDR Under N.C.G.S. § 7A-31 (COA20-144)	Denied
163A21	Murphy-Brown, LLC and Smithfield Foods, Inc. v. Ace American Insurance Company; Ace Property & Casualty Insurance Company; American Guarantee & Liability Insurance Company; Great American Insurance Company of New York; Old Republic Insurance Company; XL Insurance America, Inc.; and XL Specialty Insurance Company	1. Plts' Motion to Admit Evan T. Knott Pro Hac Vice 2. Plts' Motion to Admit John D. Shugrue Pro Hac Vice 3. Def's (Ace American Insurance Company) Motion to Admit Marianne May Pro Hac Vice 4. Def's (Ace American Insurance Company) Motion to Admit Jonathan D. Hacker and Bradley N. Garcia Pro Hac Vice	1. Allowed **06/15/2021** 2. Allowed **06/15/2021** 3. Allowed **06/25/2021** 4. Allowed **06/25/2021**
164P21	State v. Terry Wayne Harris	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1124)	Denied

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

13 AUGUST 2021

165A21	Rocky Dewalt, Robert Parham, Anthony McGee, and Shawn Bonnett, individually and on behalf of a class of similarly situated persons v. Erik A. Hooks, in his official capacity as Secretary of the North Carolina Department of Public Safety, and the North Carolina Department of Public Safety	1. Professors Sharon Dolovich, Alexander A. Reinert, Margo Schlanger, and John F. Stinneford's Motion to Admit Daniel Greenfield Pro Hac Vice 2. Professors Sharon Dolovich, Alexander A. Reinert, Margo Schlanger, and John F. Stinneford's Motion to Admit Kathrina Szymborski Pro Hac Vice 3. Professors Sharon Dolovich, Alexander A. Reinert, Margo Schlanger, and John F. Stinneford's Motion to Admit Bradford Zukerman Pro Hac Vice 4. Professors and Practitioners of Psychiatry, Psychology, and Medicine's Motion to Admit Benjamin I. Friedman Pro Hac Vice	1. Allowed **07/02/2021** 2. Allowed **07/02/2021** 3. Allowed **07/02/2021** 4. Allowed **07/19/2021**
166P14-2	State v. Donald Vernon Edwards	Def's Pro Se Motion for PDR (COAP20-153)	Denied
167A21	Inhold, LLC and Novalent, Ltd. v. PureShield, Inc.; Joseph Raich; and ViaClean Technologies, LLC	1. Plts' Motion to Dismiss Appeal 2. Defs' Motion to Admit Brian Paul Gearing, Ali H.K. Tehrani, and Joshua M. Rychlinski Pro Hac Vice	1. 2. Allowed **06/15/2021**
168P21	State v. Aaron Paul Holland	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA20-493)	Denied
170A21	In the Matter of J.D.	Petitioner and Guardian ad Litem's Joint Motion in the Cause	Allowed **07/09/2021**
172P21	State v. Tommy Lovett	Def's PDR Under N.C.G.S. § 7A-31 (COA20-539)	Denied
173P21	State v. Aaron L. Stephen	Def's Pro Se Motion for Withdrawal of Counsel	Dismissed
176A21	In the Matter of C.H. & J.H.	1. Petitioner and Guardian ad Litem's Motion to Dismiss Appeal 2. Respondent-Father's Petition for Writ of Certiorari to Review Order of District Court, Currituck County 3. Respondent-Father's Motion for Temporary Stay for the Filing of the Briefs 4. Respondent-Father's Motion in the Alternative for Extension of Time to File Brief 5. Petitioner and Guardian ad Litem's Joint Motion to Dismiss Appeal	1. Special Order 2. Special Order 3. Special Order 4. Special Order 5. Special Order

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

13 AUGUST 2021

177P21	State v. Briana Leana Richmond	Def's PDR Under N.C.G.S. § 7A-31 (COA20-615)	Denied
179P20	TD Bank USA, N.A. v. Maxine H. Corpening	1. Def's Petition for Writ of Certiorari to Review Order of the COA (COA19-714) 2. Def's Petition for Writ of Certiorari to Review Decision of District Court, Wake County	1. Denied 2. Denied
182P21	State v. Jaquan Stephon Geter	Def's PDR Under N.C.G.S. § 7A-31 (COA20-706)	Allowed
187P21	State v. Dustin Allen Lewis	Def's PDR Under N.C.G.S. § 7A-31 (COA20-641)	Denied
189P21	Michael Buttacavoli v. Maris F. Buttacavoli	1. Plt's Pro Se Motion to Produce Records 2. Plt's Pro Se Motion to Remove Judge Dray 3. Plt's Pro Se Motion to Suspend Langley and Dray 4. Plt's Pro Se Motion to Censure Dietz, Hampson and Berger 5. Plt's Pro Se Motion to Disbar Langley, Suspend Judge Dray, Censor Judge Dietz, Hampson, and Berger	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed **Berger, J., recused**
191A21	In the Matter of K.Q.	Respondent-Mother's Petition for Writ of Certiorari to Review Order of District Court, Cumberland County	Denied **07/23/2021**
197P21	State v. Charisse L. Garrett	1. Def's Motion for Temporary Stay (COA20-326) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/07/2021** Dissolved **08/10/2021** 2. Denied 3. Denied
199P21	Todd Darren Hutchins and Angela Rentenbach Hutchins v. CVS Pharmacy, Inc., et al.	1. Plts' Motion for Certification of Issue of Pro Hac Vice Admission on Direct Appeal 2. Plts' Motion for Certification of I ssue of Pro Hac Vice Admission on Direct Appeal 3. Defs' Motion to Strike Motion for Certification of Issue of Pro Hac Vice Admission on Direct Appeal 4. Plts' Motion to Stay Briefing in the COA	1. Denied **07/07/2021** 2. Denied **07/07/2021** 3. Dismissed as moot **07/07/2021** 4. Dismissed as moot **07/07/2021**

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

13 AUGUST 2021

210A21	In the Matter of T.H.	Respondent-Mother's Motion to Withdraw and Dismiss Appeal	Allowed **07/23/2021**
211P21	Marvin Millsaps v. North Carolina Department of Public Safety	1. Petitioner's Pro Se Motion for Petition Motion 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
212P21	State v. Milton E. Lancaster	Def's Pro Se Motion for PDR (COAP21-182)	Denied
216A20	James Cummings and wife, Connie Cummings v. Robert Patton Carroll; DHR Sales Corp. d/b/a Re/Max Community Brokers; David H. Roos; Margaret N. Singer; Berkeley Investors, LLC; Kim Berkeley T. Durham; George C. Bell; Thornley Holdings, LLC; Brooke Elizabeth Rudd-Gaglie f/k/a Brooke Elizabeth Rudd; Margaret Rudd & Associates, Inc.; and James C. Goodman	1. Defs' (Brooke Elizabeth Rudd-Gaglie f/k/a Brooke Elizabeth Rudd, Margaret Rudd & Associates, Inc., and James C. Goodman) Notice of Appeal Based Upon a Dissent (COA19-283) 2. Defs' (Robert Patton Carroll and DHR Sales Corp. d/b/a Re/Max Community Brokers) Notice of Appeal Based Upon a Dissent 3. Defs' Motion to Extend Times for Argument	1. --- 2. --- 3. Allowed **07/23/2021**
218P21	Christopher D. Murray v. Deerfield Mobile Home Park, LLC, and Donald W. Lewis	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA20-382) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
220P21	State v. Marcus Tyrell Hargrove	1. Def's Motion to Stay Proceedings 2. Def's Emergency Petition for Writ of Certiorari to Review Order of Superior Court, Vance County 3. Def's Motion to Consider Supplemental Ex Parte Argument, Affidavit, and Transcript Related to Emergency Petition for Writ of Certiorari	1. Dismissed as moot **07/12/2021** 2. Special Order **07/12/2021** 3. Allowed **07/12/2021**
223P21	State v. Antwan Bernard Parker	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-291) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. Dismissed 2. Denied 3. Allowed

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

13 AUGUST 2021

225P21	North State Deli, LLC d/b/a Lucky's Delicatessen, Mothers & Sons, LLC d/b/a Mothers & Sons Trattoria, Mateo Tapas, L.L.C. d/b/a Mateo Bar de Tapas, Saint James Shellfish LLC d/b/a Saint James Seafood, Calamari Enterprises, Inc. d/b/a Parizade, Bin 54, LLC d/b/a Bin 54, Arya, Inc. d/b/a City Kitchen and Village Burger, Grasshopper LLC d/b/a Nasher Cafe, Verde Cafe Incorporated d/b/a Local 22, Floga, Inc. d/b/a Kipos Greek Taverna, Kuzina, LLC d/b/a Golden Fleece, Vin Rouge, Inc. d/b/a Vin Rouge, Kipos Rose Garden Club LLC d/b/a Rosewater, and Gira Sole, Inc. d/b/a Farm Table and Gatehouse Tavern v. The Cincinnati Insurance Company; The Cincinnati Casualty Company; Morris Insurance Agency Inc.; and Does 1 Through 20, Inclusive	1. Plts' PDR Prior to a Determination by the COA (COA21-293) 2. North Carolina Restaurant and Lodging Association's Motion for Leave to File Amicus Brief	1. Denied 2. Dismissed as moot
226P21	George Edward Mayes, Jr. v. Wayne County, District Court	Petitioner's Pro Se Petition for Writ of Mandamus	Dismissed
229P21	State v. Anthony Moses Arnold	Def's Pro Se Motion to Dismiss Charges	Dismissed
230P21	State v. Jordan Nathaniel Mitchell	1. Def's Pro Se Motion for Compensation on Civil Action 2. Def's Pro Se Motion for Immediate Relief	1. Dismissed **07/02/2021** 2. Denied **07/02/2021**

Disposition of Petitions for Discretionary Review Under G.S. 7A-31

13 August 2021

232P21	Samuel Edward Hatcher Jr., Executor, Beneficiary & Trustee of Irrevocable Living Trust of Samuel Edward Hatcher, Sr., Plaintiff v. Nathan Tyler Montgomery, Defendant & Third Party Plaintiff v. Samuel Edward Hatcher, Jr., Individually, Third-Party	1. Plt's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP21-34) 2. Plt's Pro Se Motion to Request for Indigent Status	1. Denied **07/07/2021** 2. Allowed **07/07/2021**
233P21	Darlene Cheek-Tarouilly v. Joshua Stanhiser	Def's PDR Under N.C.G.S. § 7A-31 (COA20-150)	Denied
235P20	In the Matter of O.L.	Respondent's PDR Under N.C.G.S. § 7A-31 (COA19-626)	Denied
238P21	State v. Shanion J. Donta Watson	Def's Pro Se Motion to Hold Case in Abeyance	Dismissed **07/08/2021**
239P21	State v. Lawrence Verline Wilder	Def's Pro Se Motion to Dismiss Charges	Dismissed
240P20	State v. Kenneth Earl Byrd, Jr.	1. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Harnett County 2. Def's Pro Se Motion for Appointment of Counsel	1. Dismissed 2. Dismissed as moot
244P21	David Meyers v. Todd Ishee, Warden Denise Jackson, Governor Roy Cooper, Secretary of North Carolina Department of Public Safety Erik Hooks, Assistant Commissioner of Prisons of North Carolina of Public Safety Brandeshawn Harris	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **07/14/2021**
245P21	In the Matter of Kombiz Salehi	Petitioner's Pro Se Motion for Appeal	Dismissed

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

13 AUGUST 2021

246A09-2	State v. Michael Wayne Sherrill	Def's Motion to Terminate the Appeal	Allowed **08/06/2021**
246A21	State v. James Gregory Medlin	1. Def's Motion for Temporary Stay (COA20-563) 2. Def's Petition for Writ of Supersedeas	1. Allowed **07/15/2021** 2.
247P21	State v. Charles A. Fancher	Def's Pro Se Motion for Appropriate Relief	Dismissed **Berger, J., recused**
250P21	Department of Transportation v. Bloomsbury Estates, LLC; Bloomsbury Estates Condominium Homeowners Association, Inc.	1. Def's (Bloomsbury Estates Condominium Homeowners Association, Inc.) Motion for Temporary Stay (COA21-323) 2. Def's (Bloomsbury Estates Condominium Homeowners Association, Inc.) Petition for Writ of Supersedeas	1. Denied **07/20/2021** 2. Denied **07/20/2021**
252P21	State v. Roland Barrett aka Rollin Barrett	Def's Pro Se Motion for Dismissal	Denied **07/19/2021**
253P21	State v. Jimell M. Johnson	Def's Pro Se Motion for Immediate Release	Denied **07/19/2021**
256P21	Nafis Akeem-Alim Abdullah-Malik v. State of North Carolina	Def's Pro Se Motion to Intervene	Dismissed **07/21/2021**
257P21	State v. Maribel Gonzalez	1. Def's Motion for Temporary Stay (COA20-390) 2. Def's Petition for Writ of Supersedeas	1. Allowed **07/21/2021** 2.
259P21	El Maru Maurras d/b/a D Shaquielle Shackleford v. Susan Stephens d/b/a Manager at State Employees Credit Union/ Local Government Federal Credit Union Branch	1. Plt's Pro Se Motion for Due Notice of Motion 2. Plt's Pro Se Motion to Intervene with Special Injunction	1. Dismissed 2. Denied
260A20	State v. Marc Peterson Oldroyd	Def's Motion to Amend New Brief	Allowed **07/09/2021**

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

13 AUGUST 2021

263P20	Carlos J. Privette, D.D.S. v. North Carolina State Board of Dental Examiners	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA19-1048)	Denied **Morgan, J., recused**
263P21	In the Matter of J.U.	1. State's Motion for Temporary Stay (COA20-812) 2. State's Petition for Writ of Supersedeas	1. Allowed 2.
264P21	State v. Isaiah Scott Beck	1. State's Motion for Temporary Stay (COA20-499) 2. State's Petition for Writ of Supersedeas	1. Allowed **07/26/2021** 2.
265P21	State v. Vinston Levi Kearney, Jr.	1. State's Motion for Temporary Stay (COA20-486) 2. State's Petition for Writ of Supersedeas	1. Allowed **07/26/2021** 2.
271P21	Lamont Jeremiah McCauley v. Department of Social Services/ Davidson County Child Support Services/ Wendy Burchan	Petitioner's Pro Se Petition for Writ of Mandamus	Denied **08/09/2021**
276A21	State v. Michael Steven Elder	1. State's Motion for Temporary Stay (COA20-215) 2. State's Petition for Writ of Supersedeas	1. Allowed **08/05/2021** 2.
278P21	State v. Fernando Alvarez	1. State's Motion for Temporary Stay (COA20-611) 2. State's Petition for Writ of Supersedeas	1. Allowed **08/06/2021** 2.
279A21	In the Matter of E.M.D.Y.	1. Respondent's Motion for Temporary Stay (COA20-685) 2. Respondent's Petition for Writ of Supersedeas	1. Allowed **08/06/2021** 2.
290P16-2	State v. Michael Eugene Hunt	Def's Pro Se Motion Referencing Conditions of Confinement and Compassionate Release (COAP16-493)	Dismissed **07/26/2021**

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

13 AUGUST 2021

297PA16-3	In the Matter of the Adoption of C.H.M., a minor child	1. Petitioners' Motion for Temporary Stay (COA21-196) 2. Petitioners' Petition for Writ of Supersedeas 3. Respondent-Father's Motion to File Under Seal 4. Respondent-Father's Motion to Take Judicial Notice	1. Allowed **07/07/2021** 2. 3. Allowed **07/09/2021** 4. Allowed **07/09/2021**
304P20-3	Clyde Junior Meris v. Guilford County Sheriffs	Plt's Pro Se Motion for Civil Action	Dismissed
306P18-5	Hunter F. Grodner v. Andrzej Grodner (now Andrew Grodner)	1. Def's Second Pro Se Motion to Clarify this Court's Dismissal Order From 10 March 2021 2. Def's Pro Se Motion to Clarify this Court's Denial of Def's Petition for Writ of Supersedeas Filed 5 March 2021 and Denied on 10 March 20	1. Dismissed 2. Dismissed
323A92-12	State v. Charles Alonzo Tunstall	1. Def's Pro Se Motion for Notice of Appeal (COAP18-823) 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Petition in the Alternative for Writ of Certiorari to Review Order of the COA 4. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed as moot
325P14-2	State v. Doran Arthur Atkins	1. Def's Pro Se Motion for Reconsideration 2. Def's Pro Se Motion to Take Judicial Notice	1. Dismissed 2. Dismissed
339A18-2	The New Hanover County Board of Education v. Josh Stein, in his Capacity as Attorney General of the State of North Carolina and North Carolina Coastal Federation and Sound Rivers, Inc., Intervenors	Amicus Curiae's Motion to Admit Professor Marcus Gadson Pro Hac Vice	Allowed **07/06/2021** **Berger, J., recused**

Disposition of Petitions for Discretionary Review Under G.S. 7A-31

13 August 2021

345PA19	Crazie Overstock Promotions, LLC v. State of North Carolina; and Mark Senter, in his official capacity as Branch Head of the Alcohol Law Enforcement Division	Plt's Petition for Rehearing	Denied **07/20/2021** **Berger, J., recused**
356P20	Steven C. George v. Lowe's Companies, Inc.; Lowe's Home Centers, LLC; and Lowe's Home Improvement, LLC	Plt's PDR Under N.C.G.S. § 7A-31 (COA19-958)	Denied
359A20	Bruce Allen Bartley v. City of High Point and Matt Blackman, in his Official Capacity as a Police Officer with the City of High Point, and Individually	1. Def's (Matt Blackman) Notice of Appeal Based Upon a Dissent (COA19-1127) 2. Def's PDR as to Additional Issues	1. --- 2. Denied

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

13 AUGUST 2021

368A20	Reynolds American Inc. v. Third Motion Equities Master Fund Ltd., Magnetar Capital Master Fund, Ltd., Spectrum Opportunities Master Fund Ltd., Magnetar Fundamental Strategies Master Funds Ltd., Magnetar MSW Master Fund Ltd., Mason Capital Master Fund, L.P., BlueMountain Credit Alternatives Master Fund L.P., BlueMountain Foinaven Master Fund L.P., BlueMountain Guadalupe Peak Fund L.P., BlueMountain Summit Trading L.P., BlueMountain Montenvers Master Fund SCA SICAV-SIF, and Barry W. Blank Trust and Anton S. Kawalsky, Trustee for the benefit of Anton S. Kawalsky Trust UA 9/17/2015, Canyon Blue Credit Investment Fund L.P., the Canyon Value Realization Master Fund, L.P., Canyon Value Realization Fund, L.P., Amundi Absolute Return Canyon Fund P.L.C., CanyonSL Value Fund, L.P., Permal Canyon IO Ltd., Canyon Value Realization Mac 18 Ltd.	1. Plt's (Reynolds American, Inc.) Motion to Admit Nicole D. Valente Pro Hac Vice 2. Defs' (Magnetar Capital Master Fund, Ltd., et al.) Motion to Admit J. Peter Shindel, Jr. Pro Hac Vice	1. Allowed **07/26/2021** 2. Allowed **07/30/2021**
405P18-2	In the Matter of E.W.P.	Respondent's PDR Under N.C.G.S. § 7A-31 (COA20-181)	Denied

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

13 AUGUST 2021

407P20-3	Archie M. Sampson v. Erik Hooks, Secretary of Department of Public Safety	1. Petitioner's Pro Se Motion for Complaint Claim 2. Petitioner's Pro Se Motion for Complaint Claim	1. Dismissed 2. Dismissed
415P19-3	State v. Scott Randall Reich	Def's Pro Se Motion for Review and Response	Dismissed **Berger, J., recused**
440P11-3	K^2 Asia Adventures v. Krispy Kreme Doughnut Corporation, and Krispy Kreme Doughnuts, Inc.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA19-314) 2. Plt's Motion to Admit Ben C. Broocks Pro Hac Vice 3. Defs' Conditional PDR Under N.C.G.S. § 7A-31 4. Barbara A. Jackson's Motion to Withdraw as Counsel 5. Barbara A. Jackson's Amended Motion to Withdraw as Counsel	1. Denied 2. Dismissed as moot 3. Dismissed as moot 4. Dismissed as moot 5. Dismissed as moot **Ervin, J., recused**
455PA20	State v. Michael Ray Waterfield	1. Pacific Legal Foundation's Motion for Leave to File Amicus Brief 2. Amicus Curiae's (Pacific Legal Foundation) Motion to Admit Oliver J. Dunford Pro Hac Vice	1. Allowed **06/17/2021** 2. Allowed **06/18/2021**
463P20	State v. Jason Eugene Bolton	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1145)	Denied
468P20	State v. Vinson Shane-Hill	Def's PDR Under N.C.G.S. § 7A-31 (COA19-812)	Denied
479P20	State v. Marie Elizabeth Butler	1. Def's Motion for Temporary Stay (COA19-939) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/18/2020** Dissolved **08/10/2021** 2. Denied 3. Denied **Berger, J., recused**

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

13 AUGUST 2021

487P20	State v. Kedar Aziz Muhammad	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA19-590) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
499P20	In the Matter of the Foreclosure of a Deed of Trust Executed by Noorullah Noori to William J. Barham, Trustee for Nabil Algafni Dated 01-14-2017 and Recorded 01-19 -2017 at Book 4897, Page 938, Johnston County Registry, Luther D. Starling, Jr., Substitute Trustee	1. Respondent's (Noorullah Noori) Pro Se Motion for PDR (COA20-728) 2. Lender's Motion for Sanctions	1. Denied 2. Denied
504P04-5	State v. Marion Beasley, Sr.	Def's Pro Se Motion for Writ of Supervisory Control	Dismissed
512P20	State v. Abu Bakr Rahman	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA19-928) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
524P20	State v. William Charles Melton	Def's PDR Under N.C.G.S. § 7A-31 (COA20-257)	Denied
527P20	State v. Joshua Christian Bullock	1. State's Motion for Temporary Stay (COA20-187) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/23/2020** Dissolved **08/10/2021** 2. Denied 3. Denied
535A20	State v. Ciera Yvette Woods	1. Def's Motion for Temporary Stay (COA19-985) 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Dissent 4. Def's PDR as to Additional Issues	1. Allowed **12/31/2020** 2. Allowed 3. --- 4. Allowed **Berger, J., recused**

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

13 AUGUST 2021

629P01-9	State v. John Edward Butler	1. Def's Pro Se Motion for Writ of Mandamus	1. Denied
		2. Def's Pro Se Motion for Service Members Civil Relief Act	2. Dismissed
		3. Def's Pro Se Motion for Appointment of Counsel	3. Dismissed as moot
		4. Def's Pro Se Motion for Appeal Bond	4. Dismissed as moot
		5. Def's Pro Se Motion to Appeal Habeas Corpus	5. Denied
		6. Def's Pro Se Motion for Petition to Sue	6. Dismissed
		7. Def's Pro Se Motion to Appeal Cases from COA	7. Dismissed

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